

8. Administration and Records

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Introduction

8.1 Royal Commissions and other public inquiries are often appointed at short notice and may relate to incidents or events that have not been the subject of previous public scrutiny. Some or all inquiry members and staff may have had little or no involvement in other inquiries and may be unfamiliar with the practical aspects of establishing and conducting such an inquiry. As the New Zealand Law Commission (NZLC) has noted, because inquiries occur infrequently, they may encounter difficulties from a lack of institutional knowledge, and each time an inquiry is appointed, there may be 'some reinvention of the wheel'.¹

8.2 In this chapter, the ALRC discusses the administration of Royal Commissions and Official Inquiries, including the types of assistance that may be required to support the conduct of an inquiry. The ALRC discusses ways in which to preserve institutional knowledge acquired from previous Royal Commissions and inquiries and how administrative, technical and other assistance should be provided to Royal Commissions and Official Inquiries.

8.3 The ALRC also discusses important issues relating to the records of completed Royal Commissions and Official Inquiries. The utility of such inquiries depends in large part upon the extent to which their findings and recommendations are able to be acted upon and the uses to which their records may subsequently be put.

1 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 35–36.

Administrative assistance for inquiries

8.4 Customarily, responsibility for providing administrative support for Royal Commissions and certain other inquiries within the Australian Government has been allocated in accordance with the *Administrative Arrangements Order*.² The Australian Government Attorney-General's Department (AGD) currently holds this responsibility, although it has been allocated to other departments in the past. For example, the then Department of Finance and Administration was the designated department from 1998, until responsibility was transferred to the AGD in November 2001.³ The Department of Finance and Administration provided administrative support, in the initial stages, to both the HIH Royal Commission and the Royal Commission into the Building and Construction Industry (Building Royal Commission).⁴

8.5 While there is no permanent central body, such as a federal inquiries office, that has responsibility for providing administrative assistance to Royal Commissions and other public inquiries, several individuals have accumulated significant institutional knowledge in the administration of inquiries. These include senior departmental officers in the AGD and the Department of the Prime Minister and Cabinet (PM&C),⁵ as well as those who have acted as executive officers in recent inquiries.

8.6 Typically, when a new Royal Commission or public inquiry is announced, the administrative apparatus for the inquiry is not yet in existence. The inquiry members must be formally appointed and the inquiry established. The executive officer is often one of the first personnel to be appointed and he or she oversees the inquiry's establishment including staffing, accommodation, hearing room facilities, office services and information and communication technology infrastructure.

8.7 There are no formal procedures or criteria for the appointment of the executive officer. The role is generally understood to encompass responsibility for the practical issues of setting up and managing the administration and operation of the inquiry processes, including its budget and finances. In recent inquiries, the executive officer has been contracted on an ad hoc basis when the inquiry is established and the role often has been filled by former or seconded senior public servants. These individuals have previous experience in running inquiries, and are familiar with public administration, the financial accountability of public bodies, and with the workings of government.

2 Commonwealth of Australia, *Administrative Arrangements Order*, 25 January 2008 [as amended 1 May 2008, updated 1 July 2008].

3 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, Ch 5.

4 N Owen, *Report of the HIH Royal Commission* (2003), [2.1]; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, Ch 5.

5 The Department of the Prime Minister and Cabinet has portfolio responsibility for the *Royal Commissions Act 1902* (Cth) pursuant to the Commonwealth of Australia, *Administrative Arrangements Order*, 25 January 2008 [as amended 1 May 2008, updated 1 July 2008].

8.8 A significant amount of planning and organisation is required to establish and run an inquiry such as a Royal Commission. In the preliminary stages, assessments of the administrative and technical requirements of the inquiry must be made, having regard to the likely size and duration of the inquiry, the number and type of participants and the proposed methods of inquiry. Any difficulties encountered in these preliminary stages—for example, unavailability of accommodation or hearing rooms—may impact on the capacity of the inquiry to report within the timeframe set out in its terms of reference.

8.9 While there is accumulated institutional knowledge within the Australian Government relating to the administration of inquiries, as described above, there are no formal mechanisms in place to consolidate and preserve this knowledge—for example, in a handbook or in written guidelines. The ALRC’s recommendation for the development of an *Inquiries Handbook* is aimed at preserving such institutional knowledge.⁶

8.10 In contrast, the New Zealand Department of Internal Affairs—which provides some administrative assistance to Royal Commissions and Commissions of Inquiry⁷—has produced guidelines. These are called *Setting Up and Running Commissions of Inquiry*, and provide information to all parties involved with a public inquiry. The guidelines address matters relevant to ministers considering the establishment of an inquiry, members of the public appearing before an inquiry and those involved in the conduct and administration of inquiries such as inquiry members and staff.⁸

8.11 The guidelines provide a comprehensive overview of Royal Commissions and Commissions of Inquiry in New Zealand. In relation to the running of inquiries, the guidelines describe the ‘planning phase’ pertaining to matters of strategy, timetabling and procedures. This phase requires input from commissioners, counsel assisting, the executive officer, the inquiry departmental liaison officer and any other supporting officials. Specific guidance is also provided in relation to the following:

- administration, personnel and finance;
- information management and information technology;
- media and communications strategy;
- checklist for running hearings;

6 See Recommendation 6–1 and accompanying discussion in Ch 6.

7 New Zealand Government Department of Internal Affairs, *Services—Commissions of Inquiry* (2009) <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Commissions-of-Inquiry-Index?OpenDocument&ExpandView> at 4 August 2009.

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

- drafting the report;
- presenting and distributing the report;
- archiving;
- reviewing processes at the conclusion of an inquiry; and
- summary of responsibilities.

8.12 In its 2008 report, *A New Inquiries Act*, the NZLC noted that these guidelines were an important resource for government, inquiry members and participants.⁹ The Commission recognised that legislative changes could ‘only go so far in ensuring that inquiries, once in operation, are conducted in the most effective and efficient manner’.¹⁰

8.13 Another model for providing administrative assistance to inquiries was recommended by the Law Reform Commission of Ireland (LRCI) in its *Report on Public Inquiries, Including Tribunals of Inquiry*. The LRCI recommended the establishment of a Central Inquiries Office.¹¹ The LRCI considered that such a body

would provide those charged with establishing and running public inquiries easy access to precedents and guidance on a wide variety of matters pertinent to their inquiry, including legislation, procedural issues, the drafting of terms of reference and administrative matters.¹²

8.14 There are also examples of ad hoc inquiries, although generally not Royal Commissions, receiving administrative and other support from existing permanent bodies or government departments with portfolio responsibility for the subject matter of the inquiry.¹³ Courts and tribunals may also have existing facilities, such as hearing rooms, which can be used for the conduct of inquiry hearings. For example, the hearing rooