

## 6. Establishment

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### Introduction

6.1 In this chapter, the ALRC discusses the development and publication of an *Inquiries Handbook*. It then discusses when it is appropriate to establish a Royal Commission or Official Inquiry, and whether there should be greater guidance on drafting the terms of reference for either type of inquiry. The ALRC also considers

how both types of inquiry should be constituted, and whether there is scope for an expert advisor role within the recommended new statutory framework.

## **Inquiries Handbook**

6.2 Those involved in Royal Commissions and Official Inquiries, and members of the general public with an interest in a specific inquiry, may benefit from having access to information, in the form of a government publication, about matters relating to the establishment, conduct and administration of inquiries established under the recommended *Inquiries Act*. Such a publication could capture existing institutional knowledge, increase awareness of the Act, and contribute to the overall effectiveness and efficiency of inquiries established under the Act.

6.3 The New Zealand Department of Internal Affairs has published guidelines entitled *Setting Up and Running Commissions of Inquiry* (2001). The guidelines deal with matters such as the: establishment of inquiries; appointment of commissioners and staff; planning of an inquiry; procedural options available to an inquiry; and management of the budget, documentation, media and information technology. The guidelines do not prescribe how an inquiry should be conducted, but rather provide general information to those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public.

6.4 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75) the ALRC proposed that the Australian Government should develop and publish an *Inquiries Handbook*.<sup>1</sup> The ALRC made a number of proposals addressing the type of guidance that should be included in the *Inquiries Handbook*.<sup>2</sup> The matters covered were similar to those included in the New Zealand guidelines.

## **Submissions and consultations**

6.5 The majority of stakeholders who commented on this proposal expressed support for the development of an *Inquiries Handbook*.<sup>3</sup> Mr Graham Millar submitted that the *Inquiries Handbook* should address a range of issues covering the establishment, operation and closure of an inquiry. Millar was of the view that the *Inquiries Handbook* should provide practical guidance rather than be overly prescriptive. In his view, the Australian Government should have the necessary flexibility to cater for the wide range of matters that could be the subject of an inquiry.<sup>4</sup>

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1 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–4.

2 Ibid, Proposals 8–1, 8–2, 9–4, 12–3, 13–6, 15–2.

3 For example, see Liberty Victoria, *Submission RC 26*, 27 September 2009; Community and Public Sector Union, *Submission RC 25*, 22 September 2009; National Archives of Australia, *Submission RC 20*, 18 September 2009.

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

6.6 The Australian Collaboration submitted that the *Inquiries Handbook* should contain guidance regarding the different nature of inquiries that may be established under the *Inquiries Act*.<sup>5</sup>

6.7 In consultations, several stakeholders observed that the *Inquiries Handbook* would need to be regularly monitored and updated to remain useful.

### ALRC's view

6.8 The Australian Government should develop and publish an *Inquiries Handbook* containing guidance for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public on a range of matters relating to Royal Commissions and Official Inquiries. An *Inquiries Handbook* would be a useful way of ensuring that relevant institutional knowledge is readily available to those establishing, conducting and administering inquiries. It also would facilitate the communication of information about the conduct of an inquiry to inquiry participants and members of the public.

6.9 Specific recommendations regarding the content of the *Inquiries Handbook* are made in other sections of this Report.<sup>6</sup> In summary, the *Inquiries Handbook* should address matters such as: the establishment of inquiries; appointment of inquiry members; administration of inquiries; powers, protections and procedural aspects of inquiries; and the use and protection of national security information by inquiries.

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

6.11 In Chapter 8, the ALRC recommends that a single Australian Government department should be responsible for updating and monitoring the *Inquiries Handbook*.<sup>7</sup> In addition, the *Inquiries Handbook* should be easily accessible—for example, it could be published on the website of that department, or on the websites of individual Royal Commissions and Official Inquiries.

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

5 Australian Collaboration, *Submission RC 24*, 22 September 2009.

6 Recommendations 6–2, 6–6, 8–1, 8–2, 9–4, 12–3, 13–6, 15–5.

7 Recommendation 8–2.

- (a) establishment of inquiries;
- (b) appointment of inquiry members;
- (c) administration of inquiries;
- (d) powers, protections and procedural aspects of inquiries; and
- (e) use and protection of national security information by inquiries.

### **Factors for consideration before an inquiry is established**

6.12 As noted in Chapter 3, there is very little guidance in the *Royal Commissions Act 1902* (Cth) as to when a Royal Commission should be established. The Act provides that the Governor-General may establish a Royal Commission to consider ‘any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth’.<sup>8</sup> Outside of the Act, there is little publicly available guidance on when it may be appropriate to establish a Royal Commission or other type of executive inquiry.

6.13 The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission) suggested the introduction of a more principled approach to decisions to establish Royal Commissions.<sup>9</sup> It was noted in the report of that Royal Commission that not all ‘aberrant’ or unexplained conduct may warrant an executive inquiry. Instead, there should be a ‘complaint of substance’ or a ‘reasonable suspicion based on “articulable facts” of past, present or future criminal activities’.<sup>10</sup> This view reflected the fact that inquiries can have a profound effect on those who are involved with them—indeed, even the act of calling a person to appear before an inquiry may have a permanent negative impact on the reputation of that person.<sup>11</sup> The report also cautioned that, with the aim by trying to ascertain responsibility for illegal conduct, the attention of the executive may be ‘diverted’ from potential infringement of civil liberties.<sup>12</sup>

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

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

10 *Ibid.*

11 *Ibid.*, vol 2, 92–93, 98–100.

12 *Ibid.*, vol 2, 102.

6.14 Another issue for the executive to consider before establishing an inquiry is whether it may adversely affect future legal proceedings. For example, an inquiry may cause delay in commencing legal proceedings, and evidence gathered by an inquiry may be afforded certain protections from subsequent use.<sup>13</sup>

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

6.16 Legislation in other jurisdictions provides some guidance about whether a Royal Commission or similar inquiry should be established. Legislation in Tasmania enables the Governor to establish a Royal Commission if he or she is satisfied that it is both in the public interest and expedient to do so.<sup>14</sup> Legislation in the United Kingdom (UK) enables inquiries to be established into events that have caused, or may cause, ‘public concern’.<sup>15</sup> Currently, legislation in New Zealand sets out a list of matters which may be the subject of a public inquiry, including ‘any matter of public importance’.<sup>16</sup> If passed, the Inquiries Bill (before the New Zealand Parliament at the time of writing in October 2009) would enable inquiries to be established to consider ‘any matter of public importance’.<sup>17</sup>

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

- the likely consequences of not holding an inquiry;
- whether, if an inquiry were held, the likelihood that its recommendations would assist the development of improved policies; and

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13 These issues are discussed in Chs 14 and 17.

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

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

16 *Commissions of Inquiry Act 1908* (NZ) s 2.

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

- whether other mechanisms would be more appropriate (for example, criminal proceedings).<sup>18</sup>

6.18 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether legislation establishing public inquiries should provide further guidance about the circumstances in which such inquiries should be established, and what those circumstances should be.<sup>19</sup> In DP 75, the ALRC proposed that the *Inquiries Act* should provide that:

- a Royal Commission may be established if it is intended to inquire into a matter of substantial public importance; and
- an Official Inquiry may be established if it is intended to inquire into a matter of public importance.<sup>20</sup>

6.19 The ALRC also asked whether the Australian Government should be required to consider certain matters before establishing a Royal Commission or Official Inquiry. For example, it queried whether the proposed *Inquiries Act* should require the Australian Government to consider:

- whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives, or whether it would be more appropriate to achieve these objectives another way, for example, through inquiry by an existing body or through civil or criminal proceedings;
- whether the recommendations of a Royal Commission or Official Inquiry would facilitate government policy making; and
- whether powers are required and, if so, which powers, having regard to the subject matter and scope of the inquiry?<sup>21</sup>

### **Submissions and consultations**

6.20 With respect to the proposal that a Royal Commission must consider a matter of 'substantial public importance' and an Official Inquiry a matter of 'public importance', the Law Council of Australia (Law Council) noted the approach taken in the UK and submitted that legislation establishing public inquiries should include criteria to be

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

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

20 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–1.

21 *Ibid*, Question 6–1.

considered before inquiries are established.<sup>22</sup> Millar submitted that, generally, if an inquiry does not require coercive powers, it ‘does not need to be a Royal Commission’.<sup>23</sup>

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

6.22 The Community and Public Sector Union (CPSU) submitted that:

It is appropriate that the legislation clearly distinguish between the purpose for which a Royal Commission should be established and the purpose for which an Official Inquiry should be established. Such a provision should be easy to understand and will provide a simple way for the public to assess whether they believe the government has handled the issue subject to inquiry appropriately.

It is apposite that there be set criteria which is considered by the Australian Government prior to commencing a Royal Commission or Official Inquiry. Both of these measures will increase public awareness as to the purpose of Royal Commissions and Official Inquiries and the ends to which they should be directed. This has the potential to improve public understanding and therefore increase transparency. The independence of any form of public inquiry should be guaranteed by the legislation.<sup>24</sup>

6.23 On the other hand, a number of those with whom the ALRC consulted expressed concern that including legislative requirements of this nature would give rise to judicial review. The Australian Government Solicitor (AGS) submitted that

the introduction of legislative threshold requirements for different types of inquiry, namely, on the one hand, ‘a matter of substantial public importance’, and on the other, ‘a matter of public importance’, will bring with it the risk that challenges will be made on the basis that the requisite satisfaction to establish the inquiry has not been met. Thus, what should, essentially, be a political judgment, may be exposed to judicial scrutiny.<sup>25</sup>

6.24 Liberty Victoria supported the distinction between Royal Commissions and Official Inquiries, although it also questioned how and where those terms would be defined.<sup>26</sup> Similarly, Dr Ian Turnbull noted that:

Whilst the term ‘substantial’ is used frequently in legal writing and has been judicially considered often, should some attempt be made to further define ‘substantial public

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22 Law Council of Australia, *Submission RC 9*, 19 May 2009. See also Law Council of Australia, *Submission RC 30*, 2 October 2009.

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

24 Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

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

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

importance'? Is it more or less than 'public interest' (a term not well understood)? Or is 'public importance' equivalent to a policy issue of the Government at the time? Should it be stated just who is to make that determination?<sup>27</sup>

6.25 Turnbull agreed that the Australian Government should be required to consider matters such as whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives. He queried, however, whether a requirement to 'consider' such matters would require the Australian Government to apply the test.<sup>28</sup>

6.26 The Australian Commission for Law Enforcement Integrity submitted that its intrusive law enforcement and inquisitorial powers are matched to the difficulty of the issues being investigated. This principle may be useful in deciding what powers should be given to a Royal Commission or to an Official Inquiry.<sup>29</sup>

6.27 The Australian Intelligence Community (AIC) suggested additional criteria should be considered before the establishment of a Royal Commission or Official Inquiry.

The AIC further suggests that guidance/direction noting the availability of the IGIS [Inspector-General of Intelligence and Security] to examine events or issues involving discussion of national security-classified information could be included amongst the criteria to be considered in determining whether a Royal Commission or an Official Inquiry should be established and which powers should appropriately be afforded to such a body.<sup>30</sup>

### **ALRC's view**

6.28 As noted in Chapter 2, Royal Commissions and other public inquiries have important functions, such as determining what happened in a particular situation and providing a forum for public catharsis. The ALRC is mindful, however, that persons may be negatively affected by any involvement with a Royal Commission or Official Inquiry. Further, inquiries—and particularly Royal Commissions—may be very costly exercises. There should be some guidance, therefore, on when inquiries should be established. Such guidance is particularly necessary if the ALRC's recommendation for the introduction of a new form of statutory inquiry—the Official Inquiry—is accepted.

6.29 For a number of reasons, however, the ALRC has moved away from the test proposed in DP 75. First, the ALRC notes that key distinctions between the recommended two tiers of inquiry are the scope of the powers available, and the privileges enjoyed by persons appearing before an inquiry. In government deliberations before establishing an inquiry, therefore, these matters, and the degree of public

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27 I Turnbull, *Submission RC 22*, 21 September 2009.

28 *Ibid.*

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

30 Australian Intelligence Community, *Submission RC 28*, 28 September 2009.

importance associated with the subject matter of the inquiry, should be given equal weight. Secondly, the ALRC agrees with stakeholders that a statutory formulation of the type proposed in DP 75 may result in attempts to stall inquiries by commencing actions for judicial review. The ALRC notes this is even more likely if the test for establishing a Royal Commission or Official Inquiry is more detailed than that proposed in DP 75—in other words, if a statutory test also included a requirement to consider what powers and privileges are necessary in a potential inquiry.

6.30 While other options were not suggested in submissions or consultations, the ALRC has considered how else to address this issue. One option is for the *Inquiries Act* to include a statutory test, similar or more detailed to the one proposed in DP 75, and also allow a minister to issue a conclusive certificate that provides that a decision to establish an inquiry is not judicially reviewable. The ALRC queries the utility of including a non-justiciable test in the *Inquiries Act*. Moreover, a power to issue conclusive certificates is inconsistent with moves to enhance government openness, accountability and transparency. In 1995, the ALRC and Administrative Review Council noted such considerations in recommending a scaling back of the ministerial power to issue conclusive certificates in the context of freedom of information.<sup>31</sup> On 6 October 2009, the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) received royal assent. This Act removes the power of a minister to issue a conclusive certificate for all exemption provisions in the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth).<sup>32</sup> The ALRC does not see any compelling reason to introduce conclusive certificates in the public inquiries context.

6.31 Another option may be to include an objects clause or provision in the *Inquiries Act* that provides information about the jurisdiction and powers of Royal Commissions and Official Inquiries. The Office of the Parliamentary Counsel (OPC) describes objects provisions as follows:

Some objects provisions give a general understanding of the purpose of the legislation. ... Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.<sup>33</sup>

6.32 An objects provision, therefore, is a provision that guides the interpretation of the legislation in which it is contained. It is not intended to impose requirements additional to those set out in other provisions of the legislation. While the OPC may

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31 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 (1995), Rec 40A (ALRC), Rec 40B (ARC). See also Rec 41 (ALRC and ARC).

32 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) schs 1, 2. The Act also provides that existing conclusive certificates will be revoked if and when a new request for access to a document or record covered by a certificate is received. See also Explanatory Memorandum, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* (Cth).

33 Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients* (3rd ed, 2008), 33.

decide to include an objects provision in the recommended *Inquiries Act* for purposes of interpretation and clarification, in the ALRC's view it is not appropriate for the Act to contain an objects provision that effectively contains a threshold test for establishing different tiers of inquiry.

6.33 On balance, it is the ALRC's view that the matters the government should consider when deciding to establish an inquiry should be addressed in the *Inquiries Handbook*.<sup>34</sup> Such guidance should include:

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

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

- (a) the level of public importance—matters of substantial public importance being more appropriate for Royal Commissions and matters of public importance being more appropriate for Official Inquiries;
- (b) whether powers are required and, if so, which powers are appropriate, having regard to the subject matter and scope of the inquiry;
- (c) whether the recommendations of a Royal Commission or Official Inquiry will facilitate government policy making; and

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

### Establishing authority

6.34 As noted in Chapter 3, Royal Commissions with statutory powers are established by the Governor-General acting on the advice of the Federal Executive Council.<sup>35</sup> In light of the ALRC's recommendation that the *Royal Commissions Act* be amended to enable the establishment of Royal Commissions and Official Inquiries, and renamed the *Inquiries Act*, two specific issues arise. First, should the current arrangements in the *Royal Commissions Act* for establishing Royal Commissions continue under the recommended *Inquiries Act*? Secondly, who should establish Official Inquiries?

6.35 The issue of how different inquiries should be established was recently considered by the New Zealand Law Commission (NZLC). It recommended the enactment of a general Act that enabled the establishment of two tiers of inquiry—'public inquiries' and 'government inquiries'. In the NZLC's model, a principal distinguishing feature between these inquiries would be the way in which they are established. The NZLC intended public inquiries to have a similar stature and be established in the same way as inquiries established under the existing *Commissions of Inquiry Act 1908* (NZ)—that is, by the New Zealand Governor-General by Order in Council. On the other hand,

[g]overnment inquiries are designed to remove the need for non-statutory ministerial inquiries. They should be appointed by a Minister and should report directly to the Minister.<sup>36</sup>

6.36 In IP 35, the ALRC asked whether legislation establishing Royal Commissions and other public inquiries should address who should be able to establish such inquiries. It suggested that establishing authorities may include the Governor-General, the Cabinet, a Minister, or one or both Houses of Parliament.<sup>37</sup> In DP 75, the ALRC

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

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

37 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 5–3(a). See also G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 21–24.

proposed that the Governor-General should continue to establish Royal Commissions, and that ministers should establish Official Inquiries.<sup>38</sup>

### **Submissions and consultations**

#### 6.37 With respect to Royal Commissions, Millar submitted:

Royal Commissions are appointed by the Governor-General on the advice of the executive government. They are therefore 'creatures' of the executive government and, in practice, they result from Cabinet Decisions made by the Prime Minister and senior ministers. This long-standing practice seems to work well and, in the context of our system of government, I am not aware of any good reasons to depart from it.<sup>39</sup>

#### 6.38 The Law Council supported the existing arrangements for establishing Royal Commissions.

This requirement reflects the gravity of a matter of substantial public importance which necessitates the provision of a full suite of powers for the conduct of the inquiry.<sup>40</sup>

#### 6.39 The Law Council supported

the establishment of Official Inquiries with a more limited suite of powers by Ministers for matters of public importance. ... the Law Council considers that the ability of Ministers to establish statutory Official Inquiries should lead to greater use of such inquiries in appropriate cases. In particular, the Law Council hopes that the availability of Official Inquiries would lead to the establishment of such inquiries in situations similar to that of the cases of Dr Haneef and Cornelia Rau.<sup>41</sup>

#### 6.40 The AGS did not agree that a new statutory framework for inquiries was necessary. In this context, it suggested that the issue of who should establish a Royal Commission was a decision for government and should not be set out in legislation.<sup>42</sup> Further,

[e]ven if there was the ability for another type of inquiry to be established by direction of a Minister, we think it likely that before any such inquiry was established, the same deliberations of the Government as are involved in establishing a Royal Commission would end up being involved ... Further, we think there is likely to be some concern within government at the prospect that a Minister could, without recourse to Cabinet, establish an Official Inquiry (which, it is proposed, would enjoy some coercive powers) into matters which may involve another agency.<sup>43</sup>

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38 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–2.

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

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

41 *Ibid.*

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

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

6.41 With respect to whether Parliament should have a role in establishing inquiries, a suggestion was made in consultations that each Royal Commission could be established under the general *Royal Commissions Act* and a short enabling Act. There was limited support, however, for the Parliament to be involved in the establishment of individual inquiries. Stakeholders also noted that, as a practical issue, there may be resourcing issues for an inquiry not established by the executive arm of government.

### **ALRC's view**

6.42 To ensure openness, transparency and accountability, the body establishing an inquiry should be set out in the *Inquiries Act*. The Act should provide that the Governor-General should establish Royal Commissions and ministers should establish Official Inquiries. The ALRC agrees with those stakeholders who suggested that the Parliament should not have a role in establishing individual Royal Commissions or Official Inquiries. If the executive wants to commence an inquiry, it should have the flexibility to do so. If the Parliament deems it necessary to inquire into a matter, there are other mechanisms available.<sup>44</sup>

### **Royal Commissions**

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

### **Official Inquiries**

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

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

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44 In Ch 5, the ALRC discusses the enhanced role of parliamentary committees since the 1970s.

6.46 Public servants should not be able to establish a statutory inquiry with coercive powers. As discussed in Chapter 2, the decision to establish a public inquiry is inherently political and, therefore, should not be made by public servants at any level.

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

6.48 The main features of responsible government are collective ministerial responsibility and individual ministerial responsibility.<sup>45</sup> An effect of collective ministerial responsibility is that, if the government loses the confidence of the House of Representatives, the entire ministry must resign or the Prime Minister should recommend to the Governor-General that the House be dissolved and an election called.<sup>46</sup> If dismissal of an individual minister is warranted, this action tends to be taken by the Prime Minister rather than by Parliament.<sup>47</sup> In 1976, the Royal Commission on Australian Government Administration noted that:

there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.<sup>48</sup>

6.49 The ALRC notes that s 4 of the *Ministers of State Act 1952* (Cth) has the effect of providing that parliamentary secretaries are appointed as ministers for constitutional purposes.<sup>49</sup> Further, the effect of s 19 of the *Acts Interpretation Act 1901* (Cth) is that a minister may authorise a non-portfolio minister or a parliamentary secretary to act on his or her behalf.<sup>50</sup> These provisions enhance flexibility in how statutory inquiries may be established because parliamentary secretaries also would be able to establish Official Inquiries.

