Australian Government
Australian Law Reform Commission

Review of the Royal Commissions Act

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

ISSUES PAPER 35
April 2009

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The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Making a submission

Any public contribution to an inquiry is called a submission and these are actively sought by the ALRC from a broad cross-section of the community, as well as those with a special interest in the particular inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific proposals and questions or numbered paragraphs in this paper.

Open inquiry policy

In the interests of informed public debate, the ALRC is committed to open access to information. As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. As part of ALRC policy, non-confidential submissions are made available to any person or organisation upon request after completion of an inquiry, and also may be published on the ALRC website. For the purposes of this policy, an inquiry is considered to have been completed when the final Report has been tabled in Parliament.

However, the ALRC also accepts submissions made in confidence. Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material). Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Submissions should be sent to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
Email: royalcommissions@alrc.gov.au

Submissions may also be made using the online form on the ALRC's homepage: <www.alrc.gov.au>

The closing date for submissions in response to IP 35 is 19 May 2009.

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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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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 RDF 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 Tony Fitzgerald AC QC, former judge of the New South Wales Court of Appeal

Dr Scott Prasser, Senior Lecturer in Management, Faculty of Business, University of the Sunshine Coast

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

Mr Michael Sexton SC, New South Wales Solicitor-General

Ms Iris Stevens, former judge of the District Court of South Adelaide

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 Questions

3. The *Royal Commissions Act 1902* (Cth)

3–1 Are there any concerns about judicial review of decisions made by Royal Commissions or other public inquiries? If so, how should legislation establishing Royal Commissions or other public inquiries attempt to address these concerns?

5. Potential New Models of Commonwealth Public Inquiry

5–1 (a) Should the *Royal Commissions Act 1902* (Cth) be repealed and replaced with a general statute that provides for the establishment of a variety of all types of public inquiries;

(b) Should the *Royal Commissions Act* be retained and another general statute enacted to provide for the establishment of non-Royal Commission forms of public inquiry; or

(c) Is there another form of statutory model, other than those set out in (a) and (b) above, that the ALRC should consider?

5–2 Should a permanent body be established to conduct some types of public inquiries? If so, should such a body conduct investigatory inquiries, policy inquiries, or both? What should be the relationship between a permanent inquiries body and ad hoc inquiries?

5–3 What matters need to be addressed by legislation establishing public inquiries, and how should the legislation address these matters? For example, should legislation address:

(a) who should be able to establish public inquiries (for example, the Governor-General, Cabinet, a Minister, or one or both Houses of Parliament);

(b) how the terms of reference should be framed and the circumstances, if any, in which the terms of reference may be amended in the course of the inquiry (for example, in consultation with an inquiry member); and

(c) how public inquiries should be constituted (for example, should members have specific qualifications, should there be gender and regional balance amongst members, etc).

5–4 Is the *Royal Commissions Act* an appropriate title for legislation establishing public inquiries? If not, what would be an appropriate title?

5–5 Should the Australian Government be required by statute within a specific time frame to:

(a) table in parliament reports provided to it by Royal Commissions and other public inquiries;

(b) respond, in parliament (for example, by ministerial statement) or otherwise, to recommendations made by Royal Commissions and other public inquiries; and

(c) publish information about implementation of recommendations made by Royal Commissions and other public inquiries?

5–6 Should a government department or some other permanent body be required to coordinate the government's response to, and monitor the implementation of, recommendations made by Royal Commissions and other public inquiries?

6. Funding and Administration

6–1 Should more detailed information about legal fees of counsel and solicitors assisting a Royal Commission or other public inquiry be made publicly available? For example, should daily or events-based rates or caps for counsel or solicitors assisting an inquiry be made publicly available?

6–2 Should legislation establishing Royal Commissions or other public inquiries set out criteria for the appointment of counsel and solicitors assisting? If so, what should be these criteria?

6–3 Where a Royal Commission or other public inquiry is established, should any, or all, of the following be funded by the Australian Government:

(a) legal costs and allowances for counsel and solicitors assisting an inquiry;

(b) legal representation of witnesses; and

(c) non-legal expenses of witnesses?

6–4 How should Royal Commissions and other public inquiries be funded? For example, is a standing appropriation order a feasible option?

6–5 What assistance is required by those called to appear before Royal Commissions or other public inquiries? For example, should legal or other assistance be provided? Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

6–6 What assistance and guidance is required by Royal Commissions or other public inquiries? For example, is administrative assistance for inquiries, such as budgeting, technological or other guidance, required? Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

6–7 In the interests of openness, transparency and accountability in the expenditure of public funds, should the Australian Government be required to make publicly available the following information:

(a) at the outset of the Royal Commission or other public inquiry, the proposed budget for the inquiry;

(b) during the Royal Commission or other public inquiry, interim reports on costs associated with the inquiry; and

(c) upon the completion of a Royal Commission or other public inquiry, a breakdown of the costs of the inquiry?

6–8 Should a member of a Royal Commission or other public inquiry be required by legislation to monitor and control inquiry expenditure?

6–9 Should Royal Commissions or other public inquiries have the power to make an order for a person to pay all or some of the costs incurred by the inquiry or a witness? If so, in what circumstances should a Royal Commission or other public inquiry be empowered to make such an order?

7. Powers

7–1 Do Royal Commissions and other public inquiries require coercive powers? If so, should these powers depend on the nature of the inquiry?

7–2 Should the Australian Government, when establishing a Royal Commission or other public inquiry, be able to select which coercive powers the inquiry may exercise?

7–3 How effective in practice are the powers of a Royal Commission to:

(a) summon a person to appear before it, or to produce documents;

(b) take evidence of matters relating to the law of another country;

(c) inspect, retain and copy any documents or other things produced to the Commission; and

(d) authorise a person to appear before it?

Are any changes to these powers required? Should public inquiries other than Royal Commissions have similar powers?

7–4 Should Royal Commissions or other public inquiries have the power to direct a person to provide a written statement?

7–5 Should a member of a Royal Commission or other public inquiry have the power to:

(a) apply for a warrant to search for and seize a document or other thing; or

(b) on his or her own motion, issue such a warrant?

If so, in what circumstances should it be available?

7–6 Should special administrative arrangements be developed for Royal Commissions and other forms of public inquiries dealing with matters relating to national security? For example, should there be standard arrangements for access to classified and security sensitive material?

7–7 Should legislation establishing Royal Commissions or other public inquiries incorporate the procedures applied in federal criminal and civil proceedings in dealing with matters relating to national security?

7–8 Should Royal Commissions be able to communicate information relating to a contravention of a law to law enforcement bodies in addition to those listed in the *Royal Commissions Act*? If so, to which additional bodies? Should public inquiries other than Royal Commissions have similar powers?

7–9 Do any issues arise from 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?

7–10 Is it desirable that Royal Commissions and other public inquiries have the power to refer a question of law to the Federal Court during the course of an inquiry? If so, how could this be achieved within the limits of the *Australian Constitution*?

8. Witnesses

8–1 How effective in practice are the current powers available to a Royal Commissioner to determine how a witness may be examined and cross-examined? What changes, if any, are required? Should public inquiries other than Royal Commissions have similar powers?

8–2 Should a party to a Royal Commission or other public inquiry have the right to cross-examine a witness who is giving evidence adverse to that party's interests? If so, should there be any limitations on that right?

8–3 What types of information, if any, should a witness have the right to refuse to disclose to a Royal Commission or other public inquiry?

8–4 Should a witness before a Royal Commission or other public inquiry have the right to request that their evidence be taken in private? If so, in what circumstances?

8–5 Should the defence of 'reasonable excuse' in the *Royal Commissions Act* be replaced with a list of specific circumstances in which a witness may refuse to attend a hearing or to produce a document or other thing? Should there be a similar list for other public inquiries?

8–6 Should the powers in the *Royal Commissions Act* or in legislation establishing other public inquiries override secrecy provisions in federal legislation? If so, should this be stipulated in the *Royal Commissions Act* (or legislation establishing other public inquiries) or in the legislation containing the secrecy provision?

8–7 (a) Is the abrogation of the privilege against self-incrimination under the *Royal Commissions Act* appropriate? Are there any circumstances in which it should be preserved?

(b) In the absence of the privilege against self-incrimination, should any protections apply, for example:

(i) the existing use immunity applying to criminal and civil proceedings;

(ii) the strengthening of existing protections to include a derivative use immunity; or

(iii) a use immunity or derivative use immunity applying only to criminal proceedings?

8–8 Should the privilege against self-incrimination be abrogated in other public inquiries? If so, what protections, if any, should apply to the use of such information?

8–9 Should privileges established by statute, for example religious confessions privilege and professional confidential relationships privilege (including journalists' privilege), apply to Royal Commissions and other public inquiries? If so, how should the legislation specify that such privileges apply?

8–10 How effective in practice is the protection from legal liability conferred on Royal Commissioners, witnesses and advocates by s 7 of the *Royal Commissions Act*? What, if any, changes are required? Should public inquiries other than Royal Commissions be afforded similar protections?

8–11 (a) Should Royal Commissions and other public inquiries be required to:

(i) hold hearings in public; and

(ii) set out in their reports the evidence on which their decisions are based?

(b) Should these requirements be subject to specified exemptions? If so, what exemptions should apply?

8–12 What rights of witnesses, in addition to those currently set out under the *Royal Commissions Act,* should be protected in proceedings of Royal Commissions and other public inquiries?

9. Offences and Penalties

9–1 Do Royal Commissions or other public inquiries require sanctions in order to operate effectively?

9–2 Is there a role for the use of civil or administrative penalties as sanctions for breaches of legislation establishing Royal Commissions or other public inquiries?

9–3 Should any changes be made to the offences concerning non-compliance with the requirements of a Royal Commission? For example, should:

(a) these continue to be strict liability offences;

(b) any defences be added, removed or modified; or

(c) there be a requirement that the defendant be given notice of the consequences of non-compliance?

9–4 Should any changes be made to s 6D(4) of the *Royal Commissions Act*, which prohibits publication of information in contravention of a direction of a Royal Commission? For example, should:

(a) Royal Commissions be required to consider certain factors enumerated in the *Royal Commissions Act* before issuing directions not to publish;

(b) the categories of material that a Royal Commission may direct not to be published be narrowed or expanded; or

(c) the offences extend to unauthorised disclosures by Commissioners or Commission staff?

9–5 What changes, if any, should be made to the offences relating to interference with witnesses called or to be called to appear before a Royal Commission, or evidence that is or may be required before a Commission?

9–6 Should a person be subject to proceedings for contempt of a Royal Commission or other public inquiry? If so, what are the appropriate procedures?

9–7 Should the types of behaviour currently covered by s 6O(1) of the *Royal Commissions Act* constitute an offence under legislation establishing a Royal Commission or other public inquiry?

9–8 Should the penalties under the *Royal Commissions Act* be amended to:

(a) reflect more accurately the gravity of the offences? If so, which penalties should be increased or decreased;

(b) clarify the maximum penalty applicable;

(c) be consistent with the principles governing penalties and sentencing in federal criminal law; and

(d) be more consistent with the penalties in comparable state and territory legislation?

9–9 What penalties, if any, should apply if new legislation is introduced establishing other forms of public inquiries?

9–10 Are there any concerns about the ways in which proceedings for offences against the *Royal Commissions Act* may be instituted? For example, should the Attorney-General continue to have a role in the institution of proceedings, or should prosecutions only be instituted with the consent of the Commonwealth

Director of Public Prosecutions? What rules, if any, should apply to the institution of proceedings for offences relating to other public inquiries?

9–11 Are there any concerns about the substance or operation of s 15 of the *Royal Commissions Act*, relating to costs of a proceeding for an offence against the Act? What rules, if any, should apply to the costs of a proceeding for an offence under legislation relating to other public inquiries?

1. Introduction to the Inquiry

Contents

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] Clokie and 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.[3]

1.2 The *Royal Commissions Act 1902* (Cth) was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia.[4] In the Second Reading Speech for the Royal Commissions Bill 1902 (Cth), the then Attorney-General, the Hon Mr Alfred 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

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 Ibid, 26.

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

Africa to Australia on the SS Drayton Grange[5] during the Boer War had highlighted the need to introduce legislation providing Royal Commissions with coercive information-gathering powers.[6]

1.3 The original *Royal Commissions Act* contained only eight provisions. These were similar to those in the *Witnesses (Public Inquiries) Protection Act 1892* (UK).[7] In *X v Australian Prudential Regulation Authority*, Kirby J noted that the language of the UK Act on which the Australian Act 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.[8]

1.4 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 with the legislation identified by particular Royal Commissions.

1.5 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.[9] In addition, a number of the amendments have been made to facilitate information flows between Royal Commissions and other bodies.[10]

Scope of the Inquiry

1.6 This is the first comprehensive review of the *Royal Commissions Act* in its 107 year history. While the operation and provisions of the Act will be a major focus, the ALRC also has been asked to inquire into and report on a number of other issues. In

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5 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).

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

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

8 Ibid, [71].

9 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 7.

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

particular, the Terms of Reference, reproduced at the beginning of this paper, require 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.

1.7 A major focus of this Inquiry, therefore, will be 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.

1.8 The ALRC is to provide its report to the Attorney-General by 30 October 2009.

Matters Outside the Scope of the Inquiry

1.9 In this Inquiry, the ALRC is considering 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—fall outside the scope of 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 recently by the ALRC in its report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107),[11] and therefore do not need to be revisited in this Inquiry. The recommendations contained in ALRC 107 are under consideration by the Australian Government.

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

Terminology

1.11 In this Issues Paper, 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 government establishing the inquiry will be noted expressly in the text.

1.12 The term 'public inquiry' rather than 'executive inquiry' will be used when referring to ad hoc, independent, non-Royal Commission inquiries established by government. For the reasons discussed in detail in Chapter 2, the word 'public' rather than 'executive' has been used to distinguish this type of inquiry from the many other forms of executive inquiry conducted by government departments and other permanent government agencies. Further, 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 Issues Paper, the first letter of 'inquiry' will be in upper case.

Law Reform Process

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

Community consultation and participation

1.14 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.[12] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.

1.15 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 'Talking Royal Commissions' website discussed in detail below.

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

Participating in the Inquiry

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

1.17 Secondly, written submissions may be made to the ALRC, both after the release of this Issues Paper, and again after the release of the Discussion Paper. There is no specified format for submissions. The ALRC will accept gratefully anything from handwritten notes and emailed 'dot points', to detailed commentary on matters related to the Inquiry. The ALRC also receives confidential submissions. Details about making a submission may be found at the front of this Issues Paper.

1.18 The ALRC strongly urges interested parties, and especially key stakeholders, to make submissions *before* the publication of the Discussion Paper. Once the basic pattern of proposals is established it is difficult for the ALRC to alter course radically. Although it is possible for the ALRC to abandon or substantially modify proposals for which there is little support, it is more difficult to publicise, and gauge support for, novel approaches suggested to us late in the consultation process.

1.19 Thirdly, the ALRC maintains 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, consultations will be conducted around Australia. Individuals, organisations or government agencies with an interest in meeting with the ALRC in relation to the issues being canvassed in the Inquiry are encouraged to contact the ALRC.

1.20 Finally, the ALRC has established a website entitled 'Talking Royal Commissions', which can be accessed through the ALRC website at <www.alrc.gov.au>. The website is designed to facilitate public communication by creating a 'talking space'. The 'Talking Royal Commissions' website includes a discussion page to encourage comments, and a page to facilitate the receipt of electronic submissions.

Advisory Committee

1.21 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 Issues Paper. Included are former Royal Commissioners, retired judges, senior officers of Australian Government agencies, academics, senior lawyers, and members of constituencies affected by the activites of some significant Royal Commissions, such as unions and Indigenous peoples.

1.22 The Advisory Committee will meet at least twice 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 and consultation effort. The Advisory Committee also will assist with the development of reform proposals and final Report recommendations as the Inquiry progresses. The ultimate responsibility for the Report and the recommendations remains, however, with the Commissioners of the ALRC.

Organisation of this Issues Paper

1.23 This Issues Paper is divided into nine chapters. This introductory chapter outlines the background and scope of the Inquiry, matters that fall outside the Inquiry's scope, the ALRC's process of law reform, and the timeframe for the Inquiry.

1.24 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.

1.25 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.

1.26 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.

1.27 In Chapter 5, the ALRC canvasses new non-Royal Commission 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 Royal Commissions or other public inquiries are also considered.

1.28 Chapter 6 considers issues relating to the funding and administration of Royal Commissions and other public inquiries. An overview of the costs of Royal Commissions and other public inquiries is provided, followed by a consideration of the types of costs associated with inquiries. The assistance required by inquiries and parties to inquiries also is canvassed. Finally, ways to fund inquiry expenses and to control inquiry costs are explored.

1.29 The general powers of a Royal Commission to obtain information and the stronger coercive powers to search premises and seize documents and other evidence are outlined in Chapter 7. Whether there is a need for Royal Commissions to have additional powers where matters of national security are under consideration is considered. When evidence in Royal Commissions can be shared with other law

enforcement bodies and joint federal-state Royal Commissions is also discussed. Finally, a new referral power to the Federal Court to allow questions of law which arise during a Royal Commission or other public inquiry to be settled is examined.

1.30 The role of witnesses in a Royal Commission and other public inquiry is discussed in Chapter 8. Whether those appearing before a Royal Commission or other public inquiry have a right to cross-examine a witness is considered, and the right of witnesses to refuse to give evidence, or give evidence in private, is discussed.

1.31 The final chapter considers the criminal offences and penalties that are created by the *Royal Commissions Act*. An overview of the various offences in the Act is provided, followed by a discussion of penalties—and in particular the consistency of penalties. Other methods of punishing behaviour, such as through the use of civil and administrative penalties or by procedures for contempt, are also canvassed.

Timeframe for the Inquiry

1.32 It is the ALRC's standard operating procedure to produce an Issues Paper and a Discussion Paper before producing the final Report. This Issues Paper, the first document produced during the course of this Inquiry, identifies the main issues relevant to the Inquiry, provides background information and encourages informed community participation. The Issues Paper is intended to stimulate full and frank discussion of all issues arising from the Terms of Reference.

1.33 This Issues Paper will be followed by the publication of a Discussion Paper in August 2009. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and will undertake a further round of national consultations in relation to these proposals. 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.

1.34 The final report of this Inquiry, which will contain the ALRC's recommendations, is due to be presented to the Attorney-General by 30 October 2009. Once tabled in Parliament, the Report becomes a public document.[13] An ALRC report is not a self-executing document. The ALRC provides advice and recommendations about the best way to proceed, but implementation is a matter for the Australian Government and others.[14]

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

14 The ALRC, however, has a strong record of having its advice followed. About 59% or the ALRC's previous reports have been fully or substantially implemented, about 29% have been partially implemented, 4% are under consideration and 8% have had no implementation to date.

1.35 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 its final recommendations will specify the nature of any desired legislative change.

In order to be considered for use in the Discussion Paper, submissions addressing the questions in this Issues Paper must reach the ALRC by **Tuesday, 19 May 2009**. Details about how to make a submission are set out at the front of this publication.

2. Role of Public Inquiries

Contents

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 of inquiry activity in the UK, with over 350 Royal Commissions established by the UK government between 1831 and 1900.[2] Since that time, Royal Commissions again have dwindled in

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.

2 Ibid, 278.

popularity and are now 'a statistical speck amongst the many public inquiries held in Britain each year'.[3]

2.3 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.[4] The *Royal Commissions Act 1902* (Cth) was enacted shortly after Federation, and 127 Royal Commissions have been appointed under the Act.[5]

2.4 Dr 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.[6] For example, 54 Royal Commissions were established between 1910 and 1929, and 33 appointed between 1972 and 1996. The instrument was used little in the decades following the Second World War and relatively infrequently from the mid-1990s to the time of writing in early 2009. Also, as discussed below, the many Royal Commissions established under the *Royal Commissions Act* have differed in nature.

2.5 Generally, Coalition Governments have been less likely than their Labor counterparts to establish Royal Commissions.[7] 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 in 11 years (1996–2007).[8] In contrast, the Whitlam Labor Government appointed 13 Royal Commissions in three years (1972–1975), and the Hawke-Keating Labor Governments appointed 12 Royal Commissions in 13 years (1983–1996). This is not a wholly consistent trend, however, as the Fraser Coalition Governments 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.

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3 G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *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: G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *Australian and New Zealand Journal of Criminology* 289, 290–291.

4 See *Commissions of Inquiry Statute 1854* (Vic) and *Statute of Evidence Act 1864* (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 and fn 22.

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

6 Ibid, [3.12]–[3.17].

7 Ibid, Appendix 1.

8 The Howard Coalition Government also appointed the Equine Influenza Inquiry, 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 Royal Commission into HIH (2001); the Royal Commission into the Building and Construction Industry (2001); the Commission of Inquiry into the Centenary House Lease (2004); and the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme (2005).

2.6 Since the 1940s, Australian Governments increasingly have appointed non-Royal Commission forms of public inquiry.[9] For example, both the Whitlam Labor and Howard Coalition Governments established more than 70 public inquiries, taskforces, reviews or committees.[10] Non-Royal Commission forms of public inquiry are discussed below and in Chapter 4.

Characteristics of public inquiries

Established by the executive

2.7 In Australia, all arms of government conduct some form of inquiry. The judicature 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.

2.8 A number of permanent bodies are also 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; and the Productivity Commission. 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.

2.9 As discussed in Chapter 1, the ALRC is considering a particular type of 'public inquiry'—one that is conducted on an ad hoc basis by an entity commissioned by, but external to, the 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.

Public in nature

2.10 The obvious feature of a public inquiry is that, at least partly, it takes place in the public domain. This means that the inquiry and its processes have a degree of public visibility or accessibility, and members of the public contribute to the inquiry by providing information or other relevant material.

2.11 Elements of public accessibility may 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 made available

9 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 50.
10 Ibid, Appendices 6, 9.

widely—current practice is to make this information available online.[11] Public participation may be on a voluntary or mandatory basis.[12] It 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.[13]

2.12 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.[14] These interests, however, need to be balanced against the protection of the rights or interests of those involved in or affected by the inquiry. The balancing of interests is discussed further in Chapter 7.

Perceived independence

2.13 The public is more likely to accept inquiry processes and decisions when the inquiry is perceived to be at arm's length from the executive arm of government and other influential stakeholders.[15] To promote the perception of an inquiry's independence, its 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 4.

2.14 Royal Commissions are sometimes seen to be more independent than other types of inquiries because they are supported by statute.[16] This perception may be enhanced by the fact that Royal Commissions are appointed by the Governor-General on behalf of the Crown, rather than by Cabinet or individual ministers.[17] 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 3, 5 and 6.

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11 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 the website of: the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) <http://www.oilforfoodinquiry.gov.au/> at 10 February 2009.

12 Coercive information-gathering powers are discussed further in Ch 6.

13 For example, the current National Human Rights Consultation invites online submissions: National Human Rights Consultation, *Share Your Views—National Human Rights Consultation Submission Form* (2009) <www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/HaveYourSay_SubmissionForm> at 10 February 2009.

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

15 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.

16 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.

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

Limitations

2.15 Inquiries commissioned by the executive arm of government cannot implement their own recommendations, and are not intended to discharge the functions of the judicature or legislature. For example, an inquiry that investigates and reports upon responsibility for civil or criminal conduct cannot make a legal determination on this matter, 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.

2.16 Finally, public inquiries do not always enjoy coercive powers and protections. Generally, these are conferred upon public inquiries by statute. The powers of inquiries established under the *Royal Commissions Act* and other legislation are discussed further in Chapter 7.

Functions of public inquiries

2.17 Royal Commissions and other public inquiries may take far longer and cost significantly more than expected.[18] Further, Royal Commissions may make unexpected findings or recommendations critical of the government that appointed them.[19] There are several reasons, however, why governments continue to establish public inquiries.

2.18 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.[20] 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'.[21] 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'.[22]

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18 The cost of Royal Commissions is discussed in Ch 5.

19 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': S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [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.

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

21 G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *Australian and New Zealand Journal of Criminology* 289, 289–290.

22 Ibid.

2.19 'Pragmatic' reasons for which the government may establish public inquiries include 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; or
- needs to investigate allegations of impropriety where the government, or an individual working in government, is involved.[23]

2.20 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 'independent' analysis of a problem when a solution or outcome is already preferred by the government.[24]

2.21 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 5.

Policy and investigatory inquiries

2.22 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).[25]

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

24 Ibid.

25 S Prasser, *Royal Commissions and Public Inquiries* (2006), 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 Borchadt 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.

2.23 Policy and investigatory inquiries fulfil additional functions. Policy inquiries have an analytical problem-solving role for issues with systems or processes. These inquiries may advise government on policy development in areas that are novel or particularly complex.

2.24 In contrast, investigatory inquiries determine what happened in particular situations, for example where there has been a major accident or disaster, an allegation of corruption, or the death or wrongful imprisonment or treatment of individuals.[26] 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.[27]

2.25 In practice, an investigatory inquiry may consider policy and systemic issues that are relevant to the investigated incident or problem. 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'.[28]

2.26 Justice Ronald Sackville explains 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 experience, and the ability to collate and evaluate a vast amount of factual information.[29]

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

Types of public inquiries in Australia

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

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26 See, for example, the Royal Commission on loss of HMAS Voyager; Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme; and Royal Commission into Aboriginal Deaths in Custody.

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

28 Ibid, [2.15].

29 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.

Past Royal Commissions

2.29 Royal Commissions have been described as 'the most prestigious of executive inquiries in Australia'.[30] 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.[31]

2.30 The *Royal Commissions Act* provides the Australian Government with a statutory framework for establishing public inquiries with coercive information-gathering powers.[32] 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'.[33] A detailed description of the Act is contained in Chapter 3.

Classification #1—general areas of inquiry by Royal Commissions

2.31 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*.[34] These areas, and an example of a Royal Commission conducted in each, are listed below:[35]

- **administration**—Royal Commission on Federal Capital Administration (1917);
- **communications**—Independent Inquiry into Frequency Modulation Broadcasting (1974);
- **constitutional and legal affairs**—Royal Commission on the Commonwealth Constitution (1929);
- **corruption and impropriety**—Royal Commission into Alleged Payments to Australian Maritime Unions (1974);
- **crime**—Royal Commission of Inquiry into Drug Trafficking (1983);
- **defence and national security**—Royal Commission on Australia's Security and Intelligence Agencies (1985);

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30 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.

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

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

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

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

35 The year in parentheses indicates the year of the Inquiry's completion.

- **economy, industry policy and assistance**—Royal Commission on the Sugar Industry (1911);
- **employment and industrial relations**—Royal Commission of Inquiry 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 Relations between the CCA and Seaview Air (1996); and
- **veterans' affairs**—Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam (1985).

Classification #2—policy and investigatory Royal Commissions

2.32 In the early decades of the 20th century, both policy and investigatory Royal Commissions were appointed with regularity. Since the 1970s, however, the majority of Royal Commissions have been investigatory inquiries appointed to investigate incidents or problems.[36]

2.33 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).

2.34 Early investigatory Royal Commissions include: the Royal Commission on the Affray at Goaribari Island, British New Guinea, on the 6th of March, 1904 (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 issued to investigate the Chamberlain convictions (1987), the Centenary

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

House lease (2004), and the actions of certain Australian companies in relation to the United Nations Oil-For-Food Programme (2006).

2.35 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/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 'a very large number of recommendations designed to address the social, health and economic disadvantages suffered by indigenous people'.[37] Similarly, in investigating the causes of the HIH insurance collapse, the HIH Royal Commission made 61 broad policy recommendations 'on matters of corporate governance, financial reporting and assurance, regulation of general insurance, taxation and generation insurance, and a support scheme for policyholders of failed insurers'.[38]

Other federal inquiries

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

2.37 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 related to: the arts;[39] consumer affairs;[40] housing and urban affairs;[41] human rights;[42] education;[43] immigration and ethnic affairs;[44] Indigenous affairs;[45] regulation;[46] social security and welfare;[47] sport;[48] and telecommunications.[49]

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37 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.

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 41. See also N Owen, *Report of the HIH Royal Commission* (2003), vol 1, 1xv–1xxiv.

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

40 Access Card Consumer and Privacy Taskforce (2006).

41 Taskforce on Urban Design (1994).

42 National Consultation on Human Rights (underway at the time of writing in March 2009).

43 Review of Higher Education (1998).

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

45 Northern Territory Emergency Response Review Board (2008).

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

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

48 Independent Review of Soccer (2003).

49 Telecommunications Services Inquiry (2000).

2.38 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 (Palmer Inquiry), and the 2008 inquiry into the case of Dr Mohammed Haneef (Clarke Inquiry). These inquiries, however, did not have coercive information-gathering powers.[50] Non-Royal Commission forms of public inquiry are discussed further in Chapters 4 and 5.

State and territory inquiries

2.39 All states and territories have enacted legislation that provides for the appointment of Royal Commissions[51] or other public inquiries with powers and protections.[52] In addition, some public inquiries are established jointly with federal and state and territory governments.[53]

2.40 Prasser observes that the increasing number of Royal Commissions appointed by federal governments from the 1970s was a trend echoed by state governments.[54] 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.[55]

2.41 Several state governments have now established standing bodies that consider issues of impropriety and corruption.[56] In recent years, state and territory governments

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50 A notable exception was the commission of inquiry into the equine influenza outbreak and related quarantine requirements and practices (Equine Influenza Inquiry): *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). This inquiry is discussed further in Ch 5.

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

52 *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); *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); *Public Sector Management Act 1994* (WA) ss 3, 11–14; *Commission of Inquiry (Deaths in Custody) Act 1987* (NT); *Inquiries Act 1991* (ACT).

53 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 Australian. The Royal Commission of Inquiry into Chamberlain Convictions (1987) was established by the federal and Northern Territory Governments. Issues to do with powers of concurrent federal and state or territory inquiries are considered in Ch 6.

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

55 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).

56 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 Policy Integrity); Queensland (Crime and Misconduct Commission); and Western Australia (Corruption and Crime Commission).

have appointed Royal Commissions and other public inquiries to consider issues relating to:

- child protection in Indigenous and non-Indigenous communities—NSW,[57] Northern Territory (NT),[58] South Australia (SA)[59] and Western Australia;[60]
- health and disability services—NSW,[61] Queensland[62] and ACT;[63] and
- deaths of individuals—SA[64] and Tasmania.[65]

2.42 Most recently, the Victorian Premier John Brumby announced the appointment of a Royal Commission to inquire into the bushfires that occurred in Victoria in February 2009.[66] State and territory mechanisms used to establish public inquiries are discussed further in Chapter 4.

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

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

59 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).

60 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).

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

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

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

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

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

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

3. The *Royal Commissions Act 1902* (Cth)

Contents

Introduction

3.1 This chapter provides an overview of the *Royal Commissions Act 1902* (Cth). It commences by outlining the primary features of the Act, before discussing its structure and drafting. Particular aspects of the Act are discussed in greater detail in other chapters in this Issues Paper.

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'.[1] 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.[2] It does not, however, have coercive powers, such as the power to compel the attendance of witnesses or require the production of documents.[3]

1 *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 370.
2 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 156.
3 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

3.3 The Crown's common law power to issue a Royal Commission is supplemented by s 1A of the *Royal Commissions Act*. 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.[4] Historically, they have been used for a variety of purposes, such as conferring powers or privileges on persons or companies, and for the creation of peerages.[5]

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),[6] although in practice only executive councillors who are members of the ministry advise the Governor-General.[7] Accordingly, Royal Commissions are established by the Governor-General on the advice of the ministry.

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.[8] 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,[9] 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'.[10]

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,[11] taxation policy,[12] the *Australian Constitution*,[13] grain storage and handling,[14] the activities of

4 D Walker, *The Oxford Companion to Law* (1980), 761.
5 Ibid, 761.
6 *Australian Constitution* s 64.
7 Australian Government Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook* (2005), [2.14].
8 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644.
9 The doctrine of severability permits a court to read an Act as if unconstitutional sections of the Act were not included.
10 *Lockwood v Commonwealth* (1954) 90 CLR 177, 184.
11 Royal Commission on Sites for the Seat of Government of the Commonwealth (1903).
12 Royal Commission on Taxation of Leasehold Estates in Crown Lands (1919); Royal Commission on Taxation (1934).
13 Royal Commission on the Constitution (1929).
14 Royal Commission into Grain Storage, Handling and Transport (1988).

unions,[15] and the 'usual rich array of alleged improprieties'.[16] A Royal Commission cannot inquire into a matter if its inquiry would interfere with the administration of justice.[17] 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.[18] 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.[19]

3.7 One issue for this Inquiry is whether the *Royal Commissions Act* should provide further guidance about the subject matter of Royal Commissions or the circumstances in which they should be established. Legislation in the United Kingdom, for example, enables public inquiries to be established into events that have caused, or may cause, 'public concern',[20] while legislation in New Zealand sets out a list of matters which may be the subject of a public inquiry.[21] 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.[22] These issues are discussed further in Chapters 4 and 5.

Jurisdiction

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

3.9 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'.[23]

3.10 The drafting of the terms of reference for a Royal Commission 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'.[24] In addition, carefully defined terms of reference may 'limit

15 Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984).
16 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.
17 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 84.
18 *Hammond v Commonwealth* (1982) 152 CLR 188, 198.
19 *Inquiries Act 2005* (UK) s 13.
20 Ibid s 1.
21 *Commissions of Inquiry Act 1908* (NZ) s 2. The New Zealand Law Commission has recommended that this provision be amended to enable public and government inquiries to be established into 'any matter of public importance': New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec R7.
22 *Commissions of Inquiry Act 1995* (Tas) s 4.
23 *Boath v Wyvill* (1989) 85 ALR 621, 630.
24 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 52.

the opportunities for wide-ranging investigations without the safeguards associated with investigations by traditional law enforcement agencies'.[25]

3.11 On the other hand, 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 established in 2005 was criticised for having terms of reference that were so narrow that they did not enable relevant issues to be examined adequately.[26]

3.12 The ALRC is interesting in obtaining views on whether the *Royal Commissions Act* should address the framing of terms of reference for a Royal Commission in greater detail. For example, should it require that there be consultation on the draft terms of reference for a Royal Commission and, if so, with whom? Should there be a legislative requirement to publish the terms of reference in a particular manner, and should the Act contain provisions dealing with the amendment of terms of reference during the course of an inquiry?

3.13 The ALRC also is interested in whether the Act should attempt to address the content of terms of reference for a Royal Commission. The *Commissions of Investigation Act 2004* (Ireland), for example, contains a provision that stipulates the matters to be included in the terms of reference of an inquiry set up under the Act, including the dates on which events occurred, the location of the events, and the persons to be investigated.[27] It also contains a provision outlining the circumstances in which the terms of reference for an inquiry can be amended.[28]

3.14 In Chapter 5, the ALRC asks whether the *Royal Commissions Act* should be repealed and replaced with a general statute that provides for the establishment of all types of public inquiries. In the alternative, the ALRC asks whether the Act should be retained and another general statute enacted to provide for the establishment of non-Royal Commission forms of public inquiry.[29] In that chapter, the ALRC also asks whether the terms of reference for a Royal Commission or other public inquiry should be addressed by legislation establishing the inquiry, and if so, what matters should be addressed.[30]

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25 R Sackville, 'Royal Commissions in Australia: What Price Truth?' (1984) 60(12) *Current Affairs Bulletin* 3, 12.
26 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [4.33].
27 *Commissions of Investigation Act 2004* (Ireland) s 5.
28 Ibid s 6.
29 Question 5–1.
30 Question 5–3.

Membership

3.15 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 government. Commissioners are almost always drawn from outside the government, which enhances the perception of the inquiry as independent.[31]

3.16 The Act does not provide any further guidance on the appointment of Royal Commissioners. As Dr Scott Prasser has explained,

> appointing members to a public inquiry, unlike other government or public service positions, is not undertaken via advertisement or formal selection processes; rather, it is achieved by private 'soundings' of potential candidates, usually between the relevant minister's office and the department. This process may take considerable time, as locating those who are competent, have the appropriate status, and are available and willing, is not always easy.[32]

3.17 As a matter of practice, Royal Commissions are 'largely the province of lawyers'.[33] Of the 38 federal Royal Commissions that have been established since 1970, 32 have been chaired by current or former judges or legal practitioners.[34]

3.18 Royal Commissions can be conducted by one or more commissioners. 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 had more than one member, while 53% of the policy Royal Commissions appointed since this time have been multi-member Commissions.[35]

3.19 There are advantages and disadvantages associated with multi-member Royal Commissions. For example, appointing a number of Royal Commissioners to an inquiry may help to ensure that it is conducted by people who, collectively, possess adequate skills and knowledge.[36] Appointing a number of Royal Commissioners to an inquiry, however, may cause delays in the finalisation of reports and recommendations, and also may lead to reports that contain divergent views.[37]

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31 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [6.7].
32 S Prasser, *Royal Commissions and Public Inquiries* (2006), [6.21].
33 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.
34 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [8.6].
35 S Prasser, *Royal Commissions and Public Inquiries* (2006), [2.29].
36 E Marchetti, 'Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody' (2005) 5 *Macquarie Law Journal* 103, 113.
37 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 73–74.

3.20 The use of judges to conduct Royal Commissions has been a controversial issue in Australia[38] and overseas.[39] It has long been established that judges may act in administrative roles if they are acting in their personal capacity (ie, as *persona designata*).[40] 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 to punish contempt.

3.21 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.[41] Secondly, they may enhance the perception of the independence and impartiality of a Royal Commission,[42] and finally, they are generally available to conduct Royal Commissions.[43]

3.22 One concern, however, is that using judges to inquire into politically controversial matters could undermine public confidence in the individual judge[44] or the judiciary as a whole.[45] It also has been argued that judges do not always possess the most desirable skills or knowledge 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.[46]

3.23 One issue is whether the *Royal Commissions Act* should provide more guidance on the appointment of Commissioners or the procedure to be followed when appointing them. For example, the *Inquiries Act 2005* (UK) requires the minister responsible for establishing an inquiry to consider whether a proposed member of an inquiry panel has a suitable amount of expertise,[47] 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

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38 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.

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

40 Ibid, 54.

41 Ibid, 54.

42 Ibid, 54.

43 Parliament of United Kingdom—House of Commons Public Administration Select Committee, *Public Administration—First Report* (2005), [43].

44 Ibid, [48]–[51].

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

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

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

with an interested party to the inquiry.[48] Further, it requires the minister to consult with the chair of the inquiry before appointing any other members to an inquiry panel,[49] and to consult with certain senior members of the judiciary before appointing a judge as a panel member.[50] The Act also enables the minister to terminate the employment of a member of an inquiry panel in a number of limited circumstances.[51]

3.24 In Chapter 5, the ALRC asks whether legislation establishing Royal Commissions or other public inquiries should address in detail the membership of the inquiries, and if so, what matters the legislation should address.[52]

Coercive powers

3.25 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;[53] summon or require witnesses to produce documents or things;[54] and require witnesses to give evidence under oath or affirmation.[55]

3.26 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.[56] A person who refuses to be sworn or make an affirmation, or answer any relevant question asked by a Royal Commission, also commits an offence punishable by the same maximum penalty.[57]

3.27 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'[58] 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,[59] and all Royal Commissions can issue a warrant for the arrest of a witness for failing to attend in answer to a summons.[60]

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48 *Inquiries Act 2005* (UK) s 9.
49 Ibid s 4(3).
50 Ibid s 10.
51 Ibid s 12.
52 Question 5–3.
53 *Royal Commissions Act 1902* (Cth) s 2(1)(a).
54 Ibid s 2(1)(b), (2), (3A), (5).
55 Ibid s 2(3).
56 Ibid s 3.
57 Ibid s 6.
58 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.
59 Ibid s 4.
60 Ibid s 6B.

3.28 In 2003, the Commissioner conducting the Royal Commission into the Building and Construction Industry recommended, among other things, that the *Royal Commissions Act* be amended to empower a Royal Commission to require a person to provide the Commission with a written statement about a specified matter.[61] In addition, he recommended that the maximum penalties for failure to attend when summonsed, failure to answer questions, and failure to produce documents, be increased to $20,000 or imprisonment for five years.[62]

3.29 Examination of the powers of Royal Commissions raises a number of questions. For example, do all Royal Commissions require the same coercive information-gathering powers? Do the current coercive information-gathering powers adequately balance individual rights and the powers of the state, and are the penalties for offences designed to support the use of a Royal Commission's powers appropriate? The powers of Royal Commissions are discussed in detail in Chapter 7, and offences and penalties under the *Royal Commissions Act* are discussed further in Chapter 9.

Methods of taking evidence

3.30 The *Royal Commissions Act* does not preclude the taking of evidence otherwise than on oath or by affirmation.[63] The provisions of the Act, however, 'envisage that Royal Commissions will obtain evidence mainly through oral hearings'.[64] For example, s 6FA provides that counsel assisting, 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.

3.31 Royal Commissions have a general discretion to determine whether to conduct their hearings in public or private.[65] 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 openly.[66]

3.32 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

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61 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, Rec 1(a).
62 Ibid, Vol 2, Rec 1(f).
63 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 350.
64 Ibid, Appendix 4K, 350.
65 *Royal Commissions Act 1902* (Cth) s 6D(5).
66 See, eg, T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, 29.

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.

3.33 The taking of evidence by a Royal Commission is discussed in detail in Chapters 7 and 8.

Privileges and immunities

3.34 A 'privilege' is a right to resist disclosing information that would otherwise be required to be disclosed.[67] A number of privileges exist at common law—namely, the privilege against self incrimination, client legal privilege and the privilege in aid of settlement.[68] These privileges, as well as some additional privileges, also exist in statutory form.[69]

3.35 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.[70]

3.36 The *Royal Commissions Act* expressly deals with the privilege against self-incrimination and client legal privilege.[71] It also contains a provision providing that a witness does not have to disclose any 'secret process of manufacture'.[72] The extent to which other common law or statutory privileges apply to Royal Commissions is uncertain, and is discussed in detail in Chapter 8.

Offences

3.37 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 answer a relevant question.

3.38 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,[73] to practise any fraud on a person called as a witness before a Royal Commission with the intent of affecting his or her

67 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.
68 Ibid, Ch 7.
69 See, eg, *Evidence Act 1995* (Cth) pt 3.10.
70 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 110.
71 Referred to as legal professional privilege under the Act.
72 *Royal Commissions Act 1902* (Cth) s 6D(1).
73 Ibid s 6I.

testimony,[74] to prevent a witness from attending before a Royal Commission,[75] or to dismiss an employee for appearing as a witness before a Royal Commission.[76]

3.39 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.

3.40 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 appeared before the HIH Royal Commission. This was because the administrative action was in 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.[77]

3.41 The Act also contains offence provisions preventing interference with evidence. It makes it an offence to give false or misleading evidence,[78] or to destroy documents or things that are or may be required by a Royal Commission.[79]

3.42 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'.[80] In addition, it has been noted that 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 Part III of the *Crimes Act 1914* (Cth) or Chapter 7 of the *Criminal Code*.[81] The offences established by the *Royal Commissions Act*, and the nature and adequacy of the penalties attached to these offences, are discussed in detail in Chapter 9.

Communication of information

3.43 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, a

74 Ibid 6J.
75 Ibid s 6L.
76 Ibid s 6N.
77 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, [59].
78 *Royal Commissions Act 1902* (Cth) s 6H.
79 Ibid s 6K.
80 E Campbell, *Contempt of Royal Commissions* (1984), 36.
81 Ibid, 44.

State or a Territory prescribed by the regulation'.[82] This, he 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'.[83] The power of a Royal Commission to communicate information pursuant to s 6P is discussed in Chapter 7.

Contempt

3.44 Section 6O(1) of the 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.

3.45 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.[84] 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'.[85]

3.46 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'.[86] In addition, some commentators have questioned the constitutionality of the provision, given that it purports to vest judicial power in an administrative tribunal.[87]

3.47 Some acts that could constitute contempt are already punishable as criminal offences in the *Royal Commissions Act*. For example, refusing to be sworn or make an affirmation, or give evidence, could constitute contempt of a Royal Commission. One question is whether conduct which breaches a specific offence provision in the *Royal*

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82 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, Rec 1(c).
83 Ibid, Vol 2, Rec 1(c).
84 E Campbell, *Contempt of Royal Commissions* (1984), 42.
85 *R v Arrowsmith* [1950] VLR 78, 85–86.
86 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 55.
87 Ibid, 55; E Campbell, *Contempt of Royal Commissions* (1984).

Commissions Act may also be punishable under s 6O(1) of the Act.[88] The issue of contempt of a Royal Commission is discussed in detail in Chapter 9.

Concurrent Commonwealth and state Commissions

3.48 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 Commonwealth royal commission to accept powers and functions given to it by a State government in the form of a parallel commission'.[89]

3.49 In *Sorby v The Commonwealth*, Gibbs CJ noted that s 7AA was a 'rather curious provision'[90] 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.[91] 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'.[92] Concurrent Commonwealth and state Royal Commissions are discussed in Chapter 7.

Custody and use of records of Royal Commissions

3.50 Section 9 of the 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.

3.51 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

88 E Campbell, *Contempt of Royal Commissions* (1984), 30–31.
89 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337.
90 *Sorby v The Commonwealth* (1983) 46 ALR 237, 248.
91 See *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.
92 *Sorby v The Commonwealth* (1983) 46 ALR 237, 248.

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.[93]

3.52 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. The handling of Royal Commission records is discussed in detail in Chapter 7.

Drafting and structure of the *Royal Commissions Act*

3.53 One issue is whether, if retained in its current form, the *Royal Commissions Act* should be redrafted to make it more comprehensible. Currently, the Act evinces a variety of drafting styles. Some of its provisions were inserted in the early 1900s, and have remained largely unaltered since this time,[94] while others were inserted as recently as 2006.[95] The older provisions in the Act are archaic and contain old-fashioned language and complex sentence structures that have caused difficulties of judicial interpretation.[96] In addition, the fact that the Act has been amended on so many occasions means that its structure is somewhat haphazard: there is no discernible logic to the sequencing or numbering of the Act's provisions.

3.54 In Chapter 5, the ALRC asks whether the *Royal Commissions Act* should be repealed and replaced with a general statute that provides for the establishment of all types of public inquiries. If the Act is retained, another question is whether it should be redrafted to achieve a greater degree of simplicity and clarity.

Judicial review of inquiry decisions

3.55 The decisions of Royal Commissions may be subject to judicial review. Judicial review is described broadly as 'the function or capacity of courts to provide remedies to people adversely affected by unlawful government action'.[97]

3.56 Judicial review of decisions of a Royal Commission can be sought in the High Court in the exercise of its original jurisdiction; or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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93 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).

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

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

96 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630.

97 Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006), [1].

3.57 It is possible to seek judicial review of a decision of a Royal Commission on a number of grounds—for example, on the basis that it was outside the Commission's terms of reference;[98] that it was not based on any evidence or other material;[99] or that it was made in breach of the principles of natural justice. In addition, as Professor Campbell notes, there is authority for the proposition that the ultimate findings of a Royal Commission may be subject to judicial review.[100]

3.58 When legal proceedings are commenced in respect of the activities of a Royal Commission, it is established practice for the Royal Commissioner to enter a submitting appearance only, and for the Commonwealth to adopt the role of the respondent.[101]

3.59 The New Zealand Law Commission has observed that:

> judicial review, or threats of review, can have an impact on the progress of inquiries and can cause considerable delay. On the other hand, reviews can in some cases be necessary to ensure that inquiries remain within their terms of reference and act in accordance with natural justice.[102]

3.60 The *Inquiries Act 2005* (UK) requires that applications for judicial review of a decision made by the Minister responsible for establishing an inquiry, or by a member of an inquiry panel, must be brought within 14 days of the applicant becoming aware of the decision, unless the court extends the time.[103] The *Royal Commissions Act 1917* (SA) contains a 'privative clause'—that is, a provision that purports to exclude judicial review of decisions made under that legislation. Section 9 of the Act provides that:

> No decision, determination, certificate, or other act or proceeding of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, certiorari , or otherwise howsoever.

3.61 The ALRC is interested in hearing whether there are any concerns about judicial review of decisions of Royal Commissions, and if so, how should these concerns be addressed? In addition, while the discussion in this chapter has focused on decisions made by Royal Commissions, the ALRC is interested in hearing views on judicial review of decisions made by other forms of public inquiry.

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98 See, eg, *Attorney-General (Cth) v Queensland* (1990) 94 ALR 515.

99 See, eg, *Lloyd v Costigan* (1983) 48 ALR 241.

100 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, cited in E Campbell, 'Royal Commissions, Parliamentary Privilege and Cabinet Confidentiality' (1999) 28 *Western Australian Law Review* 239, 247.

101 See, eg, *Eatts v Dawson* (1990) 93 ALR 497, 499.

102 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [11.2].

103 *Inquiries Act 2005* (UK) s 38.

Question 3–1 Are there any concerns about judicial review of decisions made by Royal Commissions or other public inquiries? If so, how should legislation establishing Royal Commissions or other public inquiries attempt to address these concerns?

4. Comparative Forms of Public Inquiry

Contents

Introduction

4.1 In this chapter, the ALRC discusses forms of public inquiry conducted outside the framework of the *Royal Commissions Act 1902* (Cth). It considers existing types of public inquiries in federal jurisdictions. It also considers models of inquiry in state, territory and overseas jurisdictions.

Existing types of federal public inquiries

4.2 Currently, the Australian Government may establish public inquiries in several ways. As discussed in Chapter 2, the type of inquiry established will depend on the nature of the problem and what the government intends to achieve by establishing an inquiry. In this section, the ALRC outlines features of existing forms of inquiry other than Royal Commissions that may be established by the Australian Government.

Ad hoc inquiries established by statute

Power to enact legislation

4.3 As discussed in Chapter 3, the federal executive does not have the prerogative power to establish public inquiries with coercive powers.[1] Such powers are conferred on public inquiries by legislation. The Australian Parliament, however, does not have unlimited power to enact legislation to establish public inquiries with powers. The Parliament only may enact laws that deal with matters that fall within the legislative powers of the Commonwealth as set out in the *Australian Constitution.*

4.4 The *Royal Commissions Act* 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 incidental to the execution of powers vested in the legislature, executive or judicature.[2] Professor Enid Campbell observes that 'this head of legislative power will not support legislation to enable royal commissions to compel answers to questions generally, regardless of the subject matter of inquiry'.[3]

4.5 There are several heads of power, however, under which the Australian Parliament may enact legislation additional to the *Royal Commissions Act* for the establishment of public inquiries with coercive powers (and protections of witnesses and inquiry members).[4]

Two types of statutory inquiries

4.6 Public inquiries with statutory powers and protections include those that are established under legislation that:

- confers on a particular inquiry specific powers and protections contained in the *Royal Commissions Act*; or
- provides the executive with the power to establish an inquiry in a general area.

4.7 Neither type of statutory inquiry is used frequently by the Australian Government. One example of the first type of inquiry is the Equine Influenza Inquiry (2008), which was established under the *Quarantine Act 1908* (Cth).[5] The Equine

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

2 *Australian Constitution* s 51(xxxix):

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

3 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [2.3].

4 See *Australian Constitution* s 51.

5 The *Quarantine Act 1908* (Cth) was amended by the *Quarantine (Commission of Inquiry) Amendment Act 2007* (Cth) to provide for the establishment of the Equine Influenza Inquiry. Apart from the Equine Influenza Inquiry, the only other (relatively) recent example of a statutory instrument to establish an inquiry is the *Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987* (Cth). Section 13 of that Act vested in that inquiry most of the powers of the *Royal Commissions Act 1902* (Cth).

Influenza Inquiry was vested with most of the powers of an inquiry established under the *Royal Commissions Act*.[6] It did not have the power, however, to authorise applications for warrants to enter and search premises and seize relevant things on those premises.[7] The *Quarantine Act* also dispensed with the requirement for the Governor-General to establish the inquiry—rather, the minister responsible for administering the *Quarantine Act* had the power to establish the inquiry, appoint its members and determine its terms of reference.[8]

4.8 Examples of the second type of statutory inquiry include: the Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities (1996); and the Commission of Inquiry into Ranger Uranium Development in the Northern Territory (1977). These inquiries were established, respectively, under the *Public Service Act 1922* (Cth)[9] and the *Environment Protection (Impact of Proposals) Act 1974* (Cth).[10]

4.9 Inquiries that derive their coercive powers by reference to the *Royal Commissions Act* may contribute to fragmentation in regulation. Also, powers available to inquiries not established under the *Royal Commissions Act* are not necessarily equivalent to those enjoyed by Royal Commissions. For example, the Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities 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 them.[11]

Ad hoc inquiries established by regulations

4.10 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).[12] One commission of inquiry conducted under these regulations was an Inquiry Concerning the Circumstances Connected with the Attack made by Enemy 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.[13]

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6 *Quarantine Act 1908* (Cth) s 66AZE.
7 Ibid s 66AZE. *Royal Commissions Act 1902* (Cth) ss 4, 5.
8 *Quarantine Act 1908* (Cth) s 66AY.
9 *Public Service Act 1922* (Cth) (replaced by *Public Service Act 1999* (Cth)).
10 *Environment Protection (Impact of Proposals) Act 1974* (Cth) s 11.
11 B Bailey, *Examples of Public Sector Inquiries—Commonwealth Paedophile Inquiry* (1996–1997) Department of the Parliamentary Library, Information and Research Services, 13–17.
12 These regulations were made under the *National Security Act 1939* (Cth).
13 Justice Lowe, *Commission of Inquiry Concerning the Circumstances Connected with the Attack Made by Japanese Aircraft at Darwin on 19 February 1942* (1945).

4.11 Currently, inquiries may be conducted under the *Defence (Inquiries) Regulations 1985* (Cth).[14] Under the regulations, courts and boards of inquiry may be established to inquire into matters related to the ADF.[15] Courts and boards of inquiry tend to examine issues related to an accident, injury or damage to ADF property.[16] Courts of inquiry are established by, and report to, the Australian Minister for Defence.[17] 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.[18]

4.12 In June 2007, the *Defence (Inquiries) Regulations* were amended to provide for the establishment by the CDF of commissions of inquiry.[19] These inquiries may consider service-related deaths and suicides of ADF members.[20] A CDF commission of inquiry currently is being conducted into the loss of HMAS Sydney II in November 1941 and related loss of life.[21]

4.13 At least one member of a court or commission of inquiry established under the *Defence (Inquiries) Regulations* must be a civilian with legal (or, in the case of a commission of inquiry, judicial) experience.[22] Where there is more than one member of an inquiry, the civilian is to be the president of the inquiry.[23] Expert 'assessors' may be appointed to advise members of a board of inquiry.[24] 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.[25]

4.14 Coercive information-gathering powers are conferred upon members of all inquiries conducted under the *Defence (Inquiries) Regulations*.[26] The regulations also address procedural issues, such as whether inquiries should be conducted in private or public.[27]

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

15 *Defence (Inquiries) 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 Defence Force: pt 6. The Inspector-General of the Australian Defence Force also may carry out inquiries: pts 6 and 7.

16 Australian Government Department of Defence, *Commission of Inquiry—Frequently Asked Questions* (2009) <http://www.defence.gov.au/coi/inquiries.htm> at 26 February 2009.

17 *Defence (Inquiries) Regulations 1985* (Cth) regs 5, 6.

18 Ibid regs 23, 26.

19 *Defence (Inquiries) Amendment Regulations 2007* (Cth).

20 *Defence (Inquiries) Regulations 1985* (Cth) reg 109.

21 Australian Government Department of Defence, *Commission of Inquiry into the Loss of HMAS Sydney II* (2009) <http://www.defence.gov.au/sydneyii/index.htm> at 27 February 2009.

22 *Defence (Inquiries) Regulations 1985* (Cth) regs 4, 6, 112.

23 Ibid regs 7, 112.

24 Ibid reg 8.

25 Ibid reg 19.

26 Ibid pts II–8.

27 Ibid pts II–8.

Ad hoc inquiries without legislative basis

4.15 As discussed in Chapter 2, the Australian Government establishes taskforces, committees, panels, departmental and other inquiries to investigate and provide advice on a diverse range of matters. This type of inquiry often is used by the government because it is a more flexible, and sometimes more cost-effective, option than a Royal Commission.

4.16 There are significant differences between statutory and non-statutory inquiries. Non-statutory inquiries may not provide legal protection to inquiry members. Also, 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 legal protection afforded to individuals providing information in a public forum—and the lack of consequences for failing to provide information.[28] Consequently, non-statutory inquiries may not have all the information necessary to make the best recommendations. Further, lack of transparency in inquiry processes means that non-statutory inquiries may not enjoy the same perception of independence as statutory inquiries.

4.17 Dr Andrew Lynch illustrates some of these difficulties with reference to the alleged misconduct considered in the recent Clarke Inquiry into the Case of Dr Mohamed Haneef (Clarke Inquiry).

> Clarke's inability to unearth improper political interference or opportunism in Haneef's case needs to be understood in light of who he was able to speak to and under what conditions. [Former Minister for Immigration, Kevin] Andrews' former chief of staff declined to provide a statement, while former prime minister John Howard neither provided a statement himself nor granted permission for his former advisor, Jamie Fox, to do so. … Clarke recounts his considerable difficulties in negotiating access to Cabinet deliberations, including those of the National Security Committee, and in receiving timely responses and submissions from various departments and agencies. The only way in which Clarke felt he could gain any traction was through his announcement in July last year that transcripts of interviews and related evidential documents would not be made public.[29]

4.18 In some circumstances, it may not be necessary or efficient for the Australian Government to establish an inquiry with a legislative basis. Potential models of inquiry are discussed further in Chapter 5.

Permanent standing bodies

4.19 As noted in Chapter 2, there are several standing bodies that fulfil many of the functions of ad hoc public inquiries as well as serving other purposes. At the federal

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28 See, eg, 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, 13–14.

29 A Lynch, *Learning from Haneef* (2009) Inside Story <http://inside.org.au> at 27 February 2009.

level, bodies that conduct inquiries into certain issues include the ALRC, Commonwealth Ombudsman and Australian Crime Commission.

4.20 As noted in Chapter 5, one question for this Inquiry is whether a Royal Commission is the most appropriate body to advise the Australian Government on policy issues. Another question is whether this task may be carried out more effectively and appropriately by other bodies, including standing bodies. For example, in the context of law reform, Justice Ronald Sackville suggests that permanent law reform bodies are under utilised in the formulation of legal policy.[30] This issue is discussed further in Chapter 5.

Existing models of inquiry in Australian states and territories

4.21 Public inquiries with coercive powers may be established under legislation in all Australian states and territories as well as several overseas jurisdictions. Inquiries without statutory foundations also are established by most governments. In the next two sections, the ALRC outlines distinctive features of inquiries established by legislation in comparative jurisdictions. In particular, the ALRC notes where a model of inquiry differs from the *Royal Commissions Act* with respect to: appointment and constitution of an inquiry; flexibility or rigidity of processes; and the extent of information-gathering powers and protections.[31]

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

New South Wales

4.23 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).[32] For a brief period in 1997–1998, the *Special Commissions of Inquiry Act* allowed either or both Houses of Parliament to

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 In other chapters of this Issues Paper, the ALRC discusses in detail coercive powers of public inquiries, penalties for persons that fail to comply with these requirements, evidentiary rules of public inquiries, and funding arrangements for various types of inquiry.

32 The *Special Commissions of Inquiry Act* expressly excludes the operation of the NSW *Royal Commissions Act*: *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.* 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).

resolve to authorise the Governor to establish a special commission of inquiry to consider an issue related to parliamentary proceedings.[33]

4.24 While the Governor is not restricted in his or her choice for appointment as commissioner or commissioners of an inquiry established under the NSW *Royal Commissions Act*,[34] only certain persons may be appointed as commissioners of an inquiry established under the *Special Commissions of Inquiry Act*. 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.[35] As well, some powers in the NSW *Royal Commissions Act* only 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.[36]

4.25 Both the NSW *Royal Commissions Act* and the *Special Commissions of Inquiry Act* confer coercive powers upon inquiries appointed under the Acts.[37] In inquiries established under the *Special Commissions of Inquiry Act* and the special provisions of the NSW *Royal Commissions Act*, a commissioner shall have all the powers, rights and privileges as judges with respect to compelling the: attendance of witnesses; answering by witnesses of relevant questions; and the production of documents and other material.[38] Further, a commissioner may issue warrants for the apprehension of a witness and the bringing of that witness before the inquiry.[39] Campbell notes that, for constitutional reasons, these powers may not be conferred on members of a public inquiry established by the Australian Government.[40]

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33 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 Part 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(4) *Public Law* 227.

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

35 *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.

36 *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).

37 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 Wood Royal Commission, which was appointed under the *Royal Commissions Act 1923* (NSW).

38 *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).

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

40 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.6]. Under the *Royal Commissions Act 1902* (Cth), a relevant commission may authorise the *application* for a search warrant in certain circumstances: ss 4, 5. This issue is discussed further in Chapter 7.

4.26 Not all inquiries enacted under the NSW *Royal Commissions Act* and the *Special Commissions of Inquiry Act* are required to exercise all powers in the Acts—both Acts allow the Governor to set limitations on the powers provided to inquiries.[41] Campbell observes that a provision of this nature 'provides an element of flexibility not present in the federal Act'.[42]

Victoria

4.27 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 boards of inquiry to any person or persons under the *Constitution Act 1975* (Vic).[43]

4.28 Powers and other rules of commissions and boards of inquiry are set out in the *Evidence Act 1958* (Vic).[44] 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*.[45] Several other Victorian Acts provide that the relevant provisions of the *Evidence Act* apply with respect to investigative inquiries established under those Acts.[46]

4.29 In 2006, the Victorian Law Reform Commission recommended the: repeal of the provisions of the *Evidence Act* 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*.[47] On 1 January 2010, most provisions of the *Evidence Act 2008* (Vic) will come into force, replacing the *Evidence Act 1958*.[48] The *Evidence Act 2008*, however, does not contain provisions dealing with the powers and procedures of public inquiries. At the time of writing in March 2009, draft legislation for the establishment of public inquiries has not been introduced into the Victorian Parliament. The ALRC intends to monitor developments in this area.

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

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

43 *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].

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

45 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.

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

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

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

Queensland

4.30 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.[49] Unlike most other equivalent Acts in Australian jurisdictions, the Act expressly states that the Governor shall establish an inquiry under the Act with the advice of the Executive Council.[50] Further, the Governor in Council may declare that specified provisions of the *Commissions of Inquiry Act* apply to inquiries other than those issued under the Act.[51]

4.31 Inquiries established under the *Commissions of Inquiry Act* have the power, in certain circumstances, to enter and search premises.[52] The commission may inspect documents and make copies of any material that may be relevant to the inquiry.[53] Further, if the chairperson 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.[54]

South Australia

4.32 In South Australia (SA), the Governor has the prerogative power to establish a Royal Commission. Coercive powers of SA Royal Commissions are set out in the *Royal Commissions Act 1917* (SA).[55]

4.33 While there are no requirements in the SA *Royal Commissions Act* 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 Anangu 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 must have been male and one female; and

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

50 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.

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

52 H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2(3) *Australian Journal of Administrative Law* 157, 159.

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

54 Ibid, s 19A.

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

- at least one must have been of Aboriginal descent.[56]

4.34 Few other instruments 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 Chapters 3 and 5.

Western Australia

4.35 The *Royal Commissions Act 1968* (WA) provides that a Royal Commission with coercive powers may be appointed by the Governor.[57] The Western Australian (WA) *Royal Commissions Act* mirrors the federal *Royal Commissions Act* in providing a statutory basis for the establishment of Royal Commissions with coercive powers.[58] Other Acts may confer additional powers on inquiries established under the WA *Royal Commissions Act.*[59]

4.36 Any person may be appointed as a member of a Royal Commission established under the WA *Royal Commissions Act*. 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.[60] 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.[61]

4.37 In WA, 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 WA public sector.[62] 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.[63]

Tasmania

4.38 In Tasmania, inquiries with coercive powers are established by the Governor under the *Commissions of Inquiry Act 1995* (Tas). Unlike other Australian

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56 *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 perform the functions of the commissioner under the Act in accordance with an arrangement entered into with the commissioner: Ibid s 4A(4).

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

58 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(2) *Australian Journal of Administrative Law* 69, 72.

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

60 *Royal Commissions Act 1968* (WA) s 8.

61 Ibid s 8.

62 *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.

63 Ibid ss 12, 13.

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.[64]

4.39 The *Commissions of Inquiry Act* 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.[65]

4.40 In 2003, the Tasmania Law Reform Institute made several recommendations with respect to the powers of inquiries established under the *Commissions of Inquiry Act.*[66] These recommendations are discussed in Chapter 7.

Northern Territory

4.41 The *Inquiries Act 1945* (NT) provides the Chief Minister and the Legislative Assembly with the statutory power to appoint, or resolve to appoint, a person or board of inquiry.[67] 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, but reports are required to be tabled in the Legislative Assembly.[68]

4.42 Inquiries established under the *Inquiries Act* have similar powers to those established under the federal *Royal Commissions Act.* In addition, the *Commissions in 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 *Royal Commissions Act.*[69] Concurrent state, territory and federal inquiries are discussed in Chapter 7.

Australian Capital Territory

4.43 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).[70] 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'.[71]

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64 *Commissions of Inquiry Act 1995* (Tas) s 4(1).
65 Ibid s 4(5), sch 1.
66 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003).
67 *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.
68 *Inquiries Act 1945* (NT) s 4A. Requirements for governments to table reports in Parliament are discussed in Ch 2.
69 *Commission of Inquiry (Deaths in Custody) Act 1987* (NT) s 7.
70 *Royal Commissions Act 1991* (ACT) s 5; *Inquiries Act 1991* (ACT) s 5.
71 Explanatory Memorandum, Royal Commissions Bill 1990, Inquiries Bill 1990, Royal Commissions and Inquiries (Consequential Provisions) Bill 1990 (ACT), 2.

4.44 Commissioners appointed under the ACT *Royal Commissions Act* must be a judge or a person who has been a lawyer for five years.[72] There is no similar requirement for the membership of boards of inquiry established under the *Inquiries Act.*[73] 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.[74]

Existing models of inquiry in overseas jurisdictions

United Kingdom

4.45 In the United Kingdom (UK), any minister may establish an inquiry with coercive powers under the *Inquiries Act 2005* (UK).[75] The *Inquiries Act* replaced approximately 30 UK laws for the establishment of inquiries, including the *Tribunals of Inquiry Act 1921* (UK).[76]

4.46 Under the new *Inquiries Act,* inquiries may be established to consider particular events that have caused, or have the potential to cause, public concern. A minister also may establish an inquiry if there is public concern about a particular event that may have happened.[77] 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 chair of the inquiry.[78]

4.47 The minister responsible for establishing an inquiry appoints its chair, and in consultation with the chair, any additional panel members.[79] 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'.[80] 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.[81] In addition to 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*.[82]

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

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

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

75 *Inquiries Act 2005* (UK) s 1. Also note that a 'minister' means a minister from the UK, Scotland or Northern Ireland and references to a minister also include references to the National Assembly of Wales.

76 See United Kingdom Department of Constitutional Affairs, *Inquiries Act* (2005) <http://www.dca.gov.uk/legist/inquiries.htm> at 24 February 2009.

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

78 Ibid s 6.

79 Ibid ss 4, 7. The minister also sets the terms of reference for the inquiry in consultation with the chair: Ibid, s 5.

80 Ibid ss 8, 9.

81 Ibid s 10. This section also provides that some judges may be appointed by the minister only in consultation with certain other judges.

82 Ibid s 11.

4.48 The *Inquiries Act* provides flexibility in other contexts. For example, an inquiry commenced other than under the Act may be 'converted' to an inquiry under the Act.[83] A converted inquiry enjoys the same powers and protections as an inquiry commenced under the Act.[84] 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.[85]

Canada

4.49 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 he or she considers that it would be expedient to do so.[86] A 'departmental' inquiry may be established, with the approval of the Governor in Council, by a minister with responsibility for a federal government department.[87] Commissioners of departmental inquiries investigate and report on matters relating to departmental business and the conduct of officials.[88]

4.50 Public and departmental inquiries exercise similar powers with respect to compelling the attendance and answers of witnesses and the production of relevant material.[89] In addition, commissioners of departmental inquiries may enter any public institution and search for relevant material.[90]

4.51 The *Inquiries Act* 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.[91] 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.[92]

New Zealand

4.52 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).[93]

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83 Ibid s 15.
84 Ibid ss 15, 16.
85 Ibid s 13.
86 *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.
87 Ibid s 6.
88 Ibid s 6.
89 Ibid ss 4, 5 and 7–10.
90 Ibid s 7.
91 Ibid pt III.
92 Ibid pt IV.
93 *Commissions of Inquiry Act 1908* (NZ) s 2.

4.53 Under the *Commissions of Inquiry Act*, 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.[94] 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.[95]

4.54 Public inquiries may be commenced under a very large number of other New Zealand statutes. Over 50 New Zealand statutes incorporate by reference powers of the *Commissions of Inquiry Act*.[96] 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.*[97]

4.55 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'.[98] On 29 September 2008, the Inquiries Bill 2008 was introduced into the New Zealand Parliament. If passed, the Bill will implement many of the recommendations made by the NZLC. The ALRC will monitor developments in this area.

Ireland

4.56 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.[99] Before a commission is established, both the Minister for Finance and the Government need to approve a minister's proposal to establish a commission, and both Houses of Parliament (the Oireachtas) need to resolve to approve the draft proposal.[100]

4.57 The Irish executive also has the power to establish a tribunal of inquiry to consider a matter of 'urgent public importance'.[101] A tribunal of inquiry has coercive

94 Ibid s 2.
95 Ibid ss 13–13B.
96 These statutes are set out in New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 187–189.
97 Ibid, 190.
98 Ibid, Rec 3.
99 *Commissions of Investigation Act 2004* (Ireland) s 3.
100 Ibid s 3.
101 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [2.04].

powers vested in it by the *Tribunals of Inquiry (Evidence) Acts 1921–2004* (Ireland) If both Houses of the Irish Orieachtas pass a resolution to that effect.[102]

4.58 In 2005, the Law Reform Commission of Ireland released a *Report on Public Inquiries, Including Tribunals of Inquiry*. In that report, it 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.[103] Following the release of this report, the Tribunals of Inquiry Bill 2005 (Ireland) was introduced into the Oireachtas. This Bill has been debated, and at the time of writing in March 2009, is before the Select Committee on Justice, Equality, Defence and Women's Rights. The ALRC will monitor developments in this area.

Singapore

4.59 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.[104]

4.60 A 'committee of inquiry' may be established by any Singapore 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.[105]

4.61 Members of commissions and committees of inquiry are appointed by the person establishing the inquiry (appointing authority).[106] 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.[107]

4.62 Both types of public inquiry have identical powers with respect to procuring evidence, examining witnesses and compelling attendance of witnesses.[108] Subject to

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102 *Tribunals of Inquiry (Evidence) Acts 1921–2004* (Ireland) s 1.

103 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 26 February 2009.

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

105 Ibid s 9(1).

106 Ibid s 2.

107 Ibid ss 4(1), 10(1).

108 Ibid sch 1, para 1.

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.[109]

4.63 The *Inquiries Act* provides for the appointment of a secretary or assessors at the discretion of the appointing authority.[110] The appointing authority also may make rules with respect to the inquiry body, for example, on matters of evidence or procedure.[111] With the consent of the appointing authority, an inquiry may be suspended to allow for the completion of any relevant investigation or judicial proceedings.[112]

4.64 Under the *Inquiries Act*, an inquiry may report on anything it considers relevant to the terms of reference. It also may 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'.[113]

109 Ibid sch 1, paras 5–6.
110 Ibid ss 6–7, 12–13.
111 Ibid ss 15–16.
112 Ibid sch 1, para 2.
113 Ibid sch 1, para 15.

5. Potential New Models of Commonwealth Public Inquiry

Contents

Introduction

5.1 In this chapter, the ALRC canvasses new models of public inquiry that may be appropriate at the federal level in Australia. It also considers what requirements should rest with the Australian Government upon the completion of Royal Commissions or other public inquiries.

Key considerations for developing a model of inquiry

5.2 In addition to considering the operation and provisions of the *Royal Commissions Act 1902* (Cth), the terms of reference for this Inquiry require the ALRC to consider whether 'an alternative form or forms of Commonwealth executive inquiry should be established by statute'.

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

These issues form the basis for several questions asked by the ALRC in this Issues Paper.

- **establishment of public inquiries—**who should set or amend the terms of reference for an inquiry and appoint inquiry members (for example, the Governor-General; Cabinet; the Prime Minister; any individual minister; or one or both Houses of Parliament);[1]

- **constitution of public inquiries**—should there be any qualifications on the appointment of a chair or member of the inquiry (for example, should membership be restricted to a judge or legal practitioner; expert in a particular field; or person of a specified class);[2]

- **nature of inquiry**—whether all inquiries require similar powers (for example, do policy inquiries require coercive powers conferred by statute; should inquiries that consider issues of national security be established in a different way);[3]

- **flexibility**—whether there should be scope to provide an inquiry with different powers and protections in certain circumstances (for example, may a non-statutory inquiry be converted into a statutory inquiry if necessary; do all investigatory inquiries require the same coercive powers);[4]

- **nature and exercise of powers**—what powers are needed by an inquiry and should all inquiry members be allowed to exercise these powers (for example, should an inquiry be allowed to issue warrants; should members of an inquiry who are not judges exercise all powers set out under statute);[5]

- **protections and privileges—**what protections and privileges are provided to inquiry members and witnesses (for example, do witnesses require protection);[6]

- **offences and penalties—**what are the consequences for individuals breaching their requirements under the Act (for example, what offences and penalties are necessary);[7]

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1 See Question 5–3. Note that the Prime Minister currently is responsible for administering the *Royal Commissions Act*: Commonwealth of Australia, *Administrative Arrangements Order*, 25 January 2008 [as amended 1 May 2008, updated 1 July 2008], 34.
2 Question 5–3.
3 Questions 7–1 and 7–6.
4 Question 7–2.
5 Question 7–5.
6 See Questions in Ch 8.
7 See Questions in Ch 9.

- **funding and other assistance**—how should an inquiry be funded and assisted (for example, should there be a standing appropriations order for inquiry purposes; should legal and administrative assistance be provided; should such assistance, if provided, be on a permanent or ad hoc basis);[8]

- **review of decisions**—should decisions of the inquiry be subject to review (for example, judicial review);[9]

- **responsibilities of government**—what responsibilities does the government have after the inquiry (for example, should it be required to table inquiry reports, respond to inquiry reports or provide updates on recommendations).[10]

5.4 In the following sections, the ALRC sets out potential new ways of regulating public inquiries in Australia.

Potential models for executive inquiry

A general inquiries statute

5.5 One way to deal with the shortcomings of the current federal model is to repeal the *Royal Commissions Act* and replace it with a general Act for public inquiries. Such an Act could provide for the establishment of all such inquiries, regardless of the nature of the inquiry or the powers that it requires.[11] Like the Canadian and proposed New Zealand models discussed above, a general inquiries statute may contain separate sections dealing with inquiries that are less formal than a Royal Commission.

5.6 Flexibility would be a key benefit of such an approach. Professor Enid Campbell argues that

> such a statute need not impose a uniform regime on all inquiries conducted under its aegis. One could devise a statute which conferred a minimum set of powers on all commissions, committees, boards, etc established under the Act, and which authorised the Governor-General to declare additional provisions of the Act applicable to a particular commission. The statute could also differentiate between the commission's powers according to whether its chairman was a judge.[12]

5.7 Other advantages of a general inquiries statute would be that it may provide a cohesive framework for all ad hoc public inquiries with respect to: inquiry hearings and other procedures; the review of decisions; and consistent government responses to inquiry recommendations.

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8 See Questions in Ch 6.
9 Question 3–1.
10 Question 5–5.
11 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.12].
12 Ibid, Appendix 4K, [3.11].

5.8 There may be some drawbacks to such an approach. For example, 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'.[13] The ALRC is interested in hearing whether a general inquiries statute would provide an appropriate model for conducting public inquiries in Australia. If so, what matters should be addressed by such a statute?

Dual statutory structure

5.9 Another way to address the issues with the current model is to retain the *Royal Commissions Act* and also enact another statute that provides for the establishment of non-Royal Commission forms of inquiry with a range of powers and protections.[14] As discussed in Chapter 4, this has been the approach taken in several state and territory jurisdictions.

5.10 A dual statutory structure would have the advantage of preserving the Royal Commission instrument, with the associated prestige, at the same time as 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 instrument. Further, a dual statutory structure may result in unnecessary fragmentation of regulation.

5.11 The ALRC is interested in hearing whether a dual statutory structure is desirable. If so, what type of features should be incorporated in such a model of inquiry?

Permanent inquiries office

5.12 Another question for this Inquiry is whether a permanent body should be established to conduct some types of public inquiries.

5.13 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.[15] On the other hand, there may not be a consistent or ongoing need for such 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.[16]

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13 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.

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

15 Irish Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [2.38]–[2.46].

16 Ibid, [2.38]–[2.46].

5.14 The ALRC is interested in hearing whether an independent permanent standing body would provide an appropriate model for conducting some public inquiries in Australia.

Other models of inquiry

5.15 The ALRC is interested in hearing whether there are other models of inquiry that may be appropriate at the federal level in Australia. Existing models of inquiry in Australian and overseas jurisdictions are discussed in Chapter 4.

Question 5–1 (a) Should the *Royal Commissions Act 1902* (Cth) be repealed and replaced with a general statute that provides for the establishment of a variety of all types of public inquiries;

(b) Should the *Royal Commissions Act* be retained and another general statute enacted to provide for the establishment of non-Royal Commission forms of public inquiry; or

(c) Is there another form of statutory model, other than those set out in (a) and (b) above, that the ALRC should consider?

Question 5–2 Should a permanent body be established to conduct some types of public inquiries? If so, should such a body conduct investigatory inquiries, policy inquiries, or both? What should be the relationship between a permanent inquiries body and ad hoc inquiries?

Question 5–3 What matters need to be addressed by legislation establishing public inquiries, and how should the legislation address these matters? For example, should legislation address:

(a) who should be able to establish public inquiries (for example, the Governor-General, Cabinet, a Minister, or one or both Houses of Parliament);

(b) how the terms of reference should be framed and the circumstances, if any, in which the terms of reference may be amended in the course of the inquiry (for example, in consultation with an inquiry member); and

(c) how public inquiries should be constituted (for example, should members have specific qualifications, should there be gender and regional balance amongst members, etc).

Name of legislation establishing public inquiries

5.16 The ALRC is also interested in hearing whether the *Royal Commissions Act*, if retained in its current form, should be renamed. Some countries with a similar colonial heritage to Australia, and some Australian states, have Acts that enable the executive to establish ad hoc public inquiries with coercive powers that are not called Royal Commissions.[17] The removal of the word 'royal' from the name of the Act may reflect more adequately the status of Australia as an independent, sovereign state.

5.17 The ALRC is aware, however, that the name of the Act will depend on its content. Any new Act enabling the establishment of different types of public inquiry would, of necessity, require a different name to reflect accurately the scope of the legislation.

Question 5–4 Is the *Royal Commissions Act* an appropriate title for legislation establishing public inquiries? If not, what would be an appropriate title?

Government responses to public inquiries

5.18 Given the many and varied functions of public inquiries, their effectiveness is measured in a number of ways, for example, 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.[18] Implementation of recommendations is only one, albeit important, measure of effectiveness. Any statute establishing public inquiries may need to address all the stages of an inquiry—that is, the establishment, operation and completion of an inquiry, as well as any government follow-up in response.

Tabling reports in Parliament

5.19 The *Royal Commissions Act* does not require the tabling in Parliament of a report prepared as a result of an inquiry commissioned under that Act. In practice, however, the Australian Government tends to table Royal Commission reports promptly.[19]

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17 See, eg, *Inquiries Act 1985* RSC c I-11 (Canada); *Commissions of Inquiry Act 1908* (NZ); *Commissions of Inquiry Act 1950* (Qld); *Commissions of Inquiry Act 1995* (Tas).

18 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202, 216–220.

19 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).

5.20 The tabling of Royal Commission reports is noted briefly in Australian Government guidelines for tabling government documents in Parliament.

> 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 [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:
>
> - 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.[20]

5.21 Several state and territory Acts address the tabling in Parliament of reports arising from public inquiries. The Victorian and South Australian Parliaments have enacted legislation to provide for the tabling of reports resulting from specific inquiries.[21] In Queensland, the *Commissions of Inquiry Act 1950* provides that a report received by a minister *may* be tabled in the Legislative Assembly.[22] In the ACT, the *Royal Commissions Act 1991* and *Inquiries Act 1991* also provide that the Chief Minister *may* present a report, or part of a report, to the Legislative Assembly.[23] If this does not take place, however, the Chief Minister is required to provide an explanation to the Legislative Assembly.[24]

5.22 Should there be a requirement for the Australian Government to table in Parliament reports, recommendations or other material produced by a Royal Commission or other public inquiry? If Governments should be required to table reports, should there be any limits or restrictions on this requirement, for example, with respect to reports that may attract the operation of defamation or privacy laws?[25] If a

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20 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].

21 *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) Bill 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. By implication, reports are also required to be tabled when Parliament is sitting.

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

23 *Royal Commissions Act 1991* (ACT) s 16; *Inquiries Act 1991* (ACT) s 14A. Note that these Acts also set out a process that must be followed when an inquiry proposes to include in a report an adverse comment on an identifiable entity: *Royal Commissions Act 1991* (ACT) s 35A; *Inquiries Act 1991* (ACT) s 26A.

24 *Royal Commissions Act 1991* (ACT) s 16A; *Inquiries Act 1991* (ACT) s 14B.

25 See, for example, *Special Commissions of Inquiry Act 1983* (NSW) note to s 10.

report is tabled, how should it be characterised—for example, should it be characterised as a legislative instrument?[26]

Formal response in parliament

5.23 The *Royal Commissions Act* does not require the Australian Government formally to respond to recommendations made by a Royal Commission. In contrast, 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* (SA) required the minister responsible for administering the Act to respond in Parliament to the recommendations made in these two inquiries.[27]

5.24 In practice, the federal minister tabling a report from an inquiry appointed under the *Royal Commissions Act* may provide, in the Australian Parliament, an indication of the Government's position on the report generally.[28] Further, a federal minister may deliver a formal ministerial statement.[29] There is no central body or website, however, that provides access to official responses to Royal Commission recommendations.[30]

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26 Legislative instruments made on or after 1 January 2005 are subject to the *Legislative Instruments Act 2003* (Cth). Amongst other things, this Act provides that legislative instruments must be included on the Federal Register of Legislative Instruments and may be subject to parliamentary scrutiny: *Legislative Instruments Act 2003* (Cth) pts 4, 5. The amended *Quarantine Act 1908* (Cth) expressly provided that the report arising from the Equine Influenza Inquiry was not to be treated as a legislative instrument: s 66AY(4).

27 *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 SA 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.

28 For example, when tabling the report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, the then Attorney-General, 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: Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2006, 45 (P Ruddock—Attorney-General).

29 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: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2004, 101 (P Ruddock—Attorney-General).

30 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: *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 10 February 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 10 February 2009; *Inquiry into the Centenary House Lease* (2004) <www.ag.gov.au/agd/www/centenaryhome.nsf> at 10 February 2009; *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 10 February 2009.

Further, there is no central body or website that tracks implementation of accepted recommendations.

Other government responses

5.25 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.[31] In addition, the Australian Government has published its official responses to some Royal Commission recommendations.[32]

5.26 In December 2008, the Australian Government released its response to an inquiry that was not appointed 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.[33] In addition, this website contains a hyperlink to the website of the Australian Government Attorney-General's Department, which contains the Government's responses to the Clarke Inquiry and to counter-terrorism laws.[34]

Implementation of recommendations

5.27 The *Royal Commissions Act* does not require the Australian Government to implement or 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.[35]

5.28 The federal government provides current online information about implementation of recommendations arising from another recent inquiry that was not appointed under the *Royal Commissions Act*. The website of the Equine Influenza Inquiry (2008) contains the report from, and other information about, the inquiry.[36] It

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31 Upon the tabling of the report of the inquiry into the HIH Royal Commission, 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).

32 For example, in 1992 the Keating Government released its 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).

33 *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 10 February 2009.

34 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/www/agd/agd.nsf/AllDocs/B1C9288CD6E88535CA25752400132606?OpenDocument> at 10 February 2009.

35 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 11A.

36 *Equine Influenza Inquiry* (2008) <www.equineinfluenzainquiry.gov.au/> at 10 February 2009. Note that the Equine Influenza Inquiry had many of the same powers as commissions established under the *Royal Commissions Act 1902* (Cth), but was established under the *Quarantine Act 1908* (Cth).

also contains a hyperlink to the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) website.[37] The DAFF website provides access to the Government's official response to the report from the inquiry, and a telephone number for general inquiries about the report and the Government's response. The DAFF website also provides a hyperlink to the website of the Australian Quarantine Inspection Service, which provides extensive information about ongoing implementation of recommendations, including Implementation Status Reports.[38]

5.29 In Australia, there is no dedicated body that assists with the implementation of recommendations made by Royal Commissions or other public inquiries.[39] Recent amendments to New Zealand Cabinet practice provide an interesting contrast. 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.[40] If the minister and relevant Cabinet Committee approves of the paper, it is submitted to a Cabinet committee for approval of the recommendations.[41] If Cabinet accepts the recommendations, and a Bill is required, Cabinet will add this Bill to the Legislation Programme.[42] The New Zealand Cabinet Office monitors the progress of responses to NZLC reports.[43]

5.30 A question for the current ALRC Inquiry is whether there should be a legislative requirement for the Australian Government formally to respond to reports prepared by Royal Commissions or other public inquiries. Further, should the Australian Government be required to make publicly available information about its implementation of recommendations made by Royal Commissions or other public inquiries?

5.31 In addition, should a government department or some other permanent body be required to coordinate the government's response to, and monitor the implementation of, recommendations made by Royal Commissions or other public inquiries?

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37 Australian Government Department of Agriculture Fisheries and Forestry, *Equine Influenza Inquiry Report and Response* (2008) <www.daff.gov.au/about/publications/eiinquiry/> at 10 February 2009.

38 Australian Government Australian Quarantine and Inspection Service, *Equine Influenza Inquiry—The Government's Response* (2008) <www.daff.gov.au/aqis/about/eiimplementation> at 10 February 2009.

39 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 12 February 2009.

40 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 otherwise is directed by the relevant minister.

41 Ibid.

42 Ibid, [13]–[14].

43 Ibid, [11].

Question 5–5 Should the Australian Government be required by statute within a specific time frame to:

(a) table in parliament reports provided to it by Royal Commissions and other public inquiries;

(b) respond, in parliament (for example, by ministerial statement) or otherwise, to recommendations made by Royal Commissions and other public inquiries; and

(c) publish information about implementation of recommendations made by Royal Commissions and other public inquiries?

Question 5–6 Should a government department or some other permanent body be required to coordinate the government's response to, and monitor the implementation of, recommendations made by Royal Commissions and other public inquiries?

6. Funding and Administration

Contents

Introduction

6.1 In this chapter, the ALRC considers issues dealing with the funding and administration of Royal Commissions and other public inquiries. It commences by providing an overview of the costs of Royal Commissions and other public inquiries. The ALRC then considers the types of costs associated with inquiries and asks some questions about the types of assistance required by inquiries and parties to inquiries.

6.2 The costs of Royal Commissions and other public inquiries must be balanced against the benefits of conducting such inquiries. As noted in Chapter 2, public inquiries have several functions, and their effectiveness may be measured in many ways. Further, in its recent *Report on Public Inquiries, Including Tribunals of Inquiry*, the Law Reform Commission of Ireland (LRCI) observed that public inquiries have intangible benefits such as 'assuaging [of] public disquiet' and deterring 'future negative activities'.[1]

1 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [7.03].

6.3 Concern about the high costs of public inquiries, and public criticism about these costs, may be a factor for Australian Governments considering whether to establish such an inquiry. There are ways, however, to reduce the costs of Royal Commissions and other public inquiries. In this chapter, the ALRC asks some questions about how best to reduce inquiry costs.

Costs of public inquiries

Costs of Royal Commissions

6.4 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 very substantial indeed. Moreover, a Royal Commission incurs start-up costs that an existing agency can usually avoid.[2]

6.5 The following table provides an indication of the approximate costs of recent Royal Commissions.

Table 6.1: Estimated Cost of Selected Recent Royal Commissions

Name of Royal Commission	Date[3]	Approximate cost (adjusted for inflation)[4]
Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme	10 November 2005–24 November 2006	$13,120,084[5]
Royal Commission to Inquire into the Centenary House Lease	24 June 2004–6 December 2004	$4,356,738[6]

2 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.

3 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.

4 Adjusted to 2008 dollars using the online inflation calculator provided by the Reserve Bank of Australia: Reserve Bank of Australia, *Inflation Calculator* (2009) <http://www.rba.gov.au/calculator/calc.go> at 19 March 2009.

5 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.

6 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.

Royal Commission into the Building and Construction Industry	29 August 2001–24 February 2003	$70,794,148[7]
HIH Royal Commission	29 August 2001–4 April 2003	$47,836,434[8]
Commission of Inquiry into the Relations between the CAA and Seaview Air	25 October 1994–9 October 1996	$11,123,901[9]
Royal Commission into Aboriginal Deaths in Custody	16 October 1987–9 May 1991	$50,298,709[10]

Costs of other ad hoc public inquiries

6.6 Other forms of inquiry are generally less costly than most Royal Commissions. This may be because most forms of inquiry other than Royal Commissions conducted in Australia do not have the same coercive information-gathering powers as Royal Commissions. This may reduce the duration of the inquiry and the legal costs associated with an inquiry. On the other hand, the lack of information-gathering powers may make inquiry findings less comprehensive.

6.7 The following table provides an indication of the approximate costs of recent non-Royal Commission inquiries.

7 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.

8 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.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3408 (J Sharp).

10 Commonwealth, *Parliamentary Debates*, Senate, 11 April 1991, 2317 (N Bolkus).

Table 6.2: Estimated Cost of Selected Recent non-Royal Commissions

Name of Public Inquiry	Date	Approximate Cost (adjusted for inflation)
Inquiry into the Case of Dr Mohamed Haneef	13 March 2008–21 November 2008	$3,840,000[11]
Equine Influenza Inquiry	25 September 2007–12 June 2008	$11,327,000[12]
Fuel Tax Inquiry	8 July 2001–15 March 2002	$4,775,806[13]
Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families	2 August 1995–30 April 1997	$2,312,490[14]
Commission of Inquiry into the Lemonthyme and Southern Forests	8 May 1987–6 May 1988	$3,545,089[15]

Types and funding of costs and expenses

6.8 The types of expenses of Royal Commissions and other public inquiries include costs related to:

- commissioners or inquiry members;
- counsel and solicitors assisting the inquiry;
- contractors and consultants;
- other staff members;
- travel;

11 Australian Government, *Portfolio Budget Statements 2008–2009—Attorney-General's Portfolio* (2008), 28.

12 Australian Government, *Portfolio Additional Estimates Statements 2007–2008—Attorney-General's Portfolio*, 14. Note that the Equine Influenza Inquiry had many of the same powers as commissions established under the *Royal Commissions Act 1902* (Cth), but was established under the *Quarantine Act 1908* (Cth).

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 2003, 12413 (B McMullan).

14 N Hancock, *Bills Digest No 42—Royal Commissions and Other Legislation Amendment Bill 2001*, Department of the Parliamentary Library, Information and Research Services, Appendix B.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 2176 (G Punch).

- business and residential accommodation;
- information and communication technology; and
- document management and stationery.[16]

Inquiry legal costs

6.9 An inquiry's legal costs include those incurred by legal counsel (counsel assisting the inquiry) and solicitors (solicitors assisting the inquiry). This constitutes a significant expense for Royal Commissions and other public inquiries. For example, in the Royal Commission into the Building and Construction Industry (2006) (Building Royal Commission), the costs for 'legal and auditing' were about $23.33 million of the approximate final amount of $76.68 million.[17] The former figure does not include travel and accommodation costs for the inquiry's legal team.[18]

6.10 Counsel assisting an inquiry are appointed formally under the *Royal Commissions Act,* whereas solicitors assisting an inquiry are not. The following sections address the engagement and remuneration of counsel and solicitors assisting an inquiry.

Appointment of counsel assisting

6.11 Section 6FA of the *Royal Commissions Act* enables the Attorney-General to appoint counsel assisting a Royal Commission. 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.[19] 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.[20]

6.12 At the outset of the Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme (2006) (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

16 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, 45.
17 Ibid, vol 22, 45. These figures have been adjusted to reflect 2008 values.
18 Ibid, vol 22, 45.
19 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [13.2].
20 Ibid, [13.3].

in consultation with the Attorney-General's Department (AGD).[21] 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'.[22]

6.13 In contrast, the report of the Building Royal Commission notes that at the outset of the inquiry, expressions of interest were invited by persons interested in becoming counsel assisting the inquiry. On the basis of applications received, and on the recommendations of Commissioner Cole, the Attorney-General appointed 13 counsel to assist the inquiry.[23]

6.14 The ALRC is interested in hearing views about the methods of appointing counsel assisting under the *Royal Commissions Act*. For example, is it always necessary for counsel assisting to be a legal practitioner, and is it always appropriate for the Attorney-General to be responsible for his or her appointment? Should there be further guidance on the circumstances in which it is appropriate to appoint counsel assisting, and on the nature of the role of the position? Further, how should the number of counsel assisting be determined?

Appointment of solicitors assisting

6.15 The *Royal Commissions Act* does not deal with the appointment of solicitors assisting an inquiry. The type of work carried out by solicitors assisting the inquiry is detailed in the final report of the AWB Inquiry:

- 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.[24]

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

22 Ibid, Appendix 10, 127.

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

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

6.16 In some Royal Commissions, the provision of solicitors' legal work has been reserved for, or 'tied' to, the Australian Government Solicitor (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.[25]

6.17 The Building Royal Commission again provides a contrast. In this inquiry, expressions of interest were sought from persons or firms interested in providing legal support to the inquiry. Solicitors were appointed by the inquiry in accordance with criteria contained in its guidelines.[26] 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.[27]

6.18 A number of applications were received by the inquiry.[28] Only the AGS was able to fulfil all the criteria, however, so it provided all the solicitors that assisted the AWB Inquiry.[29]

6.19 The ALRC is interested in hearing views about the appointment of the legal team to assist Royal Commissions or other public inquiries. For example, is it appropriate to 'tie' legal work for an inquiry to the AGS or invite expressions of interest for solicitors? Should there be an application or a tendering process for the appointment of solicitors? Further, should there be guidance on the circumstances in which it is appropriate to appoint solicitors assisting the inquiry, and on the nature of the role of the position?

Payment of inquiry legal costs

6.20 At the outset of the Building Royal Commission, daily rates for counsel assisting were negotiated between counsel and the AGD. Rates were paid 'in accordance with the policy on counsel fees approved by the Attorney-General for the

25 Ibid, Appendix 10, 125. Legal services directions are issued by the Australian Government Attorney-General under the *Judiciary Act 1903* (Cth) s 55ZF(1)(b).
26 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [29].
27 Ibid, vol 22, [29]–[30].
28 Ibid, vol 22, [31].
29 Ibid, vol 22, [31].

engagement of counsel by the Commonwealth'.[30] For commercial reasons, the Australian Government has not made this policy publicly available.[31]

6.21 The remuneration payable to solicitors assisting the Building Royal Commission was negotiated by the inquiry following consultation with the AGD. In its negotiations, the inquiry had regard to 'the skills and experience of the solicitors in question and the amounts payable to counsel assisting'.[32]

6.22 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.[33] Solicitors assisting the inquiry were paid hourly rates that were negotiated by the parties. These rates were subject to a daily cap.[34] These rates and the daily cap have not been made public.

6.23 Methods for remunerating the legal team of a public inquiry were discussed by the LRCI in its recent *Report on Public Inquiries, Including Tribunals of Inquiry*. The LRCI recommended flexible arrangements in order to attract the most experienced applicants at competitive prices.[35] Further, the LRCI recommended that a tribunal of inquiry should be able to engage a particular lawyer for remuneration agreed upon by the parties.[36]

6.24 The ALRC is interested in hearing whether the current arrangements for negotiating legal costs in Royal Commissions and other public inquiries are appropriate and efficient. For example, should legal costs for both, or either, counsel and solicitors assisting the inquiry be prescribed by a scale of costs? Should legal fees always be negotiated between the parties? Further, should all legal fees be capped at a daily or hourly rate, or should fees be subject to an events-based cap?[37] If so, what should be the reference point for this rate? For example, should it be no more than the pro rata payment for Federal Court or Supreme Court judges? Further, should

30 Ibid, vol 22, [23].

31 In Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), the ALRC made recommendations designed to enhance the availability of information about legal costs: Recs 26, 32.

32 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [33].

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

34 Ibid, Appendix 10, 129.

35 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [7.50], [7.58]–[7.59].

36 Ibid, [7.58].

37 For example, 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.

information about legal fees of counsel and solicitors assisting an inquiry be made publicly available?

Witnesses' legal costs

6.25 The *Royal Commissions Act* does not make provision for the payment of legal fees incurred by witnesses and other third parties. Generally, it is not a common practice for inquiries not established under the *Royal Commissions Act* to pay the legal costs of witnesses appearing before those inquiries.

6.26 Some Royal Commissions have partially funded the legal costs of witnesses. For example, a person who appeared before the AWB Inquiry was eligible to apply to the AGD for the payment of reasonable legal costs and expenses.[38] The AWB Inquiry produced guidelines that set out the criteria under which such assistance was awarded, including where:

- the applicant's personal interests could have been exposed to prejudice as a result of appearing before the inquiry;
- the applicant was, or was likely to be, a central figure in the proceedings and thus likely to be involved to a major degree in those proceedings; or
- cross-examination of the applicant was likely to assist the inquiry.[39]

6.27 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 $1560 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.[40]

6.28 In contrast, Tasmanian legislation 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.[41] The *Commissions of Inquiry Act 1995* (Tas) sets out a number

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38 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.

39 Ibid, 1. The guidelines also set out the circumstances in which legal costs would not be paid, for example, where the applicant may recover these costs under an insurance policy or similar indemnity arrangement: 2.

40 Ibid, 1.

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

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.[42]

6.29 One question for this Inquiry is whether Royal Commissions or other public inquiries should be required to provide funding to witnesses for the payment of their legal costs in an inquiry? If so, in what circumstances should witnesses receive such funding? Further, should there be any restrictions on such funding—for example, should it be capped at a certain level?

Witnesses' non-legal expenses

6.30 The *Royal Commissions Act* makes provision for the payment of some non-legal expenses. 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.

6.31 Regulation 7 of the *Royal Commissions Regulations 2001* (Cth) provides that a witness who appears before a Commission in answer to a summons under s 2 of the *Royal Commissions Act* may be paid expenses in accordance with the High Court Scale.[43] 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

42 Ibid, s 36(2).
43 *Royal Commissions Regulations 2001* (Cth) reg 7(1).

Commission.[44] For the purposes of the regulation, a Commission includes a Commissioner authorised in writing by the Commission.[45]

6.32 The ALRC is interested in hearing whether these arrangements are appropriate and are operating effectively. The ALRC also is interested in hearing whether similar arrangements should be put in place for non-Royal Commission forms of public inquiry.

Method of funding inquiry costs

6.33 Currently, there is no permanent or standing appropriation to cover some of the costs and expenses incurred by parties involved in federal public inquiries. Professor Enid Campbell has recommended the introduction of a permanent appropriation to cover the expenses of witnesses in Royal Commissions.[46]

6.34 The *Commissions of Inquiry Act 1995* (Tas) provides 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;
- certain allowances for witnesses; and
- certain compensation to witnesses for loss of income.[47]

6.35 The ALRC is interested in stakeholder views on how Royal Commissions and other federal public inquiries should be funded. For example, is a standing appropriation order a feasible option?

Question 6–1 Should more detailed information about legal fees of counsel and solicitors assisting a Royal Commission or other public inquiry be made publicly available? For example, should daily or events-based rates or caps for counsel or solicitors assisting an inquiry be made publicly available?

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44 Ibid reg 7(2).

45 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: reg 7(3).

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

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

Question 6–2 Should legislation establishing Royal Commissions or other public inquiries set out criteria for the appointment of counsel and solicitors assisting? If so, what should be these criteria?

Question 6–3 Where a Royal Commission or other public inquiry is established, should any, or all, of the following be funded by the Australian Government:

(a) legal costs and allowances for counsel and solicitors assisting an inquiry;

(b) legal representation of witnesses; and

(c) non-legal expenses of witnesses?

Question 6–4 How should Royal Commissions and other public inquiries be funded? For example, is a standing appropriation order a feasible option?

Inquiry administration and support

Legal assistance

6.36 At the federal level in Australia, no central body provides legal assistance to individuals involved with Royal Commissions or other public inquiries. In contrast, the New South Wales (NSW) Legal Representation Office provides legal assistance to individuals involved with inquiries conducted by the NSW Independent Commission Against Corruption and the NSW Police Integrity Commission.[48]

6.37 The ALRC is interested in hearing whether a permanent body or existing government department should provide legal assistance or other support to those called to appear before Royal Commissions or other public inquiries. If so, what should be the nature and scope of this support? Where should such a body be located?

Administrative assistance

6.38 Australian Government departments, such as the AGD and the Department of Finance and Deregulation, have provided some administrative support to some ad hoc federal public inquiries.[49] The ALRC is interested in hearing whether a central body should have a standing role in providing administrative assistance to Royal Commissions or other public inquiries.

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48 New South Wales Government, *Legal Representation Office* (2009) <http://www.lawlink.nsw.gov.au/lro> at 19 March 2009.

49 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), Appendix 10, 1; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, Ch 5.

6.39 The New Zealand Department of Internal Affairs provides some administrative assistance to Royal Commissions and Commissions of Inquiry.[50] The Department has produced guidelines that provide information to all parties involved with a public inquiry—including ministers considering the establishment of an inquiry and members of the public appearing before an inquiry.[51]

6.40 In its recent *Report on Public Inquiries, Including Tribunals of Inquiry*, the LRCI recommended the establishment in Ireland of a Central Inquiries Office.[52] 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.[53]

6.41 At the federal level in Australia, an inquiries office could provide administrative support and produce guidelines for establishing and carrying out ad hoc inquiries. It also could provide valuable institutional memory for public inquiries. On the other hand, as noted in Chapter 5, there may not be a sufficiently consistent or ongoing need to justify the establishment of such an office in Australia, and maintaining a central inquiries office may be an inefficient use of resources.

6.42 The ALRC is interested in hearing stakeholder views on how to provide Royal Commissions and other public inquiries with the required administrative assistance, such as budgeting and other guidance. Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

Question 6–5 What assistance is required by those called to appear before Royal Commissions or other public inquiries? For example, should legal or other assistance be provided? Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

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50 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 26 February 2009.

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

52 Irish Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [2.51].

53 Ibid, [2.47].

Question 6–6 What assistance and guidance is required by Royal Commissions or other public inquiries? For example, is administrative assistance for inquiries, such as budgeting, technological or other guidance, required? Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

Minimising costs

6.43 In this section, the ALRC suggests some ways to minimise the costs of Royal Commissions or other public inquiries.

Publication of budgets or expenses

6.44 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 have made available some information about costs in the report released as a result of the inquiry.[54] Some estimates of costs are also available in budgets prepared by Australian Government departments.[55] 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 by non-Government members.

6.45 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.[56]

6.46 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.[57] 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.[58]

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54 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.

55 See, eg, Australian Government, *Portfolio Budget Statements 2006–2007—Attorney-General's Portfolio* (2006).

56 See, eg, Australian Law Reform Commission, *Annual Report 2007–2008*, 94.

57 Irish Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), [7.35].

58 Ibid.

6.47 Campbell has criticised the suggested imposition of a requirement for a detailed breakdown of expenses for a Royal Commission, arguing that

> [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.[59]

6.48 The ALRC is interested in hearing 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 or other public inquiries. For example, should the Australian Government make available publicly the following information:

- at the outset of Royal Commission or other public inquiry, the proposed budget for the inquiry;
- during the Royal Commission or other public inquiry, interim reports on costs associated with the inquiry; and
- upon the completion of a Royal Commission or other public inquiry, a complete breakdown of the costs of the inquiry?

Role of inquiry members

6.49 Another way to minimise inquiry costs may be to require a member of a Royal Commission or other public inquiry to monitor or control costs associated with the inquiry. In the United Kingdom, for example, the *Inquiries Act 2005* (UK) provides that the chair of an inquiry established under the Act should consider any unnecessary costs when conducting and planning inquiry proceedings.[60] 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'.[61]

6.50 The ALRC is interested in hearing stakeholder views on the role members of Royal Commissions and other public inquiries should play in monitoring and controlling inquiry expenditure. For example, should such an obligation be required by legislation? If so, what should be the nature and scope of this requirement?

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

60 *Inquiries Act 2005* (UK) s 17(3).

61 Explanatory Memorandum, Inquiry Rules 2006 (UK), [2.1].

Jurisdiction to award costs

6.51 In Australia, Royal Commissions and other public inquiries do not have the power to make an order for the payment of 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.[62]

6.52 In its recent report, *A New Inquiries Act* (2008), the New Zealand Law Commission (NZLC) noted that the power to order the payment of costs rarely had been used.[63] 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'.[64]

6.53 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.[65] In such circumstances, the inquirer 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.[66] Such an order may be made regardless of whether hearings have been held in the inquiry.[67]

6.54 The ALRC is interested in hearing 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. If so, in what circumstances should a Royal Commission or other public inquiry be empowered to make such an order?

Question 6–7 In the interests of openness, transparency and accountability in the expenditure of public funds, should the Australian Government be required to make publicly available the following information:

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62 *Commissions of Inquiry Act 1908* (NZ) s 11. See also the *Tribunals of Inquiry (Evidence) Amendment Act 1997* (Ireland) s 6(1).

63 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [7.4].

64 Ibid, [7.5].

65 Ibid, Rec 35.

66 Ibid, Rec 35.

67 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.

(a) at the outset of the Royal Commission or other public inquiry, the proposed budget for the inquiry;

(b) during the Royal Commission or other public inquiry, interim reports on costs associated with the inquiry; and

(c) upon the completion of a Royal Commission or other public inquiry, a breakdown of the costs of the inquiry?

Question 6–8 Should a member of a Royal Commission or other public inquiry be required by legislation to monitor and control inquiry expenditure?

Question 6–9 Should Royal Commissions or other public inquiries have the power to make an order for a person to pay all or some of the costs incurred by the inquiry or a witness? If so, in what circumstances should a Royal Commission or other public inquiry be empowered to make such an order?

7. Powers

Contents

Introduction

7.1 The powers available under the *Royal Commissions Act 1902* (Cth) have been expanded and modified a number of times since its enactment, often in response to the particular investigatory needs of a major inquiry. This chapter outlines the general powers of a Royal Commission to obtain information and the stronger coercive powers to search premises and seize documents and other evidence.

7.2 The chapter then considers whether there is a need for Royal Commissions to have additional powers where matters of national security are under consideration. When evidence in Royal Commissions can be shared with other law enforcement bodies and joint federal-state Royal Commissions is also discussed. Finally, whether a new power is needed to allow the Federal Court to settle questions of law arising during a Commission is considered.

Other forms of inquiry: powers to obtain information

7.3 One of the key differences between Royal Commissions and other types of inquiries and reviews are the powers of a Royal Commission to summon witnesses and

gather other evidence.[1] As discussed in Chapter 4, governments can create a multitude of other types of boards or inquiries; however these generally will lack the coercive powers of a Royal Commission.[2]

7.4 By their very nature, Royal Commissions are a 'fishing expedition'.[3] It is argued that Royal Commissions require 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.[4]

7.5 The extent to which Royal Commissions can call for witnesses and documents is controversial, however, given that they are forms of executive inquiry and not courts. As stated by Janet Ransley:

> These powers enable Commissions to unearth hidden evidence, but also have significant and sometimes intrusive impact on the affairs of governments and individuals.[5]

7.6 As noted in Chapter 5, the ALRC has been asked to consider the desirability of other forms of statutory public inquiry that may be established by the executive arm of government in Australia. One of the key issues that will be addressed is whether all inquiries require similar powers to undertake their investigations. The ALRC will consider whether there should be scope for inquiries to have different powers and protections in certain circumstances, and what those circumstances might be.

7.7 Other law reform bodies also have considered the issue of what powers are appropriate for different forms of executive inquiry. The New Zealand Law Commission (NZLC), in a recent review of the equivalent New Zealand laws, 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.[6] Nonetheless, it found that the availability of general powers to call witnesses and the production of documents are an important feature of most major inquiries.

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1 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.

2 This is not always the case. For example, the Equine Influenza Inquiry (2008), which was established under the *Quarantine Act 1908* (Cth), was vested with most of the powers of an inquiry established under the *Royal Commissions Act*.

3 *Ross v Costigan* (1982) 59 FLR 184.

4 H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2(3) *Australian Journal of Administrative Law* 157, 157.

5 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.

6 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 79.

> 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.[7]

7.8 In 1977, the Canadian Law Reform Commission drew a distinction between advisory and investigatory inquiries.[8] It took the view that Commissions should only be armed with coercive powers when they are undertaking investigatory inquiries of major importance.[9] In 1966, the Royal Commission on Tribunals of Inquiry in the United Kingdom took a similar view—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'.[10]

7.9 The remainder of this chapter considers the current powers of Royal Commissions under the *Royal Commissions Act*. The ALRC would be interested, however, in hearing views about what types of powers should be available to other forms of public inquiry.

7.10 The ALRC also is interested in stakeholder views on the scope for inquiries to have different powers in certain circumstances, and what those circumstances might be. For example, the legislation establishing a Royal Commission or other public inquiry could include provisions to allow the Australian Government to choose which coercive powers it wished the inquiry to have, based on criteria such as the subject matter of the inquiry or the types of evidence likely to be sought.

Question 7–1 Do Royal Commissions and other public inquiries require coercive powers? If so, should these powers depend on the nature of the inquiry?

Question 7–2 Should the Australian Government, when establishing a Royal Commission or other public inquiry, be able to select which coercive powers the inquiry may exercise?

General powers to obtain information

7.11 Royal Commissions need to seek information in order to report on the questions raised within their terms of reference. For the purpose of performing its investigative and associated functions, a Royal Commission may obtain information and documents

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7 Ibid, 81.
8 This distinction is discussed in Ch 2.
9 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(3) *Australian Journal of Administrative Law* 157, 157.
10 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), [26].

on a voluntary basis. Royal Commissions also have the ability to obtain information by using a range of coercive powers. These information gathering powers can be exercised in relation to persons who are directly the target of a Commission's inquiry or persons who happen to have information or documents relevant to an investigation concerning the conduct of other persons.

7.12 A Royal Commission's general powers to obtain information are similar to those exercised by courts.[11] 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.[12] Such powers typically allow officers of the agency to call a person to an oral examination or hearing or to produce documents or information.[13]

Summon witnesses and take evidence

7.13 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.[14] 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.[15]

7.14 In 2001, the *Royal Commissions Act* was amended to allow, among other things, a 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, the proceedings of which prompted the 2001 amendments.[16] In the Report of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission), 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 in identifying avenues for further investigation. In that Commission, 1692 notices to produce were issued.[17]

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11 Examples of court processes include the issuing of subpoenas and notices to produce and the summoning of witnesses.

12 For example, agencies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office.

13 See Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies*, Report No 48 (2008).

14 *Royal Commissions Act 1902* (Cth) s 2. This includes the power to require a person to produce a document that is subject to legal professional privilege, although privilege may still be a reasonable excuse for failing to produce the document. Privilege is discussed in Ch 8.

15 Penalties under the *Royal Commissions Act* are discussed further in Ch 9.

16 Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 5.

17 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, 25.

7.15 The 2001 amendments also clarified that a Commissioner can summon a person to produce documents or things without requiring them to give oral evidence.[18] This was achieved by amending s 2 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).[19]

7.16 The ALRC is interested in hearing whether the current powers of a Royal Commission to summon a person to appear before it or to produce documents or things are operating effectively in practice. Should public inquiries other than Royal Commissions have similar powers?

Power to require a written statement

7.17 In 2003, the Building Royal Commission recommended that the *Royal Commissions Act* be amended to empower a Commission to require a person to provide the Commission with a written statement about a specified matter.[20] 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 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.[21]

7.18 Some acts governing the operation of inquiries in other jurisdictions allow 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.[22] Section 19 of the *Inquiries Act 2005* (UK) provides that the Chairperson may direct a person by notice to provide evidence in the form of a written statement. The Explanatory Notes to s 19 state that it was intended that potential witnesses normally first would be asked for information voluntarily—with the power of compulsion only used where a person is unwilling to comply with an informal request for information, or a person is willing to comply, but concerned about the consequences of disclosure if they are not compelled.[23]

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18 *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) s 4A.

19 There are penalties for non-compliance with a summons. These are discussed in Ch 9.

20 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, rec 1(a).

21 Ibid, Vol 2, 24.

22 *Commissions of Investigation Act 2004* (Hong Kong) s16(1)(c), (d).

23 Explanatory Notes, Inquiries Bill 2005 (UK), 13.

7.19 Greater emphasis on the use of written statements in Royal Commissions may make proceedings more efficient and reduce the cost of witness examinations. Dr 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'.[24]

7.20 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 in, handed a copy of his or her witness statement, asked to identify it and verify that the contents are correct. The 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.[25]

7.21 This procedure could be adapted for Royal Commissions. Where appropriate, a Commissioner could supply counsel assisting the Commission and counsel representing parties to the Commission with witness statements and seek advice as to whether they intend to cross-examine the witness. If no cross-examination is to take place, the statement could be entered into evidence without the necessity of calling the witness. If cross-examination is to take place, the Commission could call the witness and follow a procedure similar to that used in the Federal Court, as outlined above.[26]

7.22 The ALRC is interested in stakeholder views about whether Royal Commissions and other public inquiries should have the power to direct a person to provide a written statement.

Authority to inquire into foreign law

7.23 The Letters Patent of a Royal Commission may grant a Commissioner authority to inquire into, and take evidence of matters relating to, the law of another country where arrangements are made between Australia and the country in question.[27] Under s 7A of the *Royal Commissions Act*, any evidence or information gathered by the Royal Commission in such circumstances may be used for any function of the Commission, subject to any restrictions or conditions on which the arrangements were based.[28]

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24 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 24.
25 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), Ch 7.
26 Cross-examination of witnesses is discussed in Ch 8.
27 *Royal Commissions Act 1902* (Cth) s 7A.
28 Ibid, s 7A.

7.24 In such an inquiry, the Commission may take evidence outside Australia, in the same way it would take evidence within Australia.[29] Statements made by witnesses in the course of giving evidence in another country are not admissible against the witness in civil or criminal proceedings in Australia. [30]

7.25 While past reports of Royal Commissions and academic comment do not indicate that there are problems with this procedure, the ALRC would be interested in stakeholder views on whether the powers of a Commission to gather evidence of matters relating to the law of another country are operating effectively. Should public inquiries other than Royal Commissions have similar powers?

Inspect and copy documents and other things

7.26 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. 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.[31]

7.27 Are there any concerns about the power under the Act to inspect, retain and copy documents? In particular, the ALRC would interested in hearing from stakeholders about difficulties in accessing documents or things collected by completed Royal Commissions or other public inquiries. If there are difficulties, is it appropriate or necessary for a permanent body or government department to operate as a central repository for material gathered by completed Royal Commissions or other public inquiries? What would be the relationship between such a central repository and the National Archives of Australia?

7.28 In Chapter 6, the ALRC considers whether Commonwealth inquiries should have a centralised administrative office to provide administrative assistance to Royal Commissions or other public inquiries. Such an office could also serve as a repository for inquiry material and could assist witnesses with the return of documents at the end of an inquiry.