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

46 *Ibid.*, 47.

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

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

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

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

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

#### ***Evidence of establishment***

6.51 Finally, the ALRC notes that s 16(1) of the *Royal Commissions Act* provides that evidence of the establishment of a Royal Commission will be the Letters Patent signed by the Governor-General, or a copy of the Letters Patent certified by an inquiry member.<sup>51</sup> This provides for the proof of establishment of a Royal Commission in related legal proceedings. The *Inquiries Act* should contain a provision equivalent to s 16(1). Further, the Act should include an equivalent provision that is applicable to an Official Inquiry, which provides that the evidence of the establishment of an Official Inquiry should be the terms of reference signed by a minister, or a copy of those terms of reference certified by an inquiry member. Stakeholders did not raise this issue in this Inquiry; rather, the ALRC makes this recommendation to ensure that this provision applies to Official Inquiries in addition to Royal Commissions.<sup>52</sup>

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

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

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

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

<sup>51</sup> Letters Patent are discussed in Ch 3.

<sup>52</sup> In this Report, the ALRC makes other recommendations to ensure that existing provisions in the *Royal Commissions Act* apply to Official Inquiries. For example, in Ch 11, the ALRC recommends that the *Inquiries Act* should contain provisions, applicable to both Royal Commissions and Official Inquiries, equivalent to those in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act 1902* (Cth): Recommendation 11–5.

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

### An inquiry's terms of reference

6.52 Whether there needs to be guidance about the drafting of an inquiry's terms of reference is an issue closely related to the establishment of an inquiry. As noted in Chapter 3, the *Royal Commissions Act* does not provide any guidance on the framing of the terms of reference for a Royal Commission. The drafting of the terms of reference for an inquiry, however, is fundamental to its success. Terms of reference that are too wide can lead to unnecessary cost, complexity and delay, and can leave an inquiry 'floundering in a wilderness of possible avenues of investigation'.<sup>53</sup> In addition, carefully defined terms of reference may 'limit the opportunities for wide-ranging investigations without the safeguards associated with investigations by traditional law enforcement agencies'.<sup>54</sup>

6.53 Terms of reference that are too narrow can undermine the efficacy of an inquiry. Some Royal Commissions have been criticised for the narrowness of their terms of reference. For example, the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) was criticised for having terms of reference that were so narrow that they did not enable relevant issues to be examined adequately.<sup>55</sup>

6.54 In IP 35, the ALRC asked whether legislation establishing public inquiries should address the framing of terms of reference for a Royal Commission in greater detail.<sup>56</sup> The ALRC also sought views on whether the Act should attempt to address the content of terms of reference.<sup>57</sup> In DP 75, the ALRC did not recommend that the *Inquiries Act* contain any such requirements.

### Submissions and consultations

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

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

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

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

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

57 *Ibid.*, [3.13].

6.56 The Law Council supported the introduction of statutory provisions that would require the executive to consult with the chair of an inquiry before setting or amending the terms of reference for a Royal Commission or Official Inquiry.<sup>58</sup>

6.57 Other stakeholders were not in favour of a statutory requirement for the Australian Government to do or consider certain things before formulating terms of reference. Commenting on Royal Commissions, Millar submitted:

The usual practice is that the person being appointed as Commissioner is consulted on the terms of reference before they are finalised and, if there is a need for subsequent amendments, it is also usual practice for the Commissioner to be consulted before the amendments are made. ... this practice seems to work well and I do not see any need for it to be covered by legislation.<sup>59</sup>

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

AGS doubts the need for statutory prescription regarding consultation on draft terms of reference, or as to requirements regarding publication of terms of reference, or dealing with the amendment of terms of reference during the course of an inquiry. We are not aware of any difficulties which have arisen as a result of the Act not prescribing these matters. For example, it is relatively commonplace for the terms of reference of Royal Commissions and inquiries to be amended during the life of an inquiry, often more than once.<sup>60</sup>

### ALRC's view

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

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

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

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

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

## Appointment of inquiry members

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

6.62 Currently, the Governor-General may issue a Royal Commission to one or more persons ‘as he or she thinks fit’.<sup>61</sup> The *Royal Commissions Act* does not provide any further guidance on the appointment of Royal Commissioners. As Professor Scott Prasser has explained,

appointing members to a public inquiry, unlike other government or public service positions, is not undertaken via advertisement or formal selection processes; rather, it is achieved by private ‘soundings’ of potential candidates, usually between the relevant minister’s office and the department. This process may take considerable time, as locating those who are competent, have the appropriate status, and are available and willing, is not always easy.<sup>62</sup>

6.63 While there is no requirement in the *Royal Commissions Act* that a person with a legal background must be appointed, most Royal Commissions are chaired by current or former judges or legal practitioners. This has been the case for 32 of the 38 federal Royal Commissions that have been established since 1970.<sup>63</sup>

6.64 Legislation in the UK provides guidance both in terms of procedure and eligibility. The *Inquiries Act 2005* (UK) requires the minister responsible for establishing an inquiry to consider whether a recommended member of an inquiry panel has the necessary amount of expertise,<sup>64</sup> and prohibits the appointment of a person if it appears to the minister that he or she has a direct interest in the inquiry or a close association with an interested party to the inquiry.<sup>65</sup> Further, it requires the minister to consult with the chair of the inquiry before appointing any other members to an inquiry panel,<sup>66</sup> and to consult with certain senior members of the judiciary before appointing a judge as a panel member.<sup>67</sup>

6.65 The NZLC recently recommended that new inquiries legislation in New Zealand should provide that inquiries be independent from the executive:

the integrity of an inquiry’s work and its outcome are reliant on the extent to which it is viewed as independent. The principle that justice should be done and be seen to be

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

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

63 *Ibid*, [8.6].

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

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

66 *Ibid* s 4(3).

67 *Ibid* s 10.

done applies to inquiries as well as courts. An inquiry's independence should be made clear, rather than simply inferred.<sup>68</sup>

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

### Eligibility of serving judges

6.67 Another issue that has attracted comment in Australia is the use of serving judges to conduct Royal Commissions.<sup>69</sup> The *Royal Commissions Act* expressly contemplates the appointment of judges to conduct Royal Commissions, as s 6O of the Act confers additional powers on a Commissioner who is also a judge (including a judge of a federal court) to punish contempt.<sup>70</sup>

6.68 It has been observed that judges are appointed as Royal Commissioners for a number of reasons. First, they possess skills and abilities that may be useful in an investigative inquiry, such as the ability to collect, collate and analyse evidence, assess the credibility of witnesses, and make findings of fact.<sup>71</sup> Secondly, they may enhance the perception of the independence and impartiality of a Royal Commission.<sup>72</sup>