Authorisation to appear

7.29 Section 6FA of the *Royal Commissions Act* also gives a Royal Commission the power to authorise a person to appear before it. It does not identify, however, the factors that are relevant to the decision of a Royal Commission to allow a person to

29 Ibid, s 7B.
30 Ibid, s 7C.
31 Ibid, s 6F.

appear before it.[32] In the Building Royal Commission, Commissioner Cole granted any application for authority to appear if the applicant:

- was substantially and directly interested in any of the matters referred to in the Letters Patent;
- had demonstrated a special interest in any of the matters referred to in the Letters Patent, beyond that shared by members of the public; or
- would be in a better position to assist the Royal Commission in carrying out its inquiry if he or she were authorised to appear.[33]

7.30 In addition, Commissioner Cole granted limited authority to appear to those who might be adversely affected by evidence, and to the legal advisers of persons summoned to give evidence.[34] All general grants of authority to appear were made subject to a number of conditions.[35]

7.31 Is it appropriate for a Royal Commission to retain the discretion to authorise appearances before it and, if so, should the Act outline the factors a Royal Commission should consider before exercising this discretion? Should public inquiries other than Royal Commissions have similar powers?

Question 7–3 How effective in practice are the powers of a Royal Commission to:

(a) summon a person to appear before it, or to produce documents;

(b) take evidence of matters relating to the law of another country;

(c) inspect, retain and copy any documents or other things produced to the Commission; and

(d) authorise a person to appear before it?

Are any changes to these powers required? Should public inquiries other than Royal Commissions have similar powers?

32 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Vol 2, 31.
33 Ibid, Vol 2, 31–32.
34 Ibid, Vol 2, 32.
35 Ibid, Vol 2, 32.

Question 7–4 Should Royal Commissions or other public inquiries have the power to direct a person to provide a written statement?

Search and seizure powers

7.32 Historically, Royal Commissions have taken evidence mainly through oral hearings.[36] 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.[37]

7.33 In the Royal Commission into the Activities of the Federated Ships 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.[38] In an interim report, Commissioner Costigan recommended that a Royal Commissioner should have the power to issue a search warrant.[39]

7.34 The Government accepted this recommendation and amended the Act in 1982, subject to the qualification that the warrant must be granted by an independent judicial officer.[40] It also limited the power to apply for warrants to 'relevant Commissions' so designated in the Letters Patent.[41] In 2001, the Act was amended further to allow an authorised police officer to apply to a judge for a warrant, in addition to a Commissioner.[42]

7.35 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 (AFP), 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 also 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

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

37 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.

38 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 203.

39 F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* Interim Report No 4 (1982), 8.

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

41 Ibid, 5.

42 Ibid, 5; *Royal Commissions Act 1902* (Cth) s 1B.

> 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 …[43]

7.36 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.[44]

7.37 Royal Commissions also may access 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.[45]

7.38 Most state legislation governing public inquiries contains similar provisions to the *Royal Commissions Act*.[46] In New South Wales, 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).[47]

7.39 Under the *Northern Territory 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.

7.40 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.[48] Under that section, a Chairperson 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.[49]

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43 *Royal Commissions Act 1902* (Cth), s 4(1)(a), 4(1)(b).
44 Ibid, s 4(3).
45 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 74.
46 See *Evidence Act 1958* (Vic) s 19E; *Commissions of Inquiry Act 1995* (Tas) s 24; *Royal Commissions Act 1968* (WA) s 18.
47 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 410.
48 A similar provision is also contained in the *Royal Commissions Act 1991* (ACT) s 25(1) and the *Royal Commissions Act 1917* (SA) s 10.
49 *Commissions of Inquiry Act 1950* (Qld) s 19B.

7.41 The Tasmania Law Reform Institute considered the issue of search warrants in their 2003 report on Commissions of Inquiry.[50] It noted that, generally, search warrants are issued under a judicial, rather than executive, power. While acknowledging the need for a Commissioner to act promptly and not give warning to those under investigation, it concluded that search warrants should not be able to be issued by a Commissioner on the basis that:

> A commission of inquiry is not a court. Powers to order search, seizure and entry should be obtained from a court … As a matter of principle, the [power to issue a search warrant] should not be exercisable by a commission of its own motion. The decision should lie with the Court, on application by the Commission. [51]

7.42 Federally, there is nothing preventing a Royal Commissioner from being given the power to issue a warrant on his or her own motion.[52] The inclusion of such a power, however, may be contrary to the established policy of the Australian Government. The Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that the power to issue warrants to enter and search premises normally should be conferred on magistrates acting in their personal capacity, and not Ministers or departmental officers. In the Australian Government's view, 'the greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigour in the warrant issuing process'.[53]

7.43 While the role of a Royal Commissioner is quite different from that of a departmental officer, it may still be preferable to have a person independent from the inquiry determining that the requirements to issue a warrant have been met. Whether a member of a Royal Commission or other public inquiry should have the power to issue a warrant on his or her own motion is of interest to the ALRC.

Are search and seizure powers necessary?

7.44 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 against allowing search and seizure powers under its proposed new Inquiries Act.[54] 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. It noted, however, the historical differences between Australia and New Zealand in this regard. In particular, it noted the role that Australian Royal Commissions had played in investigating corruption, and the subsequent creation of permanent anti-corruption bodies.[55] The Law Reform Commission of Ireland also did

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50 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003).
51 Ibid, 60–61.
52 This is on the basis that the issuing of a search warrant is not exclusively an exercise of judicial power.
53 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), [9.7].
54 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), rec 20.
55 Ibid, 83.

not recommend the inclusion of a search warrant power in their report on public inquiries.[56]

7.45 In its report on public inquiries in 1992, the Ontario Law Reform Commission recommended enacting a stronger set of criteria upon which 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.[57]

7.46 One commentator 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.[58] Although search and seizure powers were introduced for the Costigan Royal Commission, Dr Scott Prasser suggests that it was not those additional powers that produced clear evidence of tax evasion and corruption, but rather the Commission's focus on broader research methods and the adoption of a computer information system that allowed disparate data to be analysed.

> It was the systematic collection of documentary evidence from a wide range of reliable sources, analysed by skilled staff capable of making connections between apparently disparate pieces of information.[59]

Question 7–5 Should a member of a Royal Commission or other public inquiry have the power to:

(a) apply for a warrant to search for and seize a document or other thing; or

(b) on his or her own motion, issue such a warrant?

If so, in what circumstances should it be available?

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

57 Ontario Law Reform Commission, *Report on Public Inquiries* (1992), Rec 8. This recommendation has not been adopted.

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

59 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 203.

Need for special powers in cases of national security

7.47 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* 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.

7.48 The discovery of the truth has been described as a prime function of a Royal Commission.[60] 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 prepared by the Commission. There may be some national security-related information, however, which, in the national and 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.

7.49 There have been a number of Royal Commissions in the past which have dealt with issues of national security, including: the Royal Commission on Espionage (1955); Royal Commission on Intelligence and Security (1977); Royal Commission on Australia's Security and Intelligence Agencies (1985); and the Commission of Inquiry into the Australian Secret Intelligence Service (1995).

7.50 A number of general mechanisms within the Act can protect information dealing with matters of national security. 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.[61] In addition, public interest immunity, which protects certain government documents from being called for under a coercive power, applies both to Royal Commissions and court proceedings.[62]

7.51 The Royal Commission on Australia's Security and Intelligence Agencies used such mechanisms to protect some of the sensitive evidence it heard. 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. Some hearings were closed to the public and the reports were divided into

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60 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), Vol 1, [7.66].

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

62 Public interest immunity is considered in Ch 8.

publishable and non-publishable portions. The sensitive records of the Commission were transferred to the National Archives of Australia for appropriate classification. [63]

7.52 Issues concerning the protection of classified and security sensitive material also have arisen in relation to other recent Commonwealth inquiries. In the Inquiry into the Case of Dr Mohamed Haneef (2008), 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.[64] He also noted that gaining access to classified material from the United Kingdom was a 'huge obstacle for all involved in the Inquiry'.[65] Finally, there was some difficulty in establishing which aspects of the report could be freely published.[66] All of these difficulties delayed the progress of the Inquiry and eventually led to an extension of the reporting date.

7.53 Events such as the attacks in the United States on 11 September 2001 and the Bali bombings on 12 October 2002 have heightened public awareness of national security matters. The role of Australia's security and intelligence agencies—and the control and protection of the critical intelligence information that they generate, share and analyse—is also increasingly a matter of public concern.

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

7.55 The ALRC considered aspects of these issues in its 2004 report *Keeping Secrets: Protection of Classified and Security Sensitive Information* (ALRC 98). In that report, the ALRC recommended the introduction of a National Security Information Procedures Act to govern the use of classified and security sensitive 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 range of options to tailor orders to suit the exigencies of the particular case, including:

- admitting the sensitive material after it has been edited or 'redacted' (that is, with the sensitive parts obscured);

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63 J Stokes, *A Brief History of the Royal Commission on Intelligence and Security* <www.naa.gov.au/collection/issues/stokes-rcis-history.aspx> at 23 March 2009.

64 M Clarke, *The Report of the Clarke Inquiry into the case of Dr Mohamed Haneef* (2008), 5.

65 Ibid, 6.

66 Ibid, 8.

- replacing the sensitive material with alternative, less sensitive, forms of evidence;

- using closed-circuit TV, 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).[67]

7.56 It was the ALRC's view that the same principles that apply to court proceedings should generally apply to tribunal proceedings and Royal Commissions.[68]

7.57 In 2004 and 2005, the Australian Government introduced legislation establishing a scheme for the handling of national security information in criminal proceedings. The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) 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 the final report. There are some points of departure in detail, however, between the Act and the ALRC's proposed statutory scheme. Further, and critically important in the context of this Inquiry, the Act only relates to federal criminal and civil proceedings, and not to Royal Commissions or other types of inquiries.

7.58 The ALRC would be interested in stakeholder views on the procedures in the *National Security Information (Criminal and Civil Proceedings) Act 2004*, and, in particular, whether they are appropriate for use by Royal Commissions or other public inquiries.

Question 7–6 Should special administrative arrangements be developed for Royal Commissions and other forms of public inquiries dealing with matters relating to national security? For example, should there be standard arrangements for access to classified and security sensitive material?

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67 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Recs 11–1 to 11–43.

68 Ibid, [11.193].

Question 7–7 Should legislation establishing Royal Commissions or other public inquiries incorporate the procedures applied in federal criminal and civil proceedings in dealing with matters relating to national security?

Other issues

Communication of information regarding contravention of a law

7.59 Under s 6P of the *Royal Commissions Act*, 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 Australian Crime Commission, the Law Enforcement Integrity Commissioner, the Director of Public Prosecutions and 'the authority or person responsible for the administration or enforcement of that law'.

7.60 Section 6P was first 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.[69] Further amendments added the Director of Public Prosecutions to the list. 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.[70]

7.61 In 2001, the Act was amended to extend the provision to a contravention of a law which may attract a civil or administrative penalty, rather than only criminal offences. This was to facilitate the exchange of information between the HIH Royal Commission (2001) and the concurrent investigation by the Australian Securities and Investments Commission into HIH's market disclosure.[71]

7.62 In 2003, the Building Royal Commission recommended that s 6P 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, a State or a Territory prescribed by the regulation'.[72]

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69 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) s 3.

70 *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).

71 Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 2.

72 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, rec 1(c).

7.63 In Commissioner Cole's view, the scope of 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', is uncertain.[73] In particular, 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.

Question 7–8 Should Royal Commissions be able to communicate information relating to a contravention of a law to law enforcement bodies in addition to those listed in the *Royal Commissions Act*? If so, to which additional bodies? Should public inquiries other than Royal Commissions have similar powers?

Concurrent functions and powers under state laws

7.64 There is nothing to stop the establishment of joint federal-state Royal Commissions through the issuance of complementary Letters Patent.[74] 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; and the Royal Commission into Aboriginal Deaths in Custody.

7.65 Royal Commissions may gain access to documents and other material by use of state legislation in the case of joint inquiries. The Stewart Royal Commission was able to search and seize documents under the *Crimes Act 1914* (Cth), the *Criminal Code* (Qld) and the *Health Act 1937* (Qld).

7.66 Section 7AA of the *Royal Commissions Act* allows a Commonwealth 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 1983 following the decision in *Re Winneke: Ex parte Gallagher*.[75] In that case, the court found that a commissioner could rely on both the federal *Royal Commissions Act* and the relevant state Acts in issuing a summons to a witness where the matter under inquiry fell within both terms of reference.[76] The inclusion of s 7AA was intended to remove any doubt about this matter.[77]

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73 Ibid, vol 2, rec 1(c).
74 E Campbell, *Contempt of Royal Commissions* (1984), 9.
75 *Royal Commissions Amendment Act 1982* (Cth); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.
76 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 219.
77 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security). In *Sorby v The Commonwealth*, Gibbs CJ noted that the enactment of s 7AA was unnecessary, given the decision in *Re Winneke*: *R v Sorby* (1983) 152 CLR 281, 248.

7.67 While the coercive powers granted under the federal *Royal Commissions Act* may be exercised throughout Australia, the powers possessed by a state commission may be exercised only in that state. Professor Enid Campbell notes that during a joint commission, the federal 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.[78] This does not appear to be affected by s 7AA.

7.68 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 of s 6DD of the *Royal Commissions Act*—which does not allow a statement of a witness to be used in evidence against a witness in criminal or civil proceedings.[79]

Question 7–9 Do any issues arise from 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?

Referral of questions of law

7.69 As noted in Chapter 3, the decisions of a Royal Commission are subject to judicial review. Most Acts governing inquiries and commissions in Australia, however, do not provide a procedure whereby a Royal Commission can initiate its own proceedings to obtain a ruling on legal issues that arise during an inquiry.[80]

7.70 The exception is s 16 of the *Commissions of Inquiry Act 1995* (Tas) which allows a Commission to refer a question of law arising in the course of its inquiry to the Supreme Court for decision. 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.[81]

7.71 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

78 E Campbell, *Contempt of Royal Commissions* (1984), 11.

79 *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*.

80 E Campbell, *Contempt of Royal Commissions* (1984), 18.

81 *Commissions of Inquiry Act 1995* (Tas) s 16(3).

parties cannot agree, by the Commission. The court's decision is binding on the Commission and any parties to the inquiry. [82]

7.72 A similar provision is contained in s 10 of the *Commissions of Inquiry Act 1908* (NZ). The NZLC reported that s 10 had been used only five times since 1908. It noted that while such a procedure can cause delay, so can subsequent judicial review of an inquirer'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'.[83] It recommended that any new inquiry legislation in New Zealand should retain this section.[84]

7.73 In the federal context in Australia a provision such as s 10 of the *Commissions of Inquiry Act 1908* (NZ) is problematic. If a Royal Commission was to seek advice from the court in the absence of a dispute between parties, such advice could constitute an opinion rather than a declaration of the law. Under Chapter III of the *Australian Constitution*, it is not possible for a party to request that courts deliver advisory opinions in the absence of a relevant appeal because this would be inconsistent with the exercise of federal judicial power.[85] In *Mellifonts Case*, the High Court of Australia stated that federal courts cannot make declarations of law divorced from attempts to administer the law and determine the rights and obligations of parties to a matter.[86]

7.74 In Australia, disputes about the exercise of a Commission's powers may be reviewed by the Federal Court. For example, during the Inquiry into AWB Ltd (AWB) and the Oil-for-Food Programme, AWB challenged Commissioner Cole's decision to reject a claim for client legal privilege over a particular document and his capacity to determine privilege claims.[87] It may be preferable for there to be a more expedited way for disputes to be resolved judicially rather than by traditional judicial review.

7.75 Should Royal Commissions and other public inquiries have the power to refer a question of law to the Federal Court during the course of an inquiry? If so, how could such a power operate within the constitutional limitations described above?

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82 Ibid, s 16(4), 16(5).

83 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 164.

84 Ibid, rec 55. Clause 35 of the Inquiries Bill 2008 (NZ) adopts this recommendation and empowers an inquiry to state a case to the High Court on any question of law arising in any matter before the inquiry. 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), 164.

85 *Re Judiciary and Navigation Acts* (1932) 29 CLR 257.

86 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 303.

87 *AWB v Cole* (2006) 152 FCR 382.

Question 7–10 Is it desirable that Royal Commissions and other public inquiries have the power to refer a question of law to the Federal Court during the course of an inquiry? If so, how could this be achieved within the limits of the *Australian Constitution*?

8. Witnesses

Contents

Introduction

8.1 In this chapter, the ALRC discusses the rights and protections afforded to witnesses in a Royal Commission. It provides an overview of how witnesses give evidence in a Royal Commission, when witnesses can refuse to give evidence and the privileges available under the *Royal Commissions Act 1902* (Cth).

8.2 The chapter also considers whether there should be a general requirement that inquiries hold their hearings in public and whether stronger protections are required for witnesses to ensure procedural fairness in Royal Commissions and other public inquiries.

8.3 The majority of this chapter is concerned with the current protections for witnesses under the *Royal Commissions Act*. The ALRC is also interested in comments about the protections and privileges that should be provided to witnesses who appear in other forms of public inquiry.

Examination and cross-examination of witnesses

8.4 Witnesses in a Royal Commission may be examined by a Commissioner or by Counsel assisting the Commission. They also may be examined or cross-examined by a legal practitioner who is authorised by the Commission to appear before it representing a party involved in the inquiry.[1]

8.5 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.[2] 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.[3]

8.6 For example, the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) early in the 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 the Counsel assisting the Commission would then be allowed.[4]

8.7 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. The Counsel Assisting 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 to occur, if desired.[5]

Leave to cross-examine a witness

8.8 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.

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1 *Royal Commissions Act 1902* (Cth) s 6FA.
2 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 661.
3 Ibid.
4 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Volume 2, 37.
5 N Owen, *Report of the HIH Royal Commission* (2003), [2.1.22].

8.9 In a second practice note for the inquiry, 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.[6] In practice, this meant cross-examination could not occur except where there was direct evidence challenging the witness.

8.10 The other guiding principles used by Commissioner Cole to decide when leave to cross-examine would be given were:

- if there was a disputed issue of fact relevant to a matter regarded as material to any issue that had to be determined, cross-examination was allowed;

- if a person gave evidence on oath of an adverse matter, which evidence was not denied, cross-examination was not allowed on the basis that no issue was raised regarding the evidence;

- if the disputing evidence was a matter of comment, as distinct from raising a factual conflict, cross-examination was not allowed;

- if a person gave evidence on oath of a fact, and the contestant stated that he had no recollection of the alleged fact, cross-examination was not allowed unless there were surrounding circumstances casting doubt upon the veracity of the evidence alleged—because there was no sensible basis upon which a cross-examiner could contest the evidence;

- overriding all 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 the evidence, cross-examination was allowed.[7]

8.11 In the final report of the Commission, Commissioner Cole expressed the view that 'procedural fairness does not usually, and certainly does not invariably require Commissions to permit cross-examination'.[8] In the Commissioner's view, this limitation on cross-examination allowed the inquiry to proceed more efficiently, by identifying only issues genuinely in dispute.[9]

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6 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Volume 2, 39.
7 Ibid.
8 Ibid.
9 Ibid.

8.12 Counsel representing the unions under investigation by the Royal Commission argued that these procedures were obstructive to their ability to fairly represent their clients.

> At the commission hearings all around the country, allegations were sprung on unions at the last moment which made it practically impossible for them to look at the material and obtain proper legal advice. Union lawyers complained about it regularly but nothing changed. The Royal Commission also imposed extraordinary, restrictive limitations on cross-examination of witnesses. When cross-examination was allowed, it was often days or even weeks after the damage in the media was done, and even then the Royal Commission severely restricted what could be the subject of cross-examination. It is believed that the only other royal commission to impose similar restrictions on cross-examination was the Victorian Royal Commission into Communism which took place at the height of anti-communist hysteria more than 50 years ago.[10]

8.13 The conditions on cross-examination were challenged by the Construction Forestry Mining Energy Union (CFMEU) on the basis that the rules of natural justice include the right to cross-examine a witness who is giving evidence adverse to an affected person's interests.[11] 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'.[12] He held that the *Royal Commissions Act* contemplated the imposition of limitations on cross-examination, and was not inconsistent with the rules of natural justice. While it did not allow a Commissioner an 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 there was no authority for the proposition that there is a right to cross-examination under the rules of natural justice.[13]

8.14 In the HIH Royal Commission, Commissioner Owen also sought to limit excessive cross-examination, but was not as restrictive as Commissioner Cole. He issued a practice note indicating that cross-examination would be allowed only where 'it would help ascertain the facts on which the final report would be based'.[14] In his view, 'although cross-examination might play a part in affording people procedural fairness, it did not follow that it constituted the only opportunity to be heard'.[15] The Final Report of the Commission notes that leave was not withheld on any occasion.[16]

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10 Slater and Gordon Lawyers, Submission to Senate Employment, Workplace Relations and Education Committee, *Beyond Cole: The Future of the Construction Industry* (2004), 41.

11 Other aspects of the rules of natural justice are discussed below.

12 *Kingham v Cole* (2002) 118 FCR 289, 293.

13 Ibid, 295.

14 N Owen, *Report of the HIH Royal Commission* (2003), [2.1.22].

15 Ibid.

16 Ibid.

Question 8–1 How effective in practice are the current powers available to a Royal Commissioner to determine how a witness may be examined and cross-examined? What changes, if any, are required? Should public inquiries other than Royal Commissions have similar powers?

Question 8–2 Should a party to a Royal Commission or other public inquiry have the right to cross-examine a witness who is giving evidence adverse to that party's interests? If so, should there be any limitations on that right?

Exemptions from requirement to give evidence

8.15 One important issue in the operation of Royal Commissions and other public inquiries is the rights of witnesses who appear, particularly when those witnesses have been called under a coercive power. As outlined in Chapter 7, Royal Commissions have a general power to summon witnesses or ask them to produce documents. Under s 3(1) and (2) of the *Royal Commissions Act*, a person who fails to attend a hearing or produce a document when summonsed is subject to a criminal penalty of $1,000 or imprisonment for up to 6 months.[17]

8.16 There are, however, certain circumstances where witnesses may refuse to answer questions or produce documents or may request that evidence be given in private. A witness also has a defence to prosecution under s 3(1) and (2) where the information sought is not relevant to the inquiry, or if a witness has a 'reasonable excuse' for refusing to comply with the summons. A witness also may be prevented from giving certain evidence by a secrecy provision in other federal legislation.

Right not to disclose certain information

8.17 Section 6D of the *Royal Commissions Act* sets out a number of rights of witnesses not to disclose certain types of information. Section 6D(1) enables a witness to refuse to disclose any secret process of manufacture. This provision, which has been in place since 1902 when the Act commenced, is based on the premise that it would not be fair to require business people to make disclosures which may 'injure them in competing with rivals'.[18]

8.18 Equivalent provisions to s 6D(1) are contained in older state and territory Acts including the *Royal Commissions Act 1923* (NSW),[19] the *Commissions of Inquiry Act*

17 Offences and penalties are discussed further in Ch 9.
18 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1912, 1486 (J Quick).
19 *Royal Commissions Act 1923* (NSW) s 11. See also the *Special Commissions of Inquiry Act 1983* (NSW) s 17.

1950 (Qld),[20] and the *Royal Commissions Act 1914* (SA).[21] There is no direct equivalent in the more recent Acts establishing public inquiries, such as the *Commissions of Inquiry Act 1995* (Tas) or the *Royal Commissions Act 1991* (ACT).

8.19 Under s 6D(2), a witness may request that his or her evidence be given in private, where it relates to the profits or financial position of any person and the giving of that evidence in public will be 'unfairly prejudicial to the interests of that person'.[22]

8.20 Similar protections to s 6D(2) are common in other jurisdictions; however, they are generally framed in broader terms than under the *Royal Commissions Act.* For example, under the *Commissions of Inquiry Act 1950* (Qld), a commission may hold hearings in private if it is of the opinion that it is in the public interest to do so, having regard to the subject matter of the inquiry or the nature of the evidence to be given.[23]

8.21 The New Zealand Law Commission (NZLC) has considered the issue of when a witness should not be required to give evidence in a public hearing. It also recommended a 'public interest' test, with one public interest being the protection of the privacy interests of an individual, including protecting a person's trade secrets or matters of commercial sensitivity.[24]

8.22 Other categories of evidence that the NZLC found may be appropriate to hear in private included: private information about natural persons; information that could endanger a person's safety; or information which is subject to an obligation of confidence (such as counselling notes or medical information). [25]

8.23 Another example of evidence that it may be appropriate to hear in private is information that an employee has an obligation to keep confidential as part of their employment relationship. Under the Australian Public Service (APS) Code of Conduct, an APS employee

> must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.[26]

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20 *Commissions of Inquiry Act 1950* (Qld) s 14.
21 *Royal Commissions Act 1917* (SA) s 14.
22 *Royal Commissions Act 1902* (Cth) s 6D(3).
23 *Commissions of Inquiry Act 1950* (Qld) s 16A.
24 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 28.
25 Ibid, 97.
26 *Public Service Regulations 1999* (Cth) reg 2.1(3). Section 13(13) of the *Public Service Act 1999* (Cth) provides that an APS employee must comply with any other conduct requirement prescribed by the regulations.

8.24 A breach of the Code of Conduct can lead to disciplinary action under the *Public Service Act 1999* (Cth).[27]

8.25 The issue of when it is appropriate for an inquiry to conduct hearings in private is discussed further below.

Question 8–3 What types of information, if any, should a witness have the right to refuse to disclose to a Royal Commission or other public inquiry?

Question 8–4 Should a witness before a Royal Commission or other public inquiry have the right to request that their evidence be taken in private? If so, in what circumstances?

Relevance and reasonable excuse

8.26 It is a defence to a prosecution under s 3(2) of the *Royal Commissions Act*, if the defendant can show that the documents or other things sought were not relevant to the matters into which the Commission was inquiring.[28] 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 Commissions will not be prevented from pursuing a line of inquiry unless they are 'going off on a frolic of their own':[29]

> [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.[30]

8.27 A witness also may refuse to attend a hearing or to produce a document or other thing where he or she has a 'reasonable excuse'.[31] The *Royal Commissions Act* defines this as being 'an excuse which would excuse an act or omission of a similar nature by a witness before a court of law'.[32]

8.28 The High Court has made it clear that there is no exhaustive list of what constitutes 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

27 These provisions are currently under review by the Australian Law Reform Commission, see Australian Law Reform Commission, *Review of Secrecy Laws*, IP 34 (2008).
28 *Royal Commissions Act 1902* (Cth) s 3(3).
29 *Ross v Costigan* (1982) 59 FLR 184, 335.
30 Ibid. See S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 46.
31 *Royal Commissions Act 1902* (Cth) ss 3(1B), 3(2B), 3(5).
32 Ibid s 1B.

> until a court makes a decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.[33]

8.29 A reasonable excuse can be physical, such as illness, injury or inability to travel. A witness also may be able to claim reasonable excuse on the basis of practicality, such as where the volume of information requested is too much for the time available; he or she 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.[34]

8.30 There has been more contention surrounding the scope of reasonable excuse where the reason does not relate to a physical or practical matter. In those cases, the courts have looked closely at the context of the legislation. For example, an obligation to maintain secrecy under another piece of legislation may provide a reasonable excuse in some contexts.[35]

8.31 Whether the availability of a common law or statutory privilege constitutes a reasonable excuse depends on the context of the legislation. In *Sorby v Commonwealth*, the High Court found that the privilege against self-incrimination could provide a reasonable excuse for failure to give evidence. This presumption, however, may be overturned where the legislation abrogates the privilege, even where a general defence of reasonable excuse may be otherwise available. [36]

8.32 The *Royal Commissions Act* expressly abrogates the privilege against self-incrimination.[37] In the case of claims of client legal privilege, or 'legal professional privilege' as it is described in the Act, it provides a set of criteria under which it is a reasonable excuse for a person to refuse to produce a document that is subject to the privilege.[38] It is silent, however, on the application of other common law privileges to Royal Commissions. Professor Enid Campbell, in an appendix to the Report of the *Royal Commission on Australian Government Administration* (1976), has suggested that the definition of a reasonable excuse—which includes excuses that would be accepted before a 'court of law'—would include all the witness privileges that are recognised at common law. It is less clear, however, whether it would include the statutory privileges recognised in the Uniform Evidence Acts[39] or other state evidence legislation. Campbell argued that it most likely would not, because the language of the definition suggests that the only excuses available are those acceptable in all courts.[40]

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33 *Taikato v R* (1996) 186 CLR 454, 466.
34 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 48.
35 Ibid, 49. This issue is discussed further below.
36 Ibid, 49. This issue is discussed further below.
37 *Royal Commissions Act 1902* (Cth) s 6A.
38 *Royal Commissions Act 1902* (Cth) s 6AA.
39 The *Evidence Act 1995* (Cth) Part 3.10, for example, includes client legal privilege, professional confidential relationships privilege, privilege against self-incrimination, and religious confessions privilege.
40 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4.K, 352.

8.33 The Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, states that the phrase 'section X does not apply if the person has a reasonable excuse' should not be used in the context of Commonwealth offences. In the view of the Department, the phrase is 'too open ended and places uncertainty in the way of any prosecution as to what defence might be raised'.[41] Defences such as duress, mistake and ignorance of fact are covered by the generic defences contained in the federal *Criminal Code*, which contains general principles of criminal responsibility.[42] The Guide encourages reliance on those defences in Commonwealth offences, or for additional specific defences to be set out in legislation.[43] As the definition of a reasonable excuse under the *Royal Commissions Act* is unclear, it may be beneficial for this section to be repealed and replaced with a list of specific circumstances in which a witness may refuse to attend a hearing or to produce a document or other thing.

Question 8–5 Should the defence of 'reasonable excuse' in the *Royal Commissions Act* be replaced with a list of specific circumstances in which a witness may refuse to attend a hearing or to produce a document or other thing? Should there be a similar list for other public inquiries?

Statutory prohibition on the giving of evidence

8.34 A number of Commonwealth statutes impose duties on public servants not to divulge information they obtain in the course of their employment.[44] For example, s 70 of the *Crimes Act 1914* (Cth) contains a general prohibition against the unauthorised disclosure of official information to any person by Commonwealth officers. 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.[45] A similar argument could be made in relation to the duties of a witness before a Royal Commission.[46]

8.35 Some legislation contains more specific prohibitions on the disclosure of official information. For example, s 16 of the *Income Tax Assessment Act 1936* (Cth) prohibits officers of the Australian Taxation Office disclosing any information about the taxation affairs of a person to any person or to a court. An authorised person, however, is allowed to communicate information to a Royal Commission where the Letters Patent

41 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 28.
42 *Criminal Code* (Cth) Part 2.3.
43 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 28.
44 As noted above, these secrecy provisions are currently under review by the Australian Law Reform Commission, see Australian Law Reform Commission, *Review of Secrecy Laws*, IP 34 (2008).
45 *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.
46 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), 356.

issued by the Governor-General declare that the Royal Commission is one to which this section applies.[47] Section 3E(2) of the *Taxation Administration Act 1953* (Cth) is a similar provision, but applies only where the Commissioner of Taxation is satisfied that the information is relevant to establishing whether an offence has been, or is being, committed.

8.36 A number of other secrecy provisions provide that government office-holders, employees or other persons are not required to disclose information under court or tribunal processes, other than for the purposes of the particular enactment.[48] Few of these provisions specifically mention Royal Commissions.

8.37 There is a question as to whether these statutory duties override the duty to provide information imposed by ss 5 and 6 of the *Royal Commissions Act.* In Campbell's view, where the duty of confidentiality is specific as to whom any information can be divulged, then it will override the duty to provide information under the *Royal Commissions Act*. This will depend, however, on the terms of the statute imposing the duty of secrecy.[49]

Question 8–6 Should the powers in the *Royal Commissions Act* or in legislation establishing other public inquiries override secrecy provisions in federal legislation? If so, should this be stipulated in the *Royal Commissions Act* (or legislation establishing other public inquiries) or in the legislation containing the secrecy provision?

Privileges and immunities

8.38 Witnesses in a Royal Commission may refuse to answer questions or produce documents on the ground that the documents or answers to the questions contain information that is protected by a privilege or other immunity. A legal 'privilege' is essentially a right to resist disclosing information that would otherwise be required to be disclosed.[50] There are several privileges available at common law and under evidence legislation in Australia, including:

- client legal privilege;
- the privilege against self-incrimination;

47 *Income Tax Assessment Act 1936* (Cth) s 16(4)(k).

48 See, eg, *Australian Security Intelligence Organsiation Act 1979* (Cth) s 81(2); *Child Support (Assessment) Act 1989* (Cth) s 150(5); *Equal Opportunity for Women in the Workplace 1999* (Cth) s 32(2).

49 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 356–57.

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

- public interest immunity;
- privileges protecting other confidential relationships; and
- parliamentary privilege.

8.39 Privileges are not only available as part of the rules of evidence, but can also apply outside court proceedings as a substantive doctrine, wherever disclosure of information may be compelled, including by administrative agencies, investigatory bodies and Royal Commissions.[51]

8.40 In federal law, privileges are available under the *Evidence Act 1995* (Cth). They are also available at common law. As the *Evidence Act* provisions do not apply to Royal Commissions—which are not bound by the rules of evidence and procedure[52]—the focus of this section will be on the common law privilege against self-incrimination, client legal privilege and public interest immunity.

Self-incrimination

8.41 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if that answer or the production would tend to incriminate that person.[53] 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).[54]

8.42 The majority in *Environment Protection Authority v Caltex Refining Co Pty Ltd* described the privilege as 'a human right which protects personal freedom, privacy and dignity' from the power of the state.[55] It privilege is also a human right recognised under international law.[56]

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51 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382; *Comptroller General of Customs v Disciplinary Appeals Tribunal* (1992) 35 FCR 466; *Sorby v The Commonwealth* (1983) 46 ALR 237.

52 See *Royal Commissions Act 1902* (Cth); *Evidence Act 1995* (Cth) s 4.

53 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382.

54 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

55 Ibid, 498 quoting Murphy J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150. See also *Sorby v The Commonwealth* (1983) 46 ALR 237; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 135.

56 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'.

8.43 The privilege applies only to natural persons and not to corporations,[57] and it protects only against self-incrimination and cannot be invoked to shield others from incrimination.[58] There is an established procedure for claiming the privilege at common law. The onus is on the claimant to establish that there are reasonable grounds for the claim. A person must claim the privilege before answering the question or providing the document,[59] otherwise the privilege is waived. Privilege must be claimed in relation to specific requests rather than as a 'blanket' claim.[60] The information must also tend to incriminate, meaning the risk of prosecution is 'real and appreciable, and not of imaginary or insubstantial character'.[61]

8.44 Although the privilege has been described as a human right, increasingly in Australia it has been removed by statute in order to assist regulators and administrators with investigation and enforcement.[62] A common approach has been to abrogate or modify the privilege against self-incrimination expressly by statute so that individuals are not entitled to refuse to produce documents, but are permitted to assert the privilege subsequently in civil or criminal proceedings commenced after the investigation.[63]

8.45 A similar approach is taken under the *Royal Commissions Act.* Section 6A provides that it is not a reasonable excuse for a person to refuse or fail to produce a document or thing,[64] or to answer a question,[65] on the ground that doing so might incriminate the person or make the person liable to a penalty. The privilege against self-incrimination remains, however, if the person has been charged with the offence to which the document or answer relates, or if proceedings in respect of the penalty to which the person may become liable have commenced.[66]

8.46 Section 6DD provides that statements or disclosures made by a person in the course of giving evidence to a Royal Commission, are not admissible in evidence in subsequent civil or criminal proceedings in any Australian court—unless the proceedings are for an offence against the *Royal Commissions Act*. This 'use immunity' protects statements or disclosures made in response to questions asked by a

57 *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.

58 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385.

59 *R v Owen* [1951] VLR 393.

60 *Gamble v Jackson* [1983] 2 VR 334; *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397.

61 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96; *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385; *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397.

62 See discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 18.

63 B Bolton, 'Compelling Production of Documents to the ASC' (1995) 25 *Queensland Law Society Journal* 221, 238. Use and derivative use immunities are discussed in Ch 7.

64 *Royal Commissions Act 1902* (Cth) s 6A(1).

65 Ibid s 6A(2).

66 Ibid s 6A(3), (4).

Commissioner (or any other person who is authorised to examine or cross-examine a witness).[67]

8.47 Section 6DD has been part of the Act since 1912. On the basis of the section, the Act had long been interpreted as not allowing the possibility of self-incrimination as a reasonable excuse for the failure of a witness to answer questions or produce documents. In *Hammond v the Commonwealth*, however, the High Court cast doubt on the validity of that assumption. While the majority reserved judgement on the point, Gibbs CJ stated that:

> It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to over-ride so important a privilege as that against self-incrimination.[68]

8.48 As a result of the decision in *Hammond*, s 6A was introduced to make it clear that, 'in the special circumstances of a royal commission hearing, self-incrimination is not an excuse for failure to answer questions or produce documents'.[69]

8.49 While s 6DD provides a use immunity, it does not, however, provide derivative use immunity, which extends use immunity to prevent any other evidence, obtained through further inquiries based on the compulsorily disclosed material, from being admissible.[70]

8.50 In the final report of the HIH Royal Commission, Commissioner Owen noted in reference to possible proceedings that could arise from the Commission's findings, that it:

> would be wrong to assume that any evidence gathered by a royal commission cannot be used in any court proceeding, either civil or criminal, against the individual who gave the evidence. Nor is it the case that the agencies will be obliged, effectively, to start the investigation from 'square one'.[71]

8.51 In his view, the proper construction of s 6DD is that:

- Under the Act there are no constraints on either the use of the testimony of or the production of documents by a person in proceedings brought against another person.
- Although there are direct-use immunities established under s 6DD of the Act, there are no derivative-use immunities.

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67 *Giannarelli v The Queen* (1983) 154 CLR 212, 218.
68 *Hammond v the Commonwealth* (1982) 52 CLR 188, 190.
69 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). For further discussion of this amendment see Ch 7.
70 *Sorby v The Commonwealth* (1983) 46 ALR 237.
71 N Owen, *Report of the HIH Royal Commission* (2003), 18.

- The privileges against self-incrimination and self-exposure to a penalty are not available to corporations; it follows that the immunities found in s 6DD are similarly unavailable.
- While the use of immunities in s 6DD make the fact of production of documents to a commission inadmissible in civil or criminal proceedings brought against the natural person who produced the documents, they do not render the documents themselves inadmissible against that person, or any other person. [72]

8.52 The *Royal Commissions Act 1923* (NSW) also abrogates the privilege against self-incrimination where the Chairperson or sole Commissioner is a Supreme Court judge.[73] A use immunity operates in respect of testimony and documentary evidence produced before a Commission in civil and criminal proceedings. [74] Unlike the federal Act, however, the New South Wales Act requires a witness to indicate that his or her evidence is given 'unwillingly'.[75]

8.53 The Law Reform Commission of Ireland considered a model similar to that in the *Royal Commissions Act* in its report on inquiries in 2005. It expressed the view that many tribunals of inquiry would be rendered unworkable if witnesses were able to refuse to answer questions on the grounds that their answers could be used against them in subsequent criminal proceedings. If the privilege were to be abrogated, however, then a measure of protection must be offered to such witnesses. The Commission considered that use immunity offered adequate protection of an individual's rights while at the same time not removing the ultimate threat of a criminal trial.[76]

8.54 In contrast, Justice Ronald Sackville, in writing extra-judicially, has questioned the abrogation of the privilege against self-incrimination under the *Royal Commissions Act.* He noted that, while a use immunity exists, this does not prevent law enforcement agencies chasing 'leads' that might produce independent evidence that leads to prosecution. In his view, the effect of the 1982 amendments was to 'undercut protections against the intrusion of the State that many consider to be of fundamental importance to the administration of justice'.[77]

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72 Ibid, 18.
73 *Royal Commissions Act 1923* (NSW) s 17.
74 Ibid s 17(2).
75 Ibid s 17(3)(b).
76 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry* LRC 73 (2005), 162. In Ireland, the privilege against self-incrimination is a right guaranteed by the Constitution; however, as with other rights, it may be abrogated by statute where proportionate in the circumstances: *Re Irish National Bank Ltd* [1999] 3 IR 145.
77 R Sackville, 'Royal Commissions in Australia: What Price Truth?' (1984) 60(12) *Current Affairs Bulletin* 3, 7.

Protection only in criminal proceedings

8.55 The NZLC recommended New Zealand inquiries legislation should contain an immunity against the use, in *criminal* proceedings only, of information directly or indirectly obtained as a result of incriminating evidence given in the course of an inquiry.[78] This recommendation stemmed from a desire for consistency between its proposed inquiries legislation and New Zealand's evidence law. Under the *Evidence Act 2006* (NZ) a person may not claim the privilege in relation to liability for a civil penalty.[79] The NZLC's recommendation has been adopted in the Inquiries Bill 2008 (NZ), where cl 28 of the Bill applies the principles of the *Evidence Act* (NZ) to public inquiries.[80]

8.56 In contrast, in Australia both the common law and *Evidence Act 1995* (Cth) apply the privilege to evidence used in criminal and civil proceedings. In its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, 2002), the ALRC found that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. The ALRC commented at the time that the conventional common law readiness to remove the privilege more easily in relation to non-criminal penalties may require reassessment in light of the convergence of the severity of criminal punishments and non-criminal penalties.[81]

Question 8–7 (a) Is the abrogation of the privilege against self-incrimination under the *Royal Commissions Act* appropriate? Are there any circumstances in which it should be preserved?

(b) In the absence of the privilege against self-incrimination, should any protections apply, for example:

(i) the existing use immunity applying to criminal and civil proceedings;

(ii) the strengthening of existing protections to include a derivative use immunity; or

(iii) a use immunity or derivative use immunity applying only to criminal proceedings?

78 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 132.

79 *Evidence Act 2006* (NZ) s 60(1)(b).

80 A similar position exists in the United Kingdom and Canada. In the UK, it is customary for Attorneys General to guarantee immunity from criminal, but not civil, prosecution to witnesses compelled to testify before public inquiries: G Van Harten, 'Truth Before Punishment: A Defence of Public Inquiries' (2003) 29 *Queen's Law Journal* 242, 276. In Canada, see *British Columbia v Branch* [1995] 2 SCR 3.

81 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), 652.

Question 8–8 Should the privilege against self-incrimination be abrogated in other public inquiries? If so, what protections, if any, should apply to the use of such information?

Client legal privilege

8.57 The *Royal Commissions Act* provides that the power of a Royal Commission to require or summon a person to produce a document includes the power to require or summon the person to produce a document that is subject to client legal privilege.[82] It also provides that it is not a reasonable excuse to fail to produce a document to a Royal Commission, on the basis that it is the subject of a claim for privilege, unless:

- a court has found the document to be privileged; or
- the claim is made to the member of the Commission who required production of the document within the time required for its production.[83]

8.58 Where a claim for privilege is made to a Royal Commission, the Commission may serve a notice requiring the production of the document the subject of the claim for the purpose of inspecting it to decide whether to accept or reject the claim.[84] Where the claim is accepted, the Royal Commission must return the document and disregard the privileged material for the purposes of any report or decision it makes.[85] Where the claim is rejected, the Royal Commission may use the document for the purposes of its inquiry.[86] The Act also sets out offences in relation to the non-production of documents the subject of a claim for client legal privilege.[87]

8.59 These sections were added to the *Royal Commissions Act* in 2006 and were designed to

> put beyond doubt that a Commissioner may require the production of a document in respect of which [client legal privilege] is claimed, for the limited purpose of making a finding about that claim, that is deciding to accept or reject it, for the purposes of the Commission.[88]

82 *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.
83 Ibid s 6AA(1).
84 Ibid s 6AA(2), (3).
85 Ibid s 6AA(4).
86 Ibid s 6AA(5).
87 Ibid s 6AB.
88 Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.

8.60 The amendments were requested by Commissioner Cole, who headed the inquiry into Australian Wheat Board Ltd (AWB) and the Oil-for-Food Programme (the AWB Royal Commission),[89] following the decision in *AWB Ltd v Cole*.[90]

8.61 The ALRC considered the issue of whether client legal privilege should be abrogated in Royal Commissions in its report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2008). It found that a strong case can be made to abrogate client legal privilege in some Royal Commissions, on the basis that 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.[91]

8.62 Rather than a blanket abrogation of the privilege for Royal Commissions, however, the ALRC recommended that there should be capacity in the *Royal Commissions Act* to permit the Governor-General, by Letters Patent, to determine that, in relation to the whole or a particular aspect of matters the subject of inquiry, client legal privilege should not apply. The factors that should be taken into account in deciding whether client legal privilege may be abrogated were:

- 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.[92]

8.63 The recommendations contained in *Privilege in Perspective* are currently being considered by the Australian Government. The Terms of Reference for this Inquiry therefore specifically exclude consideration of the application of client legal privilege to Royal Commissions. In developing potential new models for other types of statutory public inquiries, however, the ALRC will need to consider if, and how, client legal privilege should apply to those inquiries. The ALRC also will be considering how

89 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006).

90 *AWB v Cole* (2006) 152 FCR 382. See also Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), l.

91 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), 275.

92 Ibid, Rec 6–2.

Royal Commissions should have their terms of reference established, which may potentially involve amendments to the current issuing by Letters Patent.[93]

Public interest immunity

8.64 The relevant principles of public interest immunity are enumerated in *Sankey v Whitlam*.[94] The general rule is that the 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.[95] The immunity is not absolute, especially where a claim is made that a particular 'class' of documents, rather than a specific document, is subject to public interest immunity. The court must apply a balancing test to determine whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.[96]

8.65 Public interest immunity can be distinguished from a privilege (although it was called 'Crown privilege' in its early conception). In the case of privileges, only the party holding the information is able to invoke it, whereas a claim of public interest immunity can be made by the state, a non-governmental party to the proceedings, or by the court on its own motion. Where public interest immunity is applied, all evidence related to the relevant information is excluded, including any secondary evidence held by third parties.[97] Thus:

> If the document cannot, on principles of public policy, be read into evidence, the effect will be the same as if it were not in evidence, and you may not prove the contents of the instrument.[98]

8.66 Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations; high level advice to governments; communications or negotiations between governments; national security; police investigation methods; or in relation to the activities of Australian Security Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.[99]

8.67 The application of public interest immunity to Royal Commissions is somewhat unclear, given that a Royal Commission is not a court. While there is no authority specifically on this issue, public interest immunity has been a valid basis for the non-production of information in other non-judicial proceedings.[100] For example, it has prevented the production of Cabinet documents to the New South Wales Legislative

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93 See Question 5–3.
94 *Sankey v Whitlam* (1978) 142 CLR 1.
95 Ibid, 38.
96 Ibid, 38–39.
97 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].
98 *Cooke v Maxwell* (1817) 171 ER 614, 615.
99 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].
100 *Jacobson v Rogers* (1995) 182 CLR 572.

Council.[101] Spigelman CJ, in his majority judgment in *Egan v Chadwick*, held that while client legal privilege is not a valid objection to the production of documents before the Legislative Council, public interest immunity certainly is.[102] Public interest immunity may also fall within the scope of what is a reasonable excuse to refuse to produce documents under s 3(2) of the *Royal Commissions Act*, discussed above.[103] Dr Sue McNicol has suggested that, while the matter is not settled, it would be odd if public interest immunity did not serve to limit the powers of Royal Commissions, as the disclosure of sensitive information before a Commission could be just as damaging to the public interest as if the same information had been disclosed to a court.[104]

Other statutory privileges

8.68 As noted above, 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 only protect the communication 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;[105]

- *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;[106] and

- *exclusion of evidence of settlement*—which protects communications made in connection with an attempt to negotiate a settlement of a dispute.[107]

8.69 As noted above, these privileges do not apply to Royal Commissions at present. It could be argued, however, that the public interests they protect—for example, the public interest in people giving information to journalists so that the media can report on matters of public importance—are directly relevant to Royal Commissions. The ALRC is interested in stakeholder views on whether other statutory privileges should apply to Royal Commissions and other public inquiries. If so, how should the legislation specify that such privileges apply?

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101 *Egan v Chadwick* (1999) 46 NSWLR 562.
102 Ibid, 578–79.
103 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 619.
104 S McNicol, *Law of Privilege* (1992), 381.
105 *Evidence Act 1995* (Cth) Division 1A. On 19 March 2009, the Australian Government introduced the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth). The Bill amends Division 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.
106 Ibid s 127.
107 Ibid s 131.

Question 8–9 Should privileges established by statute, for example religious confessions privilege and professional confidential relationships privilege (including journalists' privilege), apply to Royal Commissions and other public inquiries? If so, how should the legislation specify that such privileges apply?

Protection of Commissioners, witnesses and legal practitioners

8.70 Section 7 of the *Royal Commissions Act* protects participants in Royal Commissions from subsequent civil liability. It gives a Royal Commissioner the same protection and immunity as a Justice of the High Court of Australia; a legal practitioner assisting a Commissioner, or appearing on behalf of a person at a hearing before a Commission, the same protection and immunity as a barrister appearing in proceedings in the High Court; and a witness summoned to attend or appear before a Royal Commission the same protection as a witness in any case tried in the High Court. Section 7 is most likely to be used to protect Royal Commissioners, witnesses and legal practitioners against legal liability for defamatory statements made before or by a Royal Commission.[108]

8.71 The common law has long recognised immunities from suit for judges, advocates and witnesses.[109] These immunities were developed for a number of reasons, including to ensure that matters were freely and fully adjudicated before the courts without fear of consequence, and to ensure finality in litigation.[110]

8.72 One question is whether it is appropriate to give Royal Commissioners the same immunity from civil liability as that enjoyed by a Justice of the High Court, given that Royal Commissions are agencies of the executive branch of government.[111] Campbell has suggested that it may be more appropriate to give Royal Commissions similar protection to that accorded to the Ombudsman under the *Ombudsman Act 1975* (Cth), which confers immunity on the Ombudsman for acts done or omitted to be done in good faith in exercise, or purported exercise, of any power or authority conferred by the Act or certain provisions of the *Australian Federal Police Act 1979* (Cth).[112] This

108 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 35.
109 *D'Orta-Ekenaike v Victoria Legal Aid* (1996) 223 CLR 1, [38].
110 Ibid, [40]–[41].
111 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 359.
112 *Ombudsman Act 1976* (Cth) s 33.

would mean that Royal Commissioners would not be immune from suit for acts committed blatantly in excess of their jurisdiction.[113]

8.73 Another issue is whether the provision should be extended to apply to protect others from civil or criminal liability in all or any circumstances. For example, it has been suggested that the provision could be extended to protect the Crown in right of the Commonwealth, as the Crown will generally be responsible for publishing Royal Commission reports, and to protect staff of a Royal Commission.[114]

Question 8–10 How effective in practice is the protection from legal liability conferred on Royal Commissioners, witnesses and advocates by s 7 of the *Royal Commissions Act*? What, if any, changes are required? Should public inquiries other than Royal Commissions be afforded similar protections?

Public access to hearings and documents

8.74 As discussed in Chapter 2, Royal Commissions are generally established because there is 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. As such, there is a presumption that Royal Commissions should conduct their processes as openly as possible.[115] There is, however, no requirement in the *Royal Commissions Act* that hearings must be conducted in public.

8.75 As noted above, under s 6D(2), a person giving evidence about the profits or financial position of any person may request that their evidence be given in private where the taking of that evidence in public would be unfairly prejudicial to that person. A Royal Commission also may direct that any evidence or documents shall not be published, or shall be published only to certain persons or in a certain manner.[116] Section 6D(5) states that these powers operate in 'aid of and not as in derogation of the Commission's general powers to order that any evidence may be taken in private'.

8.76 The principle of open justice is an essential feature of the common law judicial tradition.[117] Like courts, Royal Commissions and other public inquiries operate in public to ensure confidence in the integrity and independence of their processes.

113 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 361.
114 Ibid, 359.
115 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 654.
116 *Royal Commissions Act 1902* (Cth) s 6D(3). A person who makes a publication in contravention of such a direction is guilty of an offence: see Ch 9.
117 *Scott v Scott* [1913] AC 417, 445.

Mason J (as he then was) described the difficulties of 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. The atmosphere of secrecy readily breathes the suspicion that the inquiry is unfair or oppressive … The denial of public proceedings immediately brings in its train other detriment. 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.[118]

8.77 Royal Commissions can have an intrusive impact on the lives of witnesses, who may find their private information disclosed and reported in the course of an investigation. Such witnesses may be compelled to give evidence, even where they are not the subject of an inquiry.[119] The protection in s 6D(2) is discretionary and there is no requirement to conduct a private hearing even when the information disclosed may damage a person's reputation.[120]

8.78 Royal Commissions and public inquiries also may involve subject matter which it is not in the public interest to disclose. This includes information that could prejudice Australia's security or economic interests, endanger a person's safety, or interfere with the administration of justice.[121]

8.79 Similar issues arise in relation to the powers of a Royal Commission to impose restrictions on the publication of evidence. Non-publication orders may provide appropriate or necessary protection for witnesses and preserve the integrity of an investigation.[122]

8.80 In the HIH Royal Commission, Commissioner Owen stated that, in making a non-publication order, a Commissioner must take into account a range of issues, including the scope and purpose of the *Royal Commissions Act* and the subject matter and nature of the particular inquiry. In his view, the decision to make an order would be based on similar principles to those used by courts in exercising their powers to suppress publication of evidence.[123]

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118 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 97.

119 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 94.

120 *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21.

121 In Ch 7, the ALRC considers whether special powers and procedures are necessary for inquiries dealing with evidence of matters of national security.

122 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 656.

123 N Owen, *HIH Royal Commission: Reasons for Ruling No 04/02* (2002). See also Ibid, 657.

8.81 One question for this Inquiry is whether Royal Commissions and other public inquiries should be required by legislation to be conducted in public and to set out in their reports the evidence on which their decisions are based. Exemptions could be provided to this general rule for evidence that should not be disclosed in the public interest. Section 18(1) of the *Inquiries Act 2005* (UK) is an example of such a requirement. It states that, subject to any restrictions imposed by the Chair of an inquiry, or Minister, reasonable steps must be taken to allow members of the public to attend inquiry hearings and view evidence.[124]

8.82 The NZLC considered this issue and found that such a presumption could encourage the use of formal hearings where they were not in the interests of the inquiry in question. In its view:

> 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. [125]

8.83 In relation to restrictions on the publication of evidence, the NZLC found that inquiries should have the power to withhold information, or restrict public access to information, where it would be in the public interest to do so. It did not propose a conclusive set of factors on which an inquirer must base a decision to exercise this power, but rather a set of considerations that should be taken in account. These considerations were:

- the risk to public confidence in the proceedings of the inquiry;
- the need for the inquiry to properly ascertain the facts;
- the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;
- the privacy interests of any individual; and
- whether such an order would interfere with the administration of justice, including the right to a fair trial.[126]

8.84 Should Royal Commissions and other public inquiries be required to hold their hearings in public and publish evidence? If such a requirement were in place, what exemptions should apply?

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124 Restrictions on public access may be imposed where it is in the public interest, a witness has agreed to appear on the basis of confidentiality, or the efficiency or effectiveness of the inquiry would be impaired: *Inquiries Act 2005* (UK) s 19.

125 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 94.

126 Ibid, 97–99, Rec 28.

Question 8–11 (a) Should Royal Commissions and other public inquiries be required to:

(i) hold hearings in public; and

(ii) set out in their reports the evidence on which their decisions are based?

(b) Should these requirements be subject to specified exemptions? If so, what exemptions should apply?

Procedural fairness

8.85 As noted in Chapter 7 and this chapter, Royal Commissions have a broad discretion to conduct proceedings as deemed appropriate to fulfil their terms of reference. This discretion is fettered to some extent, however, by the limitations on commission powers, the rights of witnesses and the principles of natural justice and procedural fairness.[127]

8.86 In the 1980s, both the Royal Commission into the Activities of the Federated Ships Painters and Dockers Union (1984) (Costigan Royal Commission) and the Royal Commission of Inquiry into Drug Trafficking (1983) (Stewart Royal Commission) questioned whether the rules of procedural fairness applied to them. In the view of the Commissions, these rules only became relevant when their findings were in the hands of law enforcement agencies.[128] Later, in *Annetts v McCann*, the High Court took a different view, finding that the rules of procedural fairness can apply in investigations.[129]

8.87 The two main aspects of procedural fairness are the rule against bias and the hearing rule. Bias arises where a decision maker has an interest in the proceedings, either because of some aspect of their conduct or because it appears he or she has pre-determined the issues.[130] In the case of Royal Commissions and other investigative commissions, the rule against bias has a more limited operation than in courts, because Commissions necessarily begin with suspicions before they commence their investigations.[131] The rule has also been held not to apply as strictly to Royal

127 *Annetts v McCann* (1990) 170 CLR 596.
128 F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* Interim Report No 4 (1982); S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 150.
129 *Annetts v McCann* (1990) 170 CLR 596.
130 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 146.
131 Ibid, 147.

Commissions as to courts, because Commissions are inquisitorial and do not resolve issues or make any determinations of legal liability.[132]

8.88 The principles within the hearing rule include a person's right to a public hearing; the right to certain minimum procedural protections, such as being fully informed of the case against him or her; the right to be given prior notice of any adverse findings; and the right to a full statement of the reasons for any decision. Not all of the principles will apply directly to the work of Royal Commissions. For example, in Australia, Commissions are not usually asked to investigate specific allegations against individuals, the right to be informed of the case against a suspect therefore may not apply at the early stages of an inquiry.[133]

8.89 In the United Kingdom, the Royal Commission on Tribunals of Inquiry (1966) (Salmon Royal Commission) recommended a number of key safeguards for witnesses appearing in public inquiries.[134] The six cardinal principles (Salmon Principles) recommended were:

- Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him or her and which the Tribunal proposes to investigate.

- Before any person who is involved in an inquiry is called as a witness, he or she should be informed of any allegations which are made against him or her and the substance of the evidence in support of them.

- He or she should be given an adequate opportunity of preparing his case and of being assisted by his or her legal advisers. His or her legal expenses should normally be met out of public funds.[135]

- He or she should have the opportunity of being examined by his or her own solicitor or counsel and of stating his or her case in public at the inquiry.

- Any material witness he or she wishes called at the inquiry should, if reasonably practicable, be heard.

- He or she should have the opportunity of testing by cross-examination conducted by his or her own solicitor or counsel any evidence which may affect him or her.[136]

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132 *Karounos v CAC* (1989) 50 SASR 484, 488.
133 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 175.
134 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), Rec 3.
135 This issue is also raised in Ch 5.
136 This issue is discussed earlier in this chapter: see Question 8–2.