6.69 One concern, however, is that using serving judges to inquire into politically controversial matters could undermine public confidence in the individual judge<sup>73</sup> or the judiciary as a whole.<sup>74</sup> It also has been argued that judges do not always possess the relevant skills to conduct a Royal Commission. For example, in evidence before the House of Commons Public Administration Select Committee, Lord Laming stated:

I would like to suggest that there are few judges who have managed a big workforce, managed a public agency, managed big budgets in competing priorities, dealt with the party political machine, both locally and nationally, dealt with trade unions going about their perfectly legitimate business and dealt with the media day by day.<sup>75</sup>

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

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

70 In Ch 20, the ALRC recommends that a contempt power should not be included in the *Inquiries Act*.

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

72 *Ibid.*

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

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

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

6.70 It has long been established that judicial officers may act in administrative roles if they are acting in their personal capacity (ie, as *persona designata*).<sup>76</sup> Professor George Winterton has noted that it is unlikely that the consensual appointment of a judge of a state court to a federal Royal Commission would present a constitutional problem.<sup>77</sup> Following the decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>78</sup> (*Wilson*), however, there may be a question whether a judge currently serving on a federal court may be a member of a Royal Commission or an Official Inquiry. In *Wilson*, a Federal Court judge was nominated to provide a report in her personal capacity to a minister pursuant to s 10 of the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth).<sup>79</sup> A majority of the High Court found that this conferred a non-judicial function on a federal judge in a way that was incompatible with the holding of judicial office under Chapter III of the *Australian Constitution*.<sup>80</sup>

6.71 The majority in *Wilson* indicated that, in some circumstances, serving federal judges may be appointed to Royal Commissions. This was on the basis that Royal Commissioners perform different functions to those of a reporter appointed under s 10 of the *Aboriginal and Torres Strait Islander Heritage Act*—in particular, members of Royal Commissions generally determine facts and apply the law, rather than advise a minister on whether he or she should make a particular decision. Relevant considerations for deciding whether the appointment of a serving federal judge to a Royal Commission is compatible with the holding of judicial office under Chapter III would include the terms of reference of the Royal Commission, and the legislation enabling its establishment.<sup>81</sup> In *Wilson*, Justice Gaudron also noted that, historically, ‘it is necessary to bear in mind that, to a large extent, functions [of Royal Commissions] were not carried out by Ch III judges’.<sup>82</sup>

6.72 The policy of the Federal Court generally is not to allow a Federal Court judge to be appointed as a Royal Commissioner, although there may be circumstances in which such appointment may be possible. An appointment may be made only with the agreement of the Chief Justice. Before approaching an individual judge, the executive

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

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

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

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

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

81 *Ibid.*

82 *Ibid.*, 69.

should first consult with the Chief Justice, who in turn should conduct further consultation.<sup>83</sup>

6.73 In DP 75, the ALRC proposed that the *Inquiries Act* should provide that Royal Commissions and Official Inquiries ‘shall be independent in the performance of their functions’.<sup>84</sup> It also proposed that the *Inquiries Handbook* should address the appointment of members of Royal Commissions and Official Inquiries. The matters addressed by the *Inquiries Handbook* should include:

- (a) whether the potential inquiry member has the skills, knowledge and experience to conduct the inquiry, having regard to the subject matter and scope of the inquiry; and
- (b) whether inquiry members should have certain attributes (for example, gender or cultural attributes).<sup>85</sup>

## Submissions and consultations

### *Serving and retired judges*

6.74 Commenting on Royal Commissions, the Law Council submitted:

There are numerous reasons why judicial officers are viewed as the appropriate members of society to undertake this role. Firstly, judicial officers possess the skills and experience that make them uniquely qualified to conduct public inquiries, which generally require the examination of evidence, fact finding, assessment of the credibility of witnesses and setting out reasons for decisions. Secondly, judicial officers bring to a public inquiry a necessary perception of independence and impartiality from government and afford a sense of authority to the proceedings. These skills are particularly necessary when the inquiry is examining issues of conduct, as opposed to inquiries into social or economic policy.<sup>86</sup>

6.75 The Law Council noted that drawbacks of appointing serving judges as inquiry members inquiry included: potentially politicising judges; undermining judicial independence; and ‘depleting already scarce judicial resources’. Further, judges may not have the necessary skills to conduct a specific inquiry. On balance, the Law Council was not opposed to the appointment of serving judges as inquiry members. Where possible, however, the Law Council preferred the appointment of a ‘suitably qualified senior member of the profession or retired judicial officer’.<sup>87</sup>

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

84 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–3.

85 *Ibid.*, Proposal 6–4.

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

87 *Ibid.* See also Law Council of Australia, *Submission RC 30*, 2 October 2009.

6.76 If a serving judge were to be appointed as an inquiry member, the Law Council suggested that this should be done in accordance with procedures set out by the Council of Chief Justices of Australia and New Zealand, which are similar to those of the Federal Court, discussed above. In its submission in response to DP 75, the Law Council suggested that such procedures should be set out in the *Inquiries Handbook*.<sup>88</sup>

6.77 It was noted in consultations that it was important for inquiry members to have a strong understanding of procedural fairness issues. In that context, it would be more appropriate for those with judicial experience to conduct inquiries as even experienced barristers have not had the same level of experience with respect to the requirements of procedural fairness. Training for inquiry members was also raised; the suggestion being that training was essential for inquiry members, regardless of whether they had judicial experience, because conducting an inquiry required a particular skill set. Further, it was noted that Australian lawyers and judges were trained in adversarial processes, which differ significantly from inquisitorial processes of inquiry.

#### ***Other criteria***

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

have sufficient qualifications and experience to conduct inquiries effectively. Typically this would require Commissioners to have judicial or at least post admission legal experience. However, in some instances, it may be more appropriate to have someone with equivalent qualifications in other fields. The key requirement being that the Commissioner is competent for the type of inquiry and ostensibly independent of Government.<sup>89</sup>

6.79 On the other hand, Millar cautioned against prescribing any criteria for the appointment of inquiry members on the basis that this ‘may have the effect of eliminating the most suitable appointee(s) to conduct a particular inquiry’.<sup>90</sup> The AGS also doubted whether it was necessary to prescribe the process or criteria for appointment of inquiry members.<sup>91</sup>

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

Selection of personnel should be entirely merit based, but should also recognise the nature and sensitivities of the inquiry. For instance, a public inquiry into indigenous issues should be headed by an indigenous person or someone with appropriate experience and knowledge. However, the overriding consideration must be his or her independence and objectivity (both in fact and as a public perception).<sup>92</sup>

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

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

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

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

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

6.81 The CPSU noted the ‘lack of broad representation among members of Royal Commissions and other inquiries’. It submitted:

It is appropriate that the proposed handbook deal with these issues, with a view to broadening representation (with special attention given to the representation of women and people from Culturally and Linguistically Diverse Backgrounds).<sup>93</sup>

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

6.83 The President of the Administrative Appeals Tribunal (AAT), the Hon Justice Garry Downes, indicated that, within the AAT,

there is a repository of considerable acknowledged, independent expertise in a wide range of government activity. Members of the Tribunal should be considered as appropriate persons to conduct inquiries. The Tribunal also has suitable facilities for the conducting of public inquiries.<sup>94</sup>