8.90 The Salmon Principles were criticised in a later inquiry for not satisfying a number of other objectives of public inquiries. These included the desirability of proceedings being non-adversarial; 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.[137]

8.91 The Salmon Principles were not intended to operate as statutory rules, but rather as guidelines for the proceedings of inquiries.[138] It has been argued, however, that ongoing judicial development of the rules of procedural fairness means that it is unnecessary to give legislative effect to the principles.[139]

8.92 The NZLC considered whether the rights of witnesses and other parties were adequately protected by the common law rules of procedural fairness or if legislation should specify some or all of the procedural requirements that should apply to an inquiry. In its view, inquiries should retain their broad discretion to determine their own procedures. The NZLC found, however, that the rules regarding adverse comment should be set out in statute to 'give clear direction to those conducting and participating in inquiries'.[140] It recommended that, where a person or body is to be the subject of an adverse finding or comment by the inquiry, the inquiry must:

- give prior notice of allegations, adverse findings or the risk of adverse findings;
- disclose the relevant material relied upon, and the reasons for the finding;
- give the person a reasonable opportunity to respond; and
- give proper consideration to those representations.[141]

8.93 A similar provision exists in the *Inquiries Act 1985* (Canada). Section 13 of that Act provides that no report shall be made against any person until reasonable notice has been given to that person of the charge of misconduct against him or her and the person has been allowed a full opportunity to be heard.

8.94 A key issue for this Inquiry is whether the rights of witnesses in Royal Commissions and other public inquiries are adequately protected, either by statute or common law. Are there other rights, in addition to those currently set out under the *Royal Commissions Act,* that should be protected in their proceedings?

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137 R Scott 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596.
138 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 63. They were adopted by the United Kingdom Council of Tribunals in 1995.
139 Ibid, 63.
140 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 71.
141 Ibid, Rec 15.

Question 8–12 What rights of witnesses, in addition to those currently set out under the *Royal Commissions Act,* should be protected in proceedings of Royal Commissions and other public inquiries?

9. Offences and Penalties

Contents

Introduction

9.1 In this chapter, the ALRC discusses the offences created by the *Royal Commissions Act 1902* (Cth), and the penalties that apply to them. The chapter commences by considering the broader question of the purpose of offences in this context, before examining the offences in detail. It continues by discussing the

applicable penalties, before concluding with a brief discussion of the provisions in the Act relating to proceedings and costs.

9.2 Although this chapter deals with the existing offences in the Act, the ALRC is also interested in the use of methods other than offences in punishing behaviour. The broader term 'sanctions' is therefore used to indicate all methods of prohibiting conduct by law, such as through the use of criminal offences, civil penalties and the exercise of contempt powers.

9.3 While the focus of this chapter is the *Royal Commissions Act*, the ALRC also will be considering these issues in the context of any legislation establishing other public inquiries, as discussed in Chapter 5.

Offences

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

- offences that punish non-compliance with the requirements of the Royal Commission;
- offences that prohibit interference with evidence or witnesses; and
- an offence prohibiting interference with the work or authority of the Royal Commission.

9.5 The primary purpose of the sanctions specified in the *Royal Commissions Act* is to ensure the effective operation of the proceedings of Royal Commissions. The offences are similar to those protecting the administration of justice in courts.

Special context of Royal Commissions

9.6 Whether particular sanctions are appropriate depends partly upon which coercive powers are considered necessary. This is an issue discussed in Chapter 7. Offences may be considered necessary to give 'teeth' to the coercive powers discussed in that chapter.

9.7 There are differences, however, between Royal Commissions and courts that may make some sanctions less appropriate in the former context—especially those sanctions relating to interference with evidence or witnesses, and relating to interference with the authority of the Royal Commission. The ALRC considered these differences in its 1987 report, *Contempt* (ALRC 35). The ALRC noted that, unlike courts, Royal Commissions:

- are created by the executive, rather than by a constitutional or legislative process;

- tend to deal with matters of general public importance, and the matters subject to inquiry are determined by the government rather than by parties;
- inquire and recommend, rather than determine rights and liabilities conclusively;
- do not apply the rules of evidence that apply to courts;
- are fundamentally inquisitorial rather than adversarial, with procedures that are typically more informal;
- are constituted temporarily by people who are not necessarily legally qualified; and
- often require publicity to succeed, while courts require an atmosphere untainted by pressure or prejudice.[1]

9.8 These considerations are also relevant when considering the appropriateness of sanctions in any legislation establishing other public inquiries.[2] Additional considerations relevant to other public inquiries include the:

- coercive powers conferred on other public inquiries;
- ways in which such public inquiries are established and constituted;
- subject-matter of the inquiries;
- public importance of the inquiries;
- the procedures adopted by such inquiries; and
- statutory protections provided to those involved in such inquiries.

Question 9–1 Do Royal Commissions or other public inquiries require sanctions in order to operate effectively?

1 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [745]–[752].
2 This is discussed in Ch 4.

Alternative sanctions

9.9 The *Royal Commissions Act* sanctions certain conduct exclusively through the use of criminal offences. The ALRC is interested in stakeholder views on the use of non-criminal sanctions as alternatives, or supplements, to the offences in the Act.

9.10 The ALRC looked at the role of non-criminal sanctions in the context of federal regulation in its report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, 2002) (*Principled Regulation*). The ALRC observed that, traditionally, criminal penalties indicated 'the repugnance attached to the [prohibited] act, which invokes social censure and shame'.[3] This did not typify many crimes recently created by statute, however, eroding the traditional distinction between criminal and non-criminal behaviour.

9.11 Civil penalties have emerged as an alternative form of sanctioning behaviour in fields such as customs, trade practices, and corporations law. These penalties are, like criminal penalties, imposed to punish conduct rather than compensate for harm. Unlike criminal penalties, however, they use civil court processes. This has significant procedural advantages for prosecutors,[4] and for defendants has the benefit of removing the stigma of criminality.

9.12 The ALRC also examined administrative penalties, which it defined as penalties where the legislation determines when a breach has occurred, as well as the nature, imposition and the amount (or method of calculation) of the penalties to be imposed. For example, tax legislation imposes specified additional charges for failing to pay tax on time.[5]

9.13 The ALRC also considered other kinds of penalty schemes, such as infringement notice schemes, where non-judicial officers may issue a notice to a suspected offender, alleging the offence and providing that the offender may pay a prescribed penalty to avoid prosecution. These are commonly used for parking and traffic violations.[6]

Criminal or non-criminal?

9.14 The Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (*Guide to Framing Offences*), drawing on *Principled Regulation*, suggests that the following factors should be considered in deciding whether a criminal or non-criminal penalty should be used:

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3 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.10].

4 For example, civil cases must be proven 'on the balance of probabilities', which is a lower standard than required in criminal cases where offences must be proven 'beyond reasonable doubt'.

5 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.70].

6 Ibid, Ch 12.

- the nature of the conduct to be deterred, and the circumstances surrounding the proposed provision;
- the place in which the proposed provision fits into the overall legislative scheme;
- the harm caused by the conduct;
- whether the conduct so seriously contravenes fundamental values as to be harmful to society;
- the appropriateness of the use of criminal enforcement powers in investigating the conduct;
- the appropriateness of the use of criminal law for dealing with the conduct;
- the regulation of similar conduct in the proposed legislative scheme and other Commonwealth legislation;
- the effectiveness of existing provisions, if any, in deterring the conduct; and
- the level and type of penalties that will provide appropriate deterrence.[7]

9.15 The *Guide to Framing Offences* considers that 'perhaps the most important factor' in deciding whether a sanction should be criminal or non-criminal is the effect of a criminal conviction.[8] It suggests that civil penalties may be more appropriate than criminal sanctions where there is no 'serious moral culpability'; where the maximum civil penalty justifies the time and expense of court proceedings;[9] and where the conduct involves corporate wrongdoing.[10]

9.16 Other relevant considerations include the:

- potential for such offences to cover a broader range of conduct, because of the inquisitorial and non-judicial character of Royal Commissions;
- possibility that non-criminal pecuniary penalties may be as effective as criminal monetary fines in ensuring compliance;[11] and

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7 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 10–11.

8 Ibid, 10–11.

9 It suggests that the maximum civil penalty be at least $5,000: Ibid, 63.

10 Ibid, 63–64.

11 In the *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union*, however, Commissioner Costigan recommended strengthening the offences by introducing a term of imprisonment: F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* Interim Report No 4 (1982).

- fact that Royal Commissions do not administer justice, unlike courts, and are appointed temporarily in a political context, so that (for example) criticism of a particular Royal Commission is unlikely to impair confidence in Royal Commissions in general, or in the judicial system.[12]

9.17 These considerations are also relevant to the types of sanctions included in any legislation establishing other forms of public inquiries. Additionally, the specific subject-matter, constitution, procedures, and powers of other public inquiries should be considered in determining whether the conduct concerned deserves the serious consequences of criminal sanctions, including moral censure and the possibility of imprisonment.

Question 9–2 Is there a role for the use of civil or administrative penalties as sanctions for breaches of legislation establishing Royal Commissions or other public inquiries?

General principles of criminal liability

9.18 The offences in the *Royal Commissions Act* must be read alongside Chapter 2 of the *Criminal Code* (Cth), which contains general principles of criminal responsibility. Under the *Criminal Code*, criminal offences are considered to be made up of physical elements (prescribing the conduct, circumstances or results that are essential to the offence) and mental elements (prescribing the mental state of the defendant essential to the offence).[13]

9.19 Mental elements are called 'fault elements' in the *Criminal Code*. The three fault elements used in the offences in the *Royal Commissions Act* are: the intention to undertake an act or bring about a consequence;[14] knowledge of a circumstance or probable result;[15] and recklessness as to whether a substantial or foreseeable risk will eventuate.[16]

9.20 The offences in the *Royal Commissions Act* which concern a refusal or failure to comply with the requirements of a Royal Commission are all strict liability offences, which do not require proof of fault. For example, it is not necessary to prove that a person intended to disobey a summons to attend a Royal Commission for this offence to be made out. The offences concerning interference with evidence or witnesses in the Act all require a degree of fault. The offence of interfering with the work or authority of a Royal Commission requires the fault element of intention.

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12 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [778].
13 'Conduct' means an act, an omission or a state of affairs: *Criminal Code* (Cth) s 4.1(2).
14 Ibid s 5.2.
15 Ibid s 5.3.
16 Ibid s 5.4.

9.21 Excuses, exceptions or defences also may be raised by the defendant to deny criminal liability.[17] In addition to any other excuses, exceptions or defences that are mentioned below, there are some defences that apply as a result of the application of the *Criminal Code*. For strict liability offences, there are two defences: that the conduct was brought about by another person's conduct or by an event over which the person had no control; or that the person acted under a reasonable mistaken belief about the existence of facts, and if that belief had been correct, the offence would not have been committed.[18]

9.22 For the offences in the *Royal Commissions Act* that are not strict liability, all of the other defences in the *Criminal Code* apply. These include, relevantly: defences that the person lacks capacity to commit an offence (because of their age, mental impairment, or involuntary intoxication); a defence of mistaken belief or ignorance about facts; and defences that the person acted under duress or in response to a sudden or extraordinary emergency.[19]

9.23 The offences in the *Royal Commissions Act* which concern a refusal or failure to comply with the requirements of a Royal Commission are also summary offences, which are tried by magistrates without a jury. The offences of interference with evidence or witnesses are indictable offences, tried before a judge or jury in a County, District or Supreme Court. All of these offences, however, also may be tried summarily if the court considers it appropriate and the parties consent.[20]

9.24 The *Criminal Code* also extends criminal responsibility to attempts, aiding and abetting, inciting, and conspiring to commit an offence.[21]

Offences of non-compliance

9.25 The *Royal Commissions Act* creates two important 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. There is a defence of reasonable excuse, and a defence that a document required to be produced was not relevant to the inquiry.[22]

9.26 Secondly, s 6 of the *Royal Commissions Act* makes it an offence for witnesses to refuse to be sworn, make an affirmation, or answer any question relevant to the inquiry

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17 Under the *Criminal Code* (Cth) s 13.3(3), the defendant must raise sufficient evidence to make any excuse, exception or defence a genuine issue. The prosecutor must prove all elements of the offence and disprove any excuses, exceptions or defences that are raised by the defendant.

18 Ibid ss 9.2 or 10.1.

19 Ibid div 7, ss 8.5, 9.1, 10.2–10.3.

20 *Crimes Act 1914* (Cth) s 4J.

21 Pt 2.4, div 11. The *Royal Commissions Act* was amended to take this into account by *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

22 These defences are discussed in Ch 8. As noted earlier, the defendant bears an evidential burden, in that the defendant must adduce sufficient evidence to make either defence a genuine issue.

put to the witness by a Commissioner, or by a person authorised to examine or cross-examine witnesses.

Strict liability

9.27 The offences in ss 3 and 6 of the *Royal Commissions Act* are strict liability offences. 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 an unjustified risk (ie recklessness).[23]

9.28 These offences were expressly provided to be strict liability offences when they were amended to be consistent with the principles of the *Criminal Code*. The Explanatory Memorandum to the amending Act, the *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001* (Cth), 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'.[24]

9.29 There are at least two concerns about the use of strict liability in relation to offences of non-compliance with the requirements of a Royal Commission. First, it is questionable whether an accidental or careless failure to comply with the requirements of a summons or written notice is morally culpable enough to justify the imposition of criminal sanctions. In its report on contempt, the ALRC recommended that the offences require that there be either an intention not to comply, or no reasonable attempt to comply. It suggested that punitive sanctions only be imposed where there was: an intention to disobey; knowledge that the act or omission constituted a breach of the summons or written notice; or reckless indifference to the issue.[25]

9.30 In May 2008, the New Zealand Law Commission (NZLC) released a report concerning inquiries.[26] The NZLC considered offences similar to ss 3 and 6 of the *Royal Commissions Act*, and recommended that, for a sanction to apply, the acts of non-compliance should have to be committed 'intentionally'.[27] This recommendation has been incorporated into in the Inquiries Bill 2008 (NZ),[28] which is now before the New Zealand Parliament.

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23 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 24.

24 Explanatory Memorandum, Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 (Cth).

25 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [522]–[526], [785].

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

27 Ibid, Recommendation 40.

28 Inquiries Bill 2008 (NZ) cl 30(b).

9.31 Secondly, it is questionable whether the offences in ss 3 and 6 of the *Royal Commissions Act* are appropriately framed as strict liability offences. In particular, they do not meet two criteria in the *Guide to Framing Offences* for the appropriateness of strict liability—that the offence is not punishable by imprisonment, and that the person is put on notice of the consequences of non-compliance.[29]

9.32 There is currently no requirement in the *Royal Commissions Act* that there should be notice of the consequences of non-compliance, although an element of notice may be imported when a person is 'required' to answer a relevant question.[30] It would be preferable to introduce a requirement that a notice be provided explaining the consequences of non-compliance, as some overseas jurisdictions do.[31] It also may be desirable to include more details in the summons or written notice about how and when a person should comply with a notice, as is recommended in the *Guide to Framing Offences*.[32]

9.33 On the other hand, there may be good reasons not to require fault in these particular offences. It is notable that no Australian jurisdiction currently requires any fault element for similar offences. It may be that the defence of reasonable excuse is sufficiently broad to protect defendants from any unfairness. It also may be that the offence in relation to refusals to be sworn or answer relevant questions implicitly requires some intent since it requires the defendant to refuse, rather than fail, to do the act required.

Comparable jurisdictions

9.34 In all Australian states or territories, as well as in comparable overseas jurisdictions such as the United Kingdom, Canada, and New Zealand, similar sanctions are provided for failing to attend or give evidence, and refusing to be sworn or answer relevant questions.

9.35 As with the federal legislation, the laws in Australian states or territories provide exceptions or defences of reasonable excuse and relevance. These are discussed in Chapter 8. The Inquiries Bill 2008 (NZ), however, adds a further defence where:

> 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.[33]

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29 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 25.

30 *Hammond v Aboudi* (2005) 31 WAR 533, [45].

31 *Inquiries Act 2005* (UK) s 21(3); *Commissions of Investigation Act 2004* (Ireland) s 13.

32 These details include the right to be accompanied by a third party, how the information or documents are to be provided, and a reasonable period for compliance: Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 97–98.

33 Inquiries Bill 2008 (NZ) cl 30(2)(c).

Question 9–3 Should any changes be made to the offences concerning non-compliance with the requirements of a Royal Commission? For example, should:

(a) these continue to be strict liability offences;

(b) any defences be added, removed or modified; or

(c) there be a requirement that the defendant be given notice of the consequences of non-compliance?

Unauthorised publications

9.36 Section 6D(3) of the *Royal Commissions Act* empowers a Commission to direct that certain material before it 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, or a description of any thing; and any information identifying witnesses.[34]

9.37 Section 6D(4) makes it a summary offence to make 'any publication in contravention' of any such direction. There are no defences specified, apart from those generally available under the *Criminal Code*, discussed earlier in this chapter.[35]

9.38 The power to prohibit or restrict the publication of material is also commonly conferred on courts. While in both courts and Royal Commissions public and transparent proceedings are generally desirable,[36] this power may be exercised to protect countervailing interests, such as the privacy and security of witnesses, or to prevent damage to important public interests, such as national security.[37]

9.39 There are differences between Royal Commissions and courts, however, which affect the exercise of the power to prohibit or restrict the publication of material. On the one hand, public inquiries may be more dependent upon publicity to instil public confidence in their work, since they cannot depend on the independence of the judiciary or the prestige of the courts.

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34 Section 6D(3) applies only to evidence once it has been given or produced: *McDonald v Brott* [1989] VR 177 .

35 These include, most relevantly, defences that the person lacked the capacity to commit an offence, a defence of mistaken belief or ignorance about facts; and defences of duress or sudden or extraordinary emergency.

36 This is discussed in detail in Ch 8.

37 National security and the powers of Royal Commissions are discussed in Ch 7.

9.40 On the other hand, there may be a greater need to restrict or prohibit publication in certain circumstances. For example, since the role of a Royal Commission is to investigate issue or events, there may be occasions where publication of evidence could hinder its ongoing investigation of allegations arising from that evidence, or where witnesses would be reluctant to give evidence in public. The wide-ranging nature and public profile of Royal Commissions mean that concerns about privacy, security and the national interest may arise more frequently.

9.41 Section 6D(3) of the *Royal Commissions Act*, however, does not refer to any of these justifications for the restriction or publication of the Act. Instead, it leaves the power to prohibit or restrict entirely within the discretion of the Royal Commission. In contrast, s 50 of the *Federal Court of Australia Act 1976* (Cth), which confers a similar power on the Federal Court, requires that an order prohibiting or restricting publication must appear to 'be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth'.

9.42 A more comprehensive approach is taken in the Inquiries Bill 2008 (NZ) that resulted from the NZLC's recent report on public inquiries. The Bill specifies that the inquiry must consider a number of matters, such as: the risk of prejudice to public confidence; the extent of prejudice to the security, defence or economic interests of New Zealand; the privacy of an individual; and any interference with the administration of justice.

Disclosures by Commissioners or staff

9.43 Another issue is whether there should be a specific provision prohibiting disclosures of information obtained by the Royal Commission, its staff or counsel and solicitors assisting the inquiry, except for the purposes of conducting the inquiry or for purposes authorised under the *Royal Commissions Act*. Such conduct will usually fall within the general provision prohibiting disclosures by 'Commonwealth officers' in s 70 of the *Crimes Act 1914* (Cth).[38] 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*.[39]

9.44 Royal Commissions have broad powers to compel the production of material, including material that would be protected from disclosure or inadmissible in courts. Royal Commissions, particularly of the investigatory kind, are likely to obtain highly sensitive personal information. Royal Commissions also tend to attract widespread publicity and interest, and the resulting media coverage may have a significant impact

38 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.

39 Australian Law Reform Commission, *Review of Secrecy Laws*, IP 34 (2008). See the website of the Australian Law Reform Commission: <http://www.alrc.gov.au>.

upon individuals being investigated, who are not yet the subject of any criminal charges.

9.45 In these circumstances, it may be appropriate to prohibit the disclosure of information obtained through, or under the threat of, the exercise of coercive powers by Royal Commissions.

9.46 For example, ACT laws provide that a Commissioner, the staff, assisting lawyers, and other employees with access to information:

> must not, either directly or indirectly, except in the exercise of a function under this Act—
>
> (a) make a record of, or divulge or communicate to any person, any information acquired by the firstmentioned person by virtue of that person's office or employment under this Act; or
>
> (b) make use of any such information; or
>
> (c) produce to any person, or permit any person to have access to, a document provided under this Act.[40]

Question 9–4 Should any changes be made to s 6D(4) of the *Royal Commissions Act*, which prohibits publication of information in contravention of a direction of a Royal Commission? For example, should:

(a) Royal Commissions be required to consider certain factors enumerated in the *Royal Commissions Act* before issuing directions not to publish;

(b) the categories of material that a Royal Commission may direct not to be published be narrowed or expanded; or

(c) the offences extend to unauthorised disclosures by Commissioners or Commission staff?

Interference with evidence

9.47 Section 6H of the *Royal Commissions Act* makes it an offence to intentionally give evidence to a Commission that the person knows to be false or misleading in respect of a material matter. There are no statutory defences.

9.48 Such conduct also may be punishable under general criminal offences. Section 35 of the *Crimes Act* makes it an offence to give false testimony in a 'judicial

40 *Royal Commissions Act 1991* (ACT) s 20(2); *Inquiries Act 1991* (ACT) s 17. See also *Royal Commission (Police Service) Act 1994* (NSW) s 30; *Crimes Act 1961* (NZ) s 105A.

proceeding', which includes the proceedings of Royal Commissions. Section 137.1 of the *Criminal Code* creates an offence of knowingly providing false or misleading information to a person exercising powers or performing functions under, or in connection with, a law of the Commonwealth.[41]

9.49 There is no offence in the *Royal Commissions Act* concerning the fabrication of evidence or the use of such evidence. However, the general offence in s 36 of the *Crimes Act* applies to Royal Commissions, so that it is an offence for a person, with intent to mislead the Commission, intentionally to fabricate evidence, or make use of fabricated evidence.

9.50 Section 6K of the *Royal Commissions Act* makes it an offence to destroy or alter evidence, either by act or omission. The forms of alteration include: concealment; mutilation; destruction; or rendering the document or thing illegible, indecipherable or incapable of identification. The person must know or be reckless as to whether the document or thing is or may be required in evidence, or whether a person is required to produce the document or thing to the Commission.

9.51 Section 39 of the *Crimes Act* creates a similar offence. However, while the offence of giving false or misleading evidence in the *Royal Commissions Act* has similar fault elements to those in the *Crimes Act* and *Criminal Code*, this is not true of the similar offences of destroying evidence in the *Royal Commissions Act* and *Crimes Act.* The offence in the *Crimes Act* requires that the person know (rather than merely be reckless as to whether) that the document or thing is or may be required in evidence. Further, the conduct must be done with the intention of preventing the altered document or thing from being used in evidence.[42]

9.52 The defences set out in Chapter 2 of the *Criminal Code*, discussed above, apply to these offences.

9.53 The ALRC is interested in hearing views about the appropriateness of the current fault elements, and in particular on the differences between the fault elements in the offences in the *Royal Commissions Act* and the *Crimes Act* relating to the destruction of documents.

Interference with witnesses

9.54 The *Royal Commissions Act* creates the following offences prohibiting interference with witnesses:

- preventing witnesses from attending or producing required evidence;[43]

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41 In addition, this offence requires that reasonable steps be taken to inform the defendant of the existence of the offence.

42 The offence in s 39 of the *Crimes Act* does not include concealment or mutilation.

43 *Royal Commissions Act 1902* (Cth) s 6L.

- bribing witnesses, or receiving bribes, to affect testimony or evidence;[44]
- practising any fraud or deceit, or making false representations, to witnesses with intent to affect their testimony or production of evidence;[45]
- inflicting injury or disadvantage on witnesses for or on account of their attendance or evidence;[46] and
- dismissing or otherwise prejudicing the employment of witnesses, for or on account of their attendance or evidence.[47]

9.55 There are similar offences in the *Crimes Act*. Section 36A forbids the following actions with respect to witnesses:

- threats, intimidation or restraint;
- using violence or inflicting an injury;
- causing or procuring violence, damage, loss or disadvantage; and
- causing or procuring their punishment.

9.56 Section 36A applies both before and after the person has appeared as a witness. The offences of bribery of witnesses, deceiving witnesses, and preventing witnesses from attending or producing evidence are also replicated in the *Crimes Act*.[48]

Drafting of offences

9.57 The offences prohibiting interference with witnesses in the *Royal Commissions Act* are drafted in an archaic style.[49] In *X v Australian Prudential Regulation Authority*, the High Court explored the problems caused by the wording of s 6M.[50] Kirby J in particular criticised the drafting as being ambiguous and convoluted, and noted 'the defects and ambiguities of the language of s 6M … were candidly, and properly, conceded by the Solicitor-General'.[51]

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44 Ibid s 6I.
45 Ibid s 6J.
46 Ibid s 6M.
47 Ibid 6N.
48 *Crimes Act 1914* (Cth) ss 37, 38, 40.
49 These were inserted by the *Royal Commissions Act 1912* (Cth).
50 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630.
51 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 658, 662.

Question 9–5 What changes, if any, should be made to the offences relating to interference with witnesses called or to be called to appear before a Royal Commission, or evidence that is or may be required before a Commission?

Offences relating to Commissioners or staff

9.58 The *Royal Commissions Act* does not contain any offences dealing with the bribery or corruption of Commissioners, staff or counsel assisting the Commission. This conduct is punishable under the *Criminal Code*, however, through offences prohibiting: the bribery of Commonwealth public officials;[52] the giving or receiving a corrupting benefit in respect of Commonwealth public officials;[53] and abuse of public office.[54]

9.59 The *Royal Commissions Act* has no offences prohibiting interference with Commissioners, staff, and counsel assisting. In contrast, the *Criminal Code* (ACT) specifically prohibits reprisals against Commissioners, counsel assisting, and interpreters.[55] Division 147 of the federal *Criminal Code*, however, does create offences prohibiting the harming of Commonwealth public officials. In *Contempt*, the ALRC recommended that the provision on reprisals applying to threats and intimidation of witnesses in the *Crimes Act* should be extended to include reprisals to other participants in judicial proceedings, such as judges and legal practitioners.[56] This also could be extended to protect Commissioners, staff, counsel assisting, and interpreters.

Range of offences

9.60 The ALRC is interested in hearing whether new offences should be included in the *Royal Commissions Act*, or existing offences in the *Royal Commissions Act* should be removed. In part, this depends on views about the appropriate powers of a Royal Commission. Powers of Royal Commissions and other public inquiries are discussed in Chapter 7.

9.61 In addition, it is relevant to consider whether:

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52 *Criminal Code* (Cth) s 141.1. 'Commonwealth public official' includes those exercising powers, or performing functions, conferred on the person by or under a law of the Commonwealth. However, this conduct must be performed 'dishonestly'.

53 Ibid s 142.1. This differs in that there is no need for intent to influence the official.

54 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.

55 *Criminal Code* (ACT) s 712.

56 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [200].

- any of these offences appear redundant, such as where the conduct would be punishable under a more general offence (for example, the dismissal of witnesses); or

- there are any gaps in the coverage of the offences.

Parallel offences

9.62 Another important consideration relates to 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 *Guide to Framing Offences* states that the offences in the *Criminal Code* or *Crimes Act* should not be replicated 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.[57]

9.63 In *Contempt*, the ALRC also recommended the repeal of statutory offences where the same ground was fully covered by the *Crimes Act*.[58] In the context of the *Royal Commissions Act*, this would result in the repeal of the offence of destroying evidence and all the offences prohibiting interference with witnesses. It also may result in the repeal of the offence of giving false or misleading evidence in the *Royal Commissions Act*—although, as noted above, there are some differences between this offence and the similar offences in the *Crimes Act* and *Criminal Code*.

9.64 It also may be desirable to move all or most of the offences in the *Royal Commissions Act* to the *Criminal Code*, as part of the federal policy of gradually consolidating federal offences into the *Criminal Code*.

9.65 Are there any offences that should be included in, or removed from, the *Royal Commissions Act*? For example, should offences in the *Royal Commissions Act* be removed where there are parallel offences in the general criminal legislation of the Commonwealth? Should the legislation establishing public inquiries other than Royal Commissions contain similar offences?

Interference with a Royal Commission's work or authority

9.66 Conduct interfering with the work or authority of a Royal Commission is prohibited under s 6O(1) of the *Royal Commissions Act*, which provides:

> 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

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57 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 16.

58 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987) [773].

> Royal Commission, or is in any matter guilty of any intentionally contempt of a Royal Commission and shall be guilty of an offence.

9.67 Section 6O(2) provides that if the President or Chair is a judge of a superior court:

> 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,[59] except that any punishment inflicted shall not exceed the punishment provided by subsection (1) of this section.