### ***Independence of inquiry members***

6.84 The Australian Collaboration strongly supported the proposal that both Royal Commissions and Official Inquiries should be independent in the performance of their functions.<sup>95</sup> The Accountability Round Table preferred a stronger statement that Royal Commissions and Official Inquiries ‘have a duty to act independently in the exercise of their functions, powers and duties’. It also noted that a legislative provision ‘should ensure that breach of the statutory obligation would be justiciable before the courts’.<sup>96</sup>

6.85 The Law Council supported

the inclusion of a principle of independence in the *Inquiries Act* similar to the provision in the *Commissions of Investigation Act 2004* (Ireland), which has been referred to by the ALRC. ... The inclusion of such a principle would reinforce other provisions in the current [*Royal Commissions Act*] and the proposed *Inquiries Act* which support the independence of Royal Commissions and Official Inquiries. Such provisions include those provisions dealing with the powers and immunities of inquiry members and the reporting obligations associated with inquiries.<sup>97</sup>

### **ALRC’s view**

6.86 It is appropriate for the person or authority that establishes an inquiry to appoint members of that inquiry. The Governor-General or minister that establishes an inquiry should consider, on a case-by-case basis, the skills, knowledge and experience

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93 Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

94 G Downes, *Advice Correspondence*, 8 September 2009.

95 Australian Collaboration, *Submission RC 24*, 22 September 2009.

96 Accountability Round Table, *Submission RC 29*, 30 September 2009.

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

necessary to conduct that particular inquiry. There is no evidence that suggests that, currently, the executive fails to consider these matters.

6.87 The ALRC agrees with the Accountability Round Table that the independence of inquiry members should be clearly set out in legislation. The *Inquiries Act* should provide that inquiry members shall be independent in the exercise of their powers, and in the performance of their duties and functions. This will help to ensure public confidence in the independence of the inquiry. It also may allay some of the concerns in *Wilson* with respect to the independence of serving federal judges acting as inquiry members.

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

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

6.90 The appointment of inquiry members, however, should be addressed in an *Inquiries Handbook*. In particular, there should be some guidance concerning the necessary skills, knowledge and experience that an inquiry member should have. The ALRC suggests that many inquiries will require the involvement of those with legal, judicial or tribunal experience. For example, given that Royal Commissions may exercise significant coercive powers, it may be more appropriate to appoint a person who has an in-depth understanding of such powers. Many other inquiries, however, may benefit from having inquiry members with skills, knowledge or experience within the subject matter of a specific inquiry. If an inquiry is not likely to abrogate privileges or have serious adverse legal implications for those involved, a person without prior experience in the use of coercive powers may still be a suitable inquiry member due to their particular skills, knowledge and experience.

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

6.92 The ALRC also agrees with President Downes that members of tribunals may be appropriate candidates for appointment as inquiry members. Tribunal members, in addition to those with judicial experience, may have the requisite experience necessary to conduct an inquiry—and in particular an investigatory inquiry. If, in a particular inquiry, it is deemed necessary to appoint an inquiry member with legal, judicial or tribunal experience, the establishing authority should consider precisely what experience is necessary. The ALRC notes that the experience of a legal practitioner is not entirely analogous with the experience of a judge. An advocate's role is to argue or defend a particular case, whereas a judge is tasked with determining questions of fact and law based on the evidence, and to ensure that procedural fairness is afforded to the parties. As discussed in Chapter 15, it is envisaged that inquiries conducted under the recommended *Inquiries Act* will be more inquisitorial in nature than the procedure adopted in Australian courts.

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

6.94 Finally, the ALRC notes a lack of broad representation among members of Royal Commissions and other inquiries. For example, the only federal Royal Commission chaired by a woman reported in 1978.<sup>98</sup> Establishing authorities should consider ensuring a broader representation on inquiries established under the *Inquiries Act*. Whether inquiry members should have certain attributes—such as gender or cultural attributes—should also be considered by those establishing an inquiry.<sup>99</sup> Guidance on these matters could be included in the *Inquiries Handbook*.

6.95 Whether national security issues and information may be raised in an inquiry is another matter that should be considered when appointing an inquiry member. While the ALRC recommends in Chapter 13 that members of Royal Commissions and Official Inquiries should not be *required* to obtain a security clearance to access national security information, in certain inquiries it may be desirable to appoint a person who holds, or may obtain, a security clearance.<sup>100</sup> Guidance on this matter should be included in the *Inquiries Handbook*.

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

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

100 Recommendation 13–3.

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

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

- (a) have the skills, knowledge and experience to conduct the inquiry;
- (b) should have certain attributes (for example, gender or cultural attributes); and
- (c) should hold or obtain a security clearance.

## Multi-member inquiries

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

6.97 Currently, Royal Commissions can be conducted by one or more commissioners.<sup>101</sup> It has been noted that investigatory Royal Commissions—that is, Royal Commissions established to investigate a particular matter, such as the cause of a particular disaster or an allegation of corruption—tend to have fewer members than Royal Commissions established to provide policy advice. Only 18.5% of investigatory Royal Commissions appointed since 1950 have had more than one member, while 53% of the policy Royal Commissions appointed since this time have been multi-member Commissions.<sup>102</sup>

6.98 In IP 35, the ALRC sought feedback from stakeholders on multi-member inquiries.<sup>103</sup> In DP 75, the ALRC proposed that the *Inquiries Act* should provide that both Royal Commissions and Official Inquiries may have more than one inquiry member.<sup>104</sup>

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

102 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [2.29].

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

104 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–5.

### Submissions and consultations

6.99 Millar submitted that, in some inquiries, it may be appropriate to have several inquiry members with a mix of qualifications.<sup>105</sup> The Law Council agreed that there should be

provision for more than one member to be appointed to a Royal Commission or Official Inquiry. The Law Council agrees with the ALRC view that multi-member inquiries should increase the diversity of skills, knowledge and experience within an inquiry and result in a more efficient use of government resources through the sharing of the workload of an inquiry.<sup>106</sup>

6.100 In consultations, the majority of stakeholders who commented on this issue supported the appointment of more than one inquiry member for similar reasons. Depending on the subject-matter of the inquiry, it also may be appropriate for persons with certain attributes or characteristics to be appointed as inquiry members. Further, it was suggested that multi-member inquiries may be an efficient use of government resources, with multiple inquiry members able to share the inquiry workload.

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

### ALRC's view

6.102 The ALRC notes that most recent Royal Commissions have had one member. Notwithstanding this, the ALRC agrees with stakeholders who suggested that there are several advantages to appointing more than one member in some inquiries. The recommended *Inquiries Act*, therefore, should provide that Royal Commissions and Official Inquiries may have more than one inquiry member. The chair of a multi-member inquiry, however, should have responsibility for making certain decisions. In other chapters of this Report, the ALRC notes where it is appropriate for the chair of an inquiry to make a decision.<sup>107</sup>

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

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

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

107 See, eg, Recommendation 20–2.

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

### Legal practitioners assisting an inquiry

6.104 In this section, the ALRC considers whether the current arrangements for the appointment and role of counsel and solicitors assisting an inquiry are appropriate and should be included in the recommended *Inquiries Act*. Arrangements for appointing other staff members for inquiries are discussed in Chapter 8. Remuneration issues are considered in Chapter 9.