9.68 Although the provision creates an offence, it relies on the common law doctrine of contempt both to define the scope of the prohibited conduct, and to punish it if the Royal Commission is chaired by a judge. The common law doctrines of contempt apply to Royal Commissions or other public inquiries only if they are applied by statute, since Royal Commissions or other public inquiries do not exercise judicial power.[60]

9.69 The three most important features of the common law doctrines of contempt are:

- *Unique procedure*: If a contempt is committed during a hearing, the presiding judge or magistrate determines liability and punishment without any formal initiating process;
- *Unlimited sentencing power*: Where contempt proceedings are heard by a superior court, the law places no limits on any prison sentence or fine that may be imposed, while for criminal offences a maximum penalty is specified; and
- *No general requirement of guilty intent*: In contrast to the criminal law, there is no presumption against the imposition of liability (absent any contrary statutory indication) unless the person acted with guilty intent.[61] However, s 6O of the *Royal Commissions Act* covers only 'intentional' contempt.

Should contempt apply to Royal Commissions?

9.70 The rationale of the common law doctrines of contempt is to protect the administration of justice. As discussed earlier in this chapter, Royal Commissions are different from courts in a number of ways. In particular, Royal Commissions investigate matters rather than administer justice. As Dean J observed in the Supreme Court of Victoria:

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59 'Contempt in the face of the court' generally comprises 'the unlawful interruption, disruption or obstruction of court proceedings': N Lowe and G Borrie (eds), *Borrie and Lowe's Law of Contempt* (2nd ed, 1983), 9.

60 *Lockwood v Commonwealth* (1954) 90 CLR 177.

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

> 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 …[62]

9.71 The appropriateness of the use of contempt was considered in the ALRC's report *Contempt*, and more recently by the NZLC in its report on inquiries. The ALRC recommended that specific statutory offences be substituted for the contempt provisions.[63] The NZLC also recommended that contempt should not be used for inquiries.[64] The recent *Inquiries Act 2005* (UK) also uses specific offences instead of contempt.

9.72 As the NZLC observed, the contempt procedure may be considered to have advantages in coercing compliance, since the sanction may be applied immediately and for an indeterminate period, unlike prosecutions for criminal offences.[65] The NZLC noted, however, that contempt of court was recognised as a 'very severe mechanism, to be exercised only as a last resort'.[66] The NZLC considered that the use of contempt was undesirable because its unique procedure and the power to impose unlimited sentences posed a greater risk of injustice.[67]

9.73 As the quotation above from Dean J also indicates, transplanting concepts specific to courts creates difficulties as these concepts may not be readily applicable in the inquisitorial and political context of Royal Commissions.[68]

Improper behaviour

9.74 The question of whether contempt should apply to Royal Commissions is a separate question to that of whether the conduct prohibited by s 6O(1) of the *Royal Commissions Act* should be punished by the law at all. However, if this conduct should not be punished by the law, it is unnecessary to decide whether the conduct should be punished in the form of contempt or in the form of criminal offences.

9.75 Most of the conduct specifically prohibited in s 6O(1) concerns improper behaviour at hearings, such as disturbing or interrupting its proceedings.[69] In *Contempt*, the ALRC considered several factors when considering whether Royal Commissions should have powers to punish for this kind of conduct:

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62 *R v Arrowsmith* [1950] VLR 78, 85-86.
63 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Rec 113.
64 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [8.24].
65 Ibid, [8.21].
66 Ibid, [8.22].
67 Ibid, [8.22].
68 See also Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [755].
69 The person may also commit an offence of trespass on Commonwealth premises by behaving in an offensive or disorderly manner: *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 12(2).

- the necessity of providing a mechanism to protect against disruption of proceedings applies to Royal Commissions as well as courts;

- the proceedings of Royal Commissions often are less formal and are not necessarily conducted in the same location, so provisions designed to maintain the formality and structure of a trial may be inappropriate;

- a greater degree of informality may be permissible since Royal Commissions make recommendations, not binding decisions; and

- Royal Commissions have a distinctly political role and can expect considerable controversy and dissension.[70]

9.76 The ALRC recommended creating an offence of intentionally causing substantial disruption.[71] It recommended that the offence provision should include an intent to cause serious disruption; and that it should extend to behaviour outside the premises which did disrupt the hearing.[72]

9.77 The ALRC recommended that there should be no offence in relation to insulting and disrespectful behaviour. In its view:

> 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.[73]

9.78 The ALRC suggested that it may be preferable to deal with such conduct in other ways, such as by adjourning the proceedings or hearing evidence in private.[74] In particular, the ALRC also considered whether a power of expulsion should be conferred on Royal Commissions. No such power currently exists in the *Royal Commissions Act.* In the *Final Report of the Royal Commission into the Building and Construction Industry*, Commissioner Cole recommended that the Act be amended to confer this power on Royal Commissioners.[75]

9.79 The ALRC also recommended that a limited power of expulsion should be conferred on Royal Commissioners, exercisable when they believe, on reasonable grounds, that the person would otherwise genuinely disrupt the proceedings. Where the person was subject to findings by the Royal Commission, the person could be removed only if the hearing could fairly continue in their absence, and steps should be taken to

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70 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [759].
71 Ibid, [762]–[763].
72 Ibid, [762]–[763].
73 Ibid, [764].
74 Ibid, [766].
75 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [91].

keep that person aware of what is occurring in the hearing. The expulsion should last no longer than is necessary to ensure that the hearing can proceed without disruption. The ALRC recommended that the power of expulsion should be subject to administrative review by the Federal Court or the Administrative Appeals Tribunal.[76]

Use of false and defamatory words, and disparagement

9.80 Section 6O also specifically creates an offence of using false and defamatory words, in writing or speech, in relation to a Royal Commission.[77] In Australia, only the inquiries legislation in Queensland and South Australia includes a similar provision.[78]

9.81 This section raises concerns about whether it may unduly restrict freedom of expression.[79] For example, in one case a trade unionist was convicted when he attacked the decision to establish a Royal Commission to inquire into the activities of a building and construction union as an attack on unions and their members. The Federal Court considered such an attack amounted to an attack upon the Royal Commission itself.[80]

9.82 The rationale for this type of contempt, in relation to courts, is that public faith in the administration of justice would be undermined if the respect and dignity of courts and their officers are not maintained.[81] In *Contempt*, the ALRC considered whether this rationale applied equally in relation to Royal Commissions.[82]

9.83 The ALRC noted that stakeholders were divided on this issue. Some submissions strongly urged that Royal Commissions should not be protected from public debate, given the political context in which they operate. On the other hand, others submitted that some kind of remedial action seemed justified when imputations were made against the integrity of a Royal Commissioner.[83]

9.84 The ALRC concluded that the very different functions of a Royal Commissioner, and the political nature of the appointment, made it unlikely that an attack on a particular Royal Commission would affect respect for Royal Commissions as a whole. The ALRC also considered that the objects of Royal Commissions could not be divorced from their political contexts, and that the appointment and membership

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76 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987) [768].
77 Disparaging the Royal Commission may also amount to an offence similar to scandalising the court as an 'intentional' contempt: *R v Arrowsmith* [1950] VLR 78.
78 *Commissions of Inquiry Act 1950* (Qld) s 9(2)(d); *Royal Commissions Act 1917* (SA) s 11.
79 Freedom of expression is discussed below in the context of residual contempt.
80 *R v O'Dea* (1983) 10 A Crim R 240.
81 N Lowe and G Borrie (eds), *Borrie and Lowe's Law of Contempt* (2nd ed, 1983), 226.
82 The ALRC also recommended that the scope of the conduct punished by this form of contempt in relation to courts be curtailed: Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Recs 56–57.
83 Ibid, [778].

of Royal Commissions are political decisions which should not be removed from public debate.[84]

Non-compliance

9.85 In some Australian jurisdictions, failing to attend or produce evidence, or refusing to be sworn or answer relevant questions, are treated as contempt.[85] In some jurisdictions, this conduct may also constitute an offence, although the legislation provides that the conduct only may be punished as either an offence or a contempt.[86]

9.86 The ALRC is interested in stakeholder views on whether the use of contempt is appropriate or desirable in punishing these types of conduct.[87] Some may consider that contempt would be a more effective and timely method of securing compliance. For example, in *Wood v Galea*, 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'.[88]

9.87 The *Guide to Framing Offences* states that orders of contempt to enforce compliance with notices should be used only 'where there is a strong incentive to withhold information because releasing information may expose a person to a large penalty for their substantive misconduct'.[89] This may not apply to Royal Commissions, because of the broad range of material a Royal Commission may require, the wide-ranging nature of its investigation, and the protection of witnesses against direct use of any incriminating information given in evidence before a Royal Commission in subsequent civil or criminal proceedings.[90]

Obstruction and delay

9.88 Obstruction and delay of proceedings also may amount to contempt. Unlike some jurisdictions,[91] there is no specific offence of obstruction and delay in the *Royal Commissions Act*, although such conduct would be covered by the general contempt provision. This conduct also would constitute an offence under s 149.1 of the *Criminal Code*.

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84 Ibid, [778]. 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.

85 *Royal Commissions Act 1923* (NSW); *Commissions of Inquiry Act 1950* (Qld), s 9; *Royal Commissions Act 1968* (WA) ss 13–15A; *Commissions of Inquiry Act 1995* (Tas) ss 27–28.

86 *Royal Commissions Act 1923* (NSW) s 18D; *Commissions of Inquiry Act 1950* (Qld) s 25(3); *Royal Commissions Act 1968* (WA) s 15E.

87 A statutory provision would be required to protect against double punishment, as the general statutory provision would not apply to contempt: Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 100.

88 *Wood v Galea* (1995) 79 A Crim R 567, 573.

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

90 This is discussed in Ch 8.

91 Queensland and the ACT make this a contempt and an offence respectively.

9.89 The Inquiries Bill 2008 (NZ) specifically empowers an inquiry to award costs where it is satisfied the person has unduly lengthened or obstructed the inquiry or added undue cost.[92]

Residual contempt

9.90 Section 6O also captures any other kind of 'intentional contempt'. The reference to intention is somewhat unclear.[93] Four states have similar provisions that equate the powers of contempt of a Royal Commission to that of a court.[94] New South Wales, however, restricts this to Royal Commissions chaired or constituted by a superior court judge, where the letters patent specify these additional powers apply.[95]

Need for residual contempt

9.91 As was noted in *Contempt*, the primary argument against a residual contempt provision is its breadth. Conduct may be punished even though it does not fall within specifically prohibited activity.[96] Further, as discussed in Chapter 7, Royal Commissions have at their disposal a range of coercive powers to ensure that they can carry out their investigations within the parameters of their terms of reference. The question arises, therefore, whether the residual contempt power is necessary.

9.92 Professor Enid Campbell considered it preferable that the *Royal Commissions Act* 'set out exhaustively the acts and omissions punishable under the Act'.[97] On the other hand, Leonard Hallett considered such a residual clause necessary because 'it is not possible to envisage all the actions which might prejudice an inquiry', and it would not be unduly unfair to defendants since it would be used rarely.[98]

Freedom of expression

9.93 An argument also can be made that s 6O of the *Royal Commissions Act* has an unwarranted impact on freedom of expression. The ALRC has considered freedom of expression in two recent reports.[99] While freedom of expression is not protected expressly in the *Australian Constitution*, the High Court has established that the

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92 Inquiries Bill 2008 (NZ), cl 29. This issue is also discussed in Ch 6: see Question 6–9.

93 In *Bell v Stewart* (1920) 28 CLR 419, 427, Isaacs and Rich JJ took the view that this required actual intention to prejudice the administration of justice in relation to a similar provision in the *Conciliation and Arbitration Act 1904* (Cth).

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

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

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

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

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

99 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), Chs 5, 7; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), Ch 42.

Constitution must be read as impliedly protecting freedom of political communication.[100]

9.94 Freedom of expression also is expressly recognised by Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[101] which provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

9.95 Section 6O of the *Royal Commissions Act* may affect freedom of expression by 'gagging public comment on or discussion of the matters into which the Commission is directed to inquire and report'.[102] Arguably, it also has the potential to limit the role the media can play in informing the public on matters of public importance and interest that arise during the course of, or in connection with, a Royal Commission.[103] The ALRC, therefore, is interested in stakeholder views on this issue.

Legal uncertainty

9.96 It is uncertain whether an act that would amount to a specific offence under the *Royal Commissions Act*, such as a refusal to answer questions, also would be punishable as an intentional contempt under s 6O.[104]

9.97 Campbell considered that s 6O could be used to punish behaviour that would also constitute offences under the *Royal Commissions Act*.[105] This seems probable, as the legislation of other jurisdictions contemplates that conduct may amount to either a contempt or an offence.[106] As a stakeholder in the ALRC's 1980s contempt inquiry observed, this meant those dealing with Royal Commissions did not have a clear idea

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100 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

101 This was ratified by Australia on 13 August 1980. The ALRC is required by its enabling statute to ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with the ICCPR: *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

102 E Campbell, *Contempt of Royal Commissions* (1984), 42.

103 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [756]. Certain uses of the law of contempt have been held to violate the right to freedom of speech in other jurisdictions: see, eg, *Sunday Times v United Kingdom* (1979–1980) 2 EHRR 245.

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

105 E Campbell, *Contempt of Royal Commissions* (1984), 30–31.

106 *Royal Commissions Act 1923* (NSW) s 18D; *Royal Commissions Act 1968* (WA) s 15E.

of what behaviour was unacceptable. It also was unhelpful to members without legal training.[107]

Commission's power to punish

9.98 Perhaps most importantly, the procedure in s 6O(2) allows a Commissioner to punish an offender directly for contempt. There are several problems with this provision.

9.99 The first and most important problem is that there is a strong argument that s 6O(2) is unconstitutional in that it offends against the separation of powers entrenched in Chapter III of the *Australian Constitution*. The constitutional issue was succinctly stated by Professor 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.[108]

9.100 Section 71 states explicitly that the judicial power of the Commonwealth shall be vested in various courts. The power to punish for contempt, as was noted in *Attorney-General for Australia v The Queen*,[109] is an indicia of judicial power and the existence of a 'court' within the meaning of s 71.

9.101 Even if the provision is constitutional, a second issue is whether such a power is desirable. Although the constitutional issue does not arise in relation to Australian states,[110] only South Australian and Queensland legislation confers powers to punish directly upon Commissioners, and these powers are more limited.[111]

9.102 In most Australian jurisdictions, Royal Commissions certify the facts of the contempt to the Supreme Court, which examines the evidence and exercises its inherent powers to punish for contempt of court.[112] In NSW, this procedure is restricted to Royal Commissions chaired by judges,[113] while in Queensland any Commissioner can elect to use the procedure.[114]

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

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

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

110 Only the *Australian Constitution* exclusively vests judicial power in the courts, so there is no equivalent constitutional doctrine of separation of powers in the states or territories.

111 *Royal Commissions Act 1917* (SA) s 11(1) limits the power to punish to improper behaviour, non-compliance and false and defamatory writing and speech. *Commissions of Inquiry Act 1950* (Qld) s 10(2) allows summary punishment by non-judicial Commissioners with a maximum penalty of two penalty units.

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

113 Ibid s 15. It also applies where the Royal Commission is chaired by a lawyer of at least seven years' standing.

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

9.103 The power of the Commission to punish may also violate Article 14 of the 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.

9.104 As noted in Chapter 3, concerns have been expressed that s 6O(2) empowers a Royal Commissioner to 'act at once as informant, prosecutor and judge'.[115] If it is the Commissioner who determines the guilt of person charged with contempt, as provided for in s 6O(2), 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.[116]

9.105 Finally, the ALRC noted in *Contempt* that a practical difficulty arises when a Royal Commission expires before the sentence of imprisonment imposed for contempt of the Royal Commission ends. It is clearly preferable that the body that instigates the contempt proceedings—or actually convicts the offender in the case of s 6O(2)—is in existence and approachable while the offender is serving a sentence.[117]

9.106 In light of these difficulties, the ALRC in *Contempt* recommended against conferring a summary power of punishment on Royal Commissions. Instead, the ALRC recommended that these be made indictable federal offences triable summarily in the appropriate state or territory court.[118]

9.107 While the ALRC remains inclined to the view that, at a minimum, s 6O(2) should be amended to provide that the sanction of contempt should be imposed by a competent court, rather than by the Royal Commission itself, it is interested in stakeholder views on this issue.

Question 9–6 Should a person be subject to proceedings for contempt of a Royal Commission or other public inquiry? If so, what are the appropriate procedures?

Question 9–7 Should the types of behaviour currently covered by s 6O(1) of the *Royal Commissions Act* constitute an offence under legislation establishing a Royal Commission or other public inquiry?

115 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 55.

116 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.

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

118 Ibid, Rec 122.

Penalties

9.108 The maximum penalties for the federal offences described in this chapter are specified in the legislation. The two main forms of penalties are monetary penalties or a term of imprisonment. Maximum penalties indicate to courts how seriously a contravention is viewed, while allowing courts discretion to tailor the sentence to the circumstances of the offence.[119] The ALRC has considered penalties in detail in its recent report on sentencing *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006) (*Same Crime, Same Time*).[120]

9.109 The penalties in the *Royal Commissions Act* generally specify a maximum monetary penalty in dollars, and an alternative maximum term of imprisonment in years.

9.110 However, the penalties set out in the *Royal Commissions Act* must be read alongside the provisions in the *Crimes Act* dealing with penalties. These provisions alter the monetary value of the specified penalties,[121] set monetary penalties where none is stipulated in the legislation,[122] increase the maximum monetary penalties that may be imposed on bodies corporate,[123] and set alternative maximum penalties where offences are tried using a summary procedure.[124]

9.111 This means that a reader cannot immediately ascertain from the *Royal Commissions Act* the penalties for the offences created by the Act. For example, the *Royal Commissions Act* states that the offence of bribery of witness attracts a maximum penalty of imprisonment for five years. It is not apparent from this provision that there is a maximum monetary penalty, or that different maximum penalties apply to bodies corporate and those prosecuted summarily.

9.112 The *Royal Commissions Act* presently sets a maximum penalty of $1,100 or six months' imprisonment for failing to attend or give evidence, or refusing to be sworn or answer relevant questions. The offence of publishing contrary to a direction of the Royal Commission attracts a maximum penalty is $2,200 or 12 months' imprisonment.

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119 Courts have a range of other sentencing options under Part 1B of the *Crimes Act*, such dismissing charges, discharging an offender without proceeding to conviction upon a finding of guilt, releasing an offender after conviction on conditions, and wholly or partially suspending sentences of imprisonment.

120 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006).

121 Section 4AB of the *Crimes Act* increases the specified maximum monetary penalties by converting them into penalty units. The present result is to increase the monetary penalties by 10%.

122 Section 4B(2) states that, where no maximum monetary penalty is specified, the maximum term of imprisonment (in months) is multiplied by five to calculate the number of penalty units. Currently one penalty unit is equivalent to $110.

123 Section 4B(3) enables a court to impose a maximum monetary penalty five times that applicable to individuals on a body corporate, if it thinks it appropriate in all the circumstances.

124 Section 4J(3) provides a maximum penalty of 12 months or a fine of 60 penalty units (currently $6,600) if an offence is tried summarily and the legislation does not provide specifically for this.

9.113 The other penalties for offences in the *Royal Commissions Act* are set out in the table below.

Offence	Maximum penalty
False or misleading evidence	5 years, or $22,000; if tried summarily, 12 months or $2,200
Bribery of witness	5 years, or (applying s 4B(2) of the *Crimes Act*) $33,000
Fraud on witness	2 years, or (applying s 4B(2) of the *Crimes Act*) $13,200
Destroying documents or other things	2 years or $11,000; if tried summarily, 12 months or $2,200
Preventing witnesses from attending	1 year, or (applying s 4B(2) of the *Crimes Act*) $6,600
Injury to witness	1 year or $1,100
Dismissal by employers of witness	1 year or $1,100
Contempt	3 months or $200; if tried by a judge, unlimited sentencing powers

Setting penalties

9.114 The ALRC has considered the purposes of penalties in the context of regulation in *Principled Regulation*. The ALRC observed penalties generally serve one or more of the purposes of retribution, condemnation, specific or general deterrence, compensation, and protection.[125]

9.115 The ALRC noted that there are two competing theories of penalty setting, the 'just deserts' theory and the 'deterrence' theory. In the first theory, associated with criminal penalties, penalties are considered to express state censure. Under this approach, penalties should be proportional to the perceived seriousness of the offence. Seriousness is determined by two concepts, harm and culpability. Harm measures loss or damage, while culpability measures blameworthiness by factors such as intent and motive.[126]

9.116 The 'deterrence' approach, more prominent in the context of regulation, seeks to deter the prohibited conduct by ensuring the price of a contravention outweighs its benefits.[127]

125 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [25.1].
126 Ibid, [25.8].
127 Ibid, [25.9]–[25.13].

9.117 The ALRC has also considered the principles of sentencing in its recent report *Same Crime, Same Time*. The two most relevant principles are that of proportionality and consistency.

Proportionality

9.118 The principle of proportionality states that penalties should bear a reasonable or proportionate relationship to the objective seriousness of the offence. Two penalties in the *Royal Commissions Act* do not appear proportionate to the offence.

9.119 The offence of injuring witnesses, which attracts a maximum penalty of 12 months' imprisonment, expressly includes the use of violence in its definition. Offences involving violence normally attract heavier penalties because of the potential for harm to the victim as well as the moral blameworthiness attached to such conduct.

9.120 The maximum monetary penalty for contempt of a Royal Commission, $200, is extremely low.[128] In the *Final Report of the Royal Commission into the Building and Construction Industry*, Commissioner Cole recommended that this be raised to at least $5,000.[129]

9.121 The maximum term of imprisonment for contempt, three months, also may need revision because, as the *Guide to Framing Offences* suggests, terms below six months' imprisonment are unlikely to indicate that the offence is a serious one. If a longer term cannot be justified, a fine is likely to be more appropriate.[130] The ALRC has considered the question of the effectiveness of short sentences of imprisonment in its recent report on sentencing.[131]

9.122 There also are questions about whether the penalties in the *Royal Commissions Act* are in proportion to each other. For example, there is a maximum penalty of five years' imprisonment for the offence of giving false or misleading evidence, and a maximum penalty of two years' imprisonment for the offences of destroying evidence and deceiving witnesses.[132] However, destroying evidence and deceiving witnesses could cause as much harm as giving false or misleading evidence, and require a degree of premeditation that is not necessary in the offence of giving false or misleading evidence.

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128 The maximum penalty was set at £100 when the offence was introduced in the *Royal Commissions Act 1912* (Cth). It was converted into dollars by the *Statute Law Revision (Decimal Currency) Act 1966* (Cth), but has otherwise remained unchanged.

129 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), rec 1(g).

130 Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 42.

131 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 7.

132 The first two offences provide for a maximum of two years' imprisonment, while the last provides for five years.

Consistency of penalties

9.123 Perhaps the most significant problem raised by the current penalties is their lack of consistency with the principles governing penalties in federal criminal law, and between the federal penalties and those in comparable legislation in states or territories.

9.124 In particular, there is inconsistency between:

- the monetary penalties and the months of imprisonment, especially in relation to the ratio of five penalty units to one month of imprisonment enshrined in s 4AB(2) of the *Crimes Act*;

- the penalties in the *Royal Commissions Act* and penalties for equivalent offences in the *Crimes Act* or *Criminal Code*;[133]

- the hierarchy of penalties in the *Royal Commissions Act* and similar federal criminal legislation, such as the *Australian Crimes Commission Act 2002* (Cth);[134] and

- the Commonwealth penalties and those other Australian jurisdictions.

9.125 The penalties in the *Royal Commissions Act*, in general, are lower than in other Australian jurisdictions—an artefact of the age of the Act. This is especially problematic when Royal Commissions are established under both federal and state powers,[135] allowing the prosecutor to elect to prosecute under either the federal or state law.[136] While there always will be some variation between penalties in different jurisdictions, it is possible that a greater degree of consistency could be achieved between the jurisdictions.

9.126 The federal and state penalties vary most in relation to interferences with witnesses or evidence. This partly reflects the fact that many jurisdictions use offences in their general criminal legislation which apply to courts and, therefore, it may be appropriate to set lower penalties because of the differences between Royal Commissions and courts.

9.127 The considerations discussed above also will apply to penalties if new legislation is introduced establishing other forms of public inquiries. However, it may be that lesser penalties ought to apply to other public inquiries, depending upon matters such as the nature of the inquiry, its form, and the character of its membership.

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133 For example, in relation to destruction of evidence, and injury to witnesses.

134 This makes the penalties for non-compliance the same as those for giving false or misleading evidence. See also the penalties for destruction of evidence, and false or misleading evidence, in the *Australian Securities and Investments Commission Act 2001* (Cth).

135 This is discussed in detail in Ch 3.

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

Question 9–8 Should the penalties under the *Royal Commissions Act* be amended to:

(a) reflect more accurately the gravity of the offences? If so, which penalties should be increased or decreased;

(b) clarify the maximum penalty applicable;

(c) be consistent with the principles governing penalties and sentencing in federal criminal law; and

(d) be more consistent with the penalties in comparable state and territory legislation?

Question 9–9 What penalties, if any, should apply if new legislation is introduced establishing other forms of public inquiries?

Proceedings

9.128 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 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.

9.129 Section 13 of the *Crimes Act* enables any person to institute committal proceedings against a person in respect of an indictable federal offence, although a 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.[137] The Commonwealth Director of Public Prosecutions (DPP) may prosecute an indictable offence commenced by another person.[138] In contrast, some overseas jurisdictions provide that prosecutions for these offences can be instituted only with the consent of the DPP.[139]

9.130 In *Contempt*, the ALRC concluded that Royal Commissions should have the power to instigate proceedings themselves. The ALRC observed that any person could prosecute indictable offences through to the stage of committal, and summary offences

137 *Judiciary Act 1903* (Cth) s 69.

138 *Director of Public Prosecutions Act 1983* (Cth) s 9(3). This applies other than to those commenced by the Attorney-General or Special Prosecutor.

139 *Inquiries Act 2005* (UK) s 35(6); *Commissions of Investigation Act 2004* (Ireland) s 49.

through to verdict.[140] The NZLC, however, saw no reason to 'bypass the usual prosecution process' in New Zealand legislation establishing public inquiries.[141]

9.131 Another issue that arises is whether all the offences relating to interference with evidence or witnesses should remain indictable, although triable summarily. In particular, the provisions relating to injuries to witnesses, and dismissal of witnesses, prescribe a penalty of one year, but are indictable. This differs from the default provision in the *Crimes Act* which provides that offences punishable by imprisonment of 12 months or less are summary offences.[142]

Question 9–10 Are there any concerns about the ways in which proceedings for offences against the *Royal Commissions Act* may be instituted? For example, should the Attorney-General continue to have a role in the institution of proceedings, or should prosecutions only be instituted with the consent of the Commonwealth Director of Public Prosecutions? What rules, if any, should apply to the institution of proceedings for offences relating to other public inquiries?

Costs

9.132 Most federal offences are prosecuted in state and territory courts. Sections 68(1) and 79 of the *Judiciary Act 1903* (Cth) pick up and apply state and territory laws relating to costs to proceedings for federal offences in state and territory courts, unless the *Australian Constitution* or another federal law provides otherwise.

9.133 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 offence.

9.134 Section 8ZN of the *Taxation Administration Act 1953* (Cth) contains a similar provision. In *MacPherson v Commissioner of Taxation*,[143] the Court held that s 8ZN was directly inconsistent with a state provision dealing with costs, since the latter set out criteria to be satisfied before the making of a costs order and therefore fettered the discretion under s 8ZN. This inconsistency rendered the state provision invalid insofar

140 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [791].
141 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [8.40].
142 *Crimes Act 1914* (Cth) s 4H. The Australian Government Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 46, recommends that this dividing line apply unless it is demonstrated that it is inappropriate.
143 *Federal Commissioner of Taxation v McPherson* [2000] 1 Qd R 496.

as it purported to apply to an order for costs in a prosecution for a prescribed tax offence.[144]

9.135 Applying this reasoning, it appears that s 15 of the *Royal Commissions Act* will be the exclusive source of power and jurisdiction for a court to order costs in proceedings for offences against the Act (apart from committal proceedings for indictable offences against the Act) if the relevant state legislation restrains the discretion of the court to order costs in any way.

9.136 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.[145]

Question 9–11 Are there any concerns about the substance or operation of s 15 of the *Royal Commissions Act*, relating to costs of a proceeding for an offence against the Act? What rules, if any, should apply to the costs of a proceeding for an offence under legislation relating to other public inquiries?

144 Under s 109 of the *Australian Constitution.*

145 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).

Appendix 1. List of Abbreviations

ADF	Australian Defence Force
AFP	Australian Federal Police
AGD	Australian Government Attorney-General's Department
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
ALRC 107	Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007)
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIO	Australian Security Intelligence Organisation
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)
CDF	Chief of the Defence Force
CFMEU	Construction Forestry Mining Energy Union
Clarke inquiry	The Clarke Inquiry into the case of Dr Mohammed Haneef (2008)
Commissioner Cole	The Hon Terence Cole AO RDF QC

Costigan Royal Commission	Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984)
DAFF	Department of Agriculture, Fisheries and Forestry
DFAT	Department of Foreign Affairs and Trade
DPP	Director of Public Prosecutions
Guide to Framing Offences	Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007)
ICCPR	*International Covenant on Civil and Political Rights*
LRCI	Law Reform Commission of Ireland
NZLC	New Zealand Law Commission
Palmer inquiry	Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005)
Salmon Royal Commission	Royal Commission on Tribunals of Inquiry (1966)
Stewart Royal Commission	Royal Commission of Inquiry into Drug Trafficking (1983)
UK	United Kingdom