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

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

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

### Counsel assisting

6.107 At the outset of the AWB Inquiry, the Attorney-General appointed four counsel to assist the inquiry. These appointments were based on the recommendations of the Commissioner in charge of the inquiry, the Hon Terence Cole QC (Commissioner Cole). In turn, as noted in the inquiry report, Commissioner Cole based his recommendations on a shortlist of candidates drawn up by the AWB Inquiry in consultation with the Australian Government Attorney-General’s Department (AGD). Commissioner Cole noted that efforts were made to select ‘experienced barristers who possessed a range of skills and expertise relevant to the areas of investigation and law the Inquiry was likely to encounter’.<sup>108</sup>

6.108 In contrast, the report of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) noted that, at the outset of the inquiry, expressions of interest were invited by persons interested in becoming counsel assisting the inquiry. On the basis of applications received, and on the

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

recommendations of Commissioner Cole (who was also the Commissioner in charge of this inquiry), the Attorney-General appointed 13 counsel to assist the inquiry.<sup>109</sup>

6.109 While the Act does not define the nature of the role of counsel assisting, in practice he or she has a number of onerous duties, such as to identify and obtain all relevant evidence for the Commission.<sup>110</sup> 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.<sup>111</sup>

### Solicitors assisting

6.110 In some Royal Commissions, the provision of solicitors' legal work has been reserved for, or 'tied' to, the AGS. For example, at the outset of the AWB Inquiry, the Attorney-General issued a legal services direction that provided that legal work for solicitors assisting the inquiry was to be provided by the AGS.<sup>112</sup>

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

- interviewing potential witnesses and assisting with the preparation of witness statements;
- assisting in obtaining, analysing and preparing material to be presented by counsel assisting;
- aiding counsel assisting to finalise submissions arising from hearings;
- providing specialist legal advice; and
- carrying out related legal services.<sup>113</sup>

6.112 The Building Royal Commission again provides a contrast. In this inquiry, expressions of interest were sought from persons or firms interested in providing legal support to the inquiry. Solicitors were appointed by the inquiry in accordance with

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109 This number included three Queen's Counsel and one Senior Counsel: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [21]–[22].

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

111 *Ibid*, [13.3].

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

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

criteria contained in its guidelines.<sup>114</sup> 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.<sup>115</sup>

6.113 A number of applications were received by the inquiry.<sup>116</sup> Only the AGS was able to fulfil all the criteria, so it provided all the solicitors that assisted the Building Royal Commission.<sup>117</sup>

6.114 In IP 35, the ALRC asked whether legislation establishing Royal Commissions or other public inquiries should set out criteria for the appointment of counsel and solicitors assisting, and if so, what these criteria should be.<sup>118</sup> In DP 75, the ALRC proposed that the *Inquiries Act* should provide that:

- in consultation with members of Royal Commissions and Official Inquiries, the Attorney-General may appoint legal practitioners to assist inquiry members; and
- legal practitioners assisting an inquiry are independent of inquiry members.<sup>119</sup>

### **Submissions and consultations**

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

- the Commissioner's personal experience and soundings in relation to prospective appointees
- the mix of skills required for the particular inquiry

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

115 *Ibid.*, vol 22, [29]–[30].

116 *Ibid.*, vol 22, [31].

117 *Ibid.*

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

119 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–6.

- the availability of the appointees for the duration of the inquiry ie they may need to be away from their practice for some time
- any issues of conflict, and
- the location of the inquiry.<sup>120</sup>

6.116 The AGS submitted:

We do not see that there is any marked difference in the underlying nature of the roles to be performed by counsel and solicitors assisting and for that reason we consider that it probably is desirable that solicitors as well as counsel are engaged on the same basis by being ‘appointed’ within the meaning of s 6FA [of the *Royal Commissions Act*].<sup>121</sup>

6.117 The Law Council suggested that the chair of a second tier of inquiry should be able to appoint counsel assisting. It noted that this was the approach taken in other jurisdictions.<sup>122</sup>

6.118 The role of legal practitioners appointed to assist inquiries attracted some comment. The AGS favoured a flexible approach to determining the role of a legal practitioner assisting, suggesting that the most appropriate system ‘will depend upon the Commissioner’s own preferences and the nature and breadth of the matter the subject of inquiry’. It noted that legal practitioners need to carry out independent tasks such as marshalling and tendering evidence as well as advising inquiry members.<sup>123</sup>

6.119 The AGS suggested that, in some cases,

it may be appropriate to have a structure that builds in a degree of separation between the commissioner and the investigative process. This might be necessary in cases where the parties before the commission are conducting themselves in an adversarial manner and are likely to make collateral challenges to a commissioner’s authority, for example, where there has been an allegation of bias.<sup>124</sup>

6.120 The AGS noted circumstances in which an inquiry member was criticised for not being inquisitorial and relying too heavily on counsel and solicitors assisting.<sup>125</sup>

6.121 The Law Council supported the ALRC’s proposal that legal practitioners should be independent. In the Law Council’s view, the proposal reinforced the ‘traditional position of an independent profession’.<sup>126</sup> On the other hand, a number of stakeholders suggested that the appointment and role of counsel assisting did not need to be

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

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

122 Law Council of Australia, *Submission RC 30*, 2 October 2009. See also Law Council of Australia, *Submission RC 9*, 19 May 2009.

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

124 *Ibid.*

125 *Ibid.*

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

addressed in legislation. Mr Kym Bills suggested that the ALRC's proposed legislative criterion of independence should be clarified

so that the independence of legal practitioners assisting an inquiry is not such that they could go off on a frolic of their own regardless of the wishes of inquiry members. Governance arrangements for inquiries need to be clear.<sup>127</sup>

6.122 In consultations, it was noted that statutory provisions in inquiries legislation addressing counsel assisting indicated that an inquiry would be conducted in an adversarial way. It was suggested that any statutory requirement of independence would be undermined in practice, as legal practitioners do communicate with, and generally take some form of instruction from, inquiry members. It also was noted that a statutory requirement of independence is unnecessary as legal practitioners have existing professional obligations.

### **ALRC's view**

6.123 The ALRC notes stakeholder views that inquiries tend to be dominated, sometimes unnecessarily, by lawyers. If inquiry members adopt an adversarial approach—for example, public hearings in which examination and cross-examination is allowed—the need for the advocacy experience of counsel or solicitors may be necessary. Not all inquiries established within the ALRC's recommended statutory framework will need to adopt such an adversarial procedure.

6.124 The best way to address the dominance of lawyers in inquiries, however, is not to exclude them from the recommended *Inquiries Act* provisions that deal with the appointment and role of legal practitioners assisting Royal Commissions and Official Inquiries. In many inquiries, it will be appropriate to appoint legal practitioners. A statutory provision could set out a general appointment process for legal practitioners. A statutory provision also could make clear what protections are enjoyed by a legal practitioner assisting an inquiry.<sup>128</sup> A legal practitioner assisting an inquiry, however, should not be able to exercise coercive information-gathering powers.<sup>129</sup>

6.125 The recommended *Inquiries Act* should preserve the current arrangements for appointing legal practitioners to assist an inquiry. It is appropriate for a person other than an inquiry member to have a role in the appointment of legal practitioners assisting. It is the ALRC's view, therefore, that the Attorney-General should continue to make these appointments. In practice, inquiry members will need to work closely with legal practitioners. Inquiry members should be consulted before legal practitioners are appointed to assist an inquiry, and this requirement should be made clear in the *Inquiries Act*.

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127 K Bills, *Submission RC 19*, 17 September 2009.

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

129 This is discussed further in Part D.

6.126 The *Inquiries Act* should not specify that legal practitioners are independent of inquiry members. As stakeholders noted, such a requirement may cause problems in practice. The ALRC agrees that inquiry members should determine how inquiries established under the Act are to be conducted. A statutory requirement for the independence of legal practitioners assisting an inquiry is unnecessary as legal practitioners are already subject to professional ethical obligations. A Royal Commission or other statutory inquiry falls within the definition of a court for the purposes of nearly all the *Model Rules of Professional Conduct and Practice* (Model Rules), which were developed by the Law Council and adopted in revised form in 2002. The Model Rules inform a number of rules in Australian jurisdictions.<sup>130</sup>

6.127 Finally, the ALRC notes that the AGS has provided solicitors to assist most recent Royal Commissions. This continuity improves institutional memory between inquiries. In several cases, the AGS may be the only firm without a conflict of interest. In the ALRC's view, however, the *Inquiries Act* should not stipulate that legal assistance to inquiries established under the Act be reserved for, or 'tied' to, the AGS.

### Expert advisors

6.128 In this section, the ALRC considers whether the *Inquiries Act* recommended in this Report should provide for the appointment of expert advisors. The *Inquiries Act 2005* (UK) provides for the appointment of expert 'assessors' to assist inquiry members. Assessors have an advisory role and do not exercise powers under the Act.<sup>131</sup> The Explanatory Notes to the Act state:

The role of assessors will vary from inquiry to inquiry, but in essence they are experts in their own particular field whose knowledge, where necessary, can provide the panel with the expertise it needs in order to fulfil an inquiry's terms of reference. For example in the Victoria Climbié inquiry, four expert assessors, including a consultant paediatrician and a detective superintendent, joined the chairman, Lord Laming. Assessors do not have any of the inquiry panel's powers and are not responsible for the inquiry report or findings. An assessor could be appointed for the duration of the inquiry, but it would also be possible to appoint an assessor only for part of the inquiry, to assist when evidence on a particular subject was being considered.<sup>132</sup>

6.129 In the context of Federal Court proceedings, O 34B of the *Federal Court Rules* (Cth) provides for the appointment of a person with specialised knowledge to assist a judge ('expert assistant'). An expert assistant may be appointed only with the consent of the parties, and may not provide evidence in the proceedings. Further, an

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130 See, eg, the *Barristers' Rules 2008* (NSW). Also note that the ALRC made a number of recommendations about professional obligations of legal practitioners and the Model Rules in its 2000 Report, *Managing Justice* (ALRC 89). For further information about professional obligations of legal practitioners, see S Ross, *Ethics in Law* (2nd ed, 1998).

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

132 Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), [23].

expert assistant may provide assistance only on issues identified by the Court or Judge, and in the form of a written report.<sup>133</sup>

6.130 In its 2000 Report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), the ALRC considered the appointment of expert assistants and assessors under federal legislation and the *Federal Court Rules* (Cth). The ALRC noted several benefits of an expert advisory role, but also noted some stakeholders had concerns about the scope of such a role.<sup>134</sup> The ALRC recommended that the Federal Court should continue to develop appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.<sup>135</sup>

6.131 In IP 35, the ALRC also sought feedback on whether it was always appropriate for those assisting an inquiry to be legal practitioners.<sup>136</sup> In DP 75, the ALRC proposed that the *Inquiries Act* should provide that Royal Commissions and Official Inquiries may appoint an expert or experts in any field as an advisor to provide technical or specialist advice.<sup>137</sup>

### **Submissions and consultations**

6.132 Several stakeholders supported the introduction of a more general advisor role in legislation establishing public inquiries. The Law Council noted that expert advisors would be able to provide detailed knowledge on a particular subject arising in an inquiry.<sup>138</sup> Some stakeholders suggested that Royal Commissions do not need to be dominated by lawyers. It was suggested that appointing non-legal advisors would not undermine the role of legal practitioners, but rather would enhance the information and advice available to inquiries.

6.133 Turnbull queried whether the *Inquiries Act* should provide that experts should be independent of inquiries. He also queried whether there should be an obligation on an inquiry to do more than ‘consider’ expert advice.<sup>139</sup>

6.134 In consultations, it was noted that the use of expert advisors may save time and resources. It was also noted that a statutory provision empowering an inquiry member to appoint an expert advisor may be an important safeguard against any challenges that otherwise may be made to such appointment. It was also suggested that the *Inquiries Act* should allow inquiries to engage all staff as required.

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

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

135 *Ibid*, Recs 85, 76.

136 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [6.14].

137 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–7.

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

139 I Turnbull, *Submission RC 22*, 21 September 2009.

**ALRC's view**

6.135 The *Inquiries Act* should provide for the appointment of 'expert advisors' to Royal Commissions and Official Inquiries. This will allow for the appointment to an inquiry of a non-legal advisor where an inquiry member has legal experience rather than a detailed knowledge of the subject-matter of the inquiry. It also will allow for the appointment of a legal advisor where an inquiry member is appointed because he or she has experience with the subject-matter of the inquiry but does not have extensive legal knowledge.

6.136 In the ALRC's view, there is no need for the *Inquiries Act* to stipulate that an advisor is independent of the inquiry member, and inquiry members should not be required to take into account the views of an advisor. This would decrease flexibility. The advisor role should be as adaptable as possible—for example, an advisor may be appointed for part or all of an inquiry.

6.137 The *Inquiries Act* should make clear, however, that an advisor may not exercise coercive information-gathering powers under the Act. Further, given that expert advisors are appointed to assist inquiry members, it is appropriate for the advisor to be appointed by those members.

6.138 It is the ALRC's view that the *Inquiries Act* does not need to provide for the appointment of other staff. It has not heard any feedback in this Inquiry that suggests that the appointment of staff has been a problem for Royal Commissions and other inquiries. In Chapter 8, the ALRC recommends that an Australian Government department should be allocated responsibility for the administration of Royal Commissions and Official Inquiries.<sup>140</sup> This department could assist inquiries with the appointment of staff, should this be required.

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

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

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140 Recommendation 8–2.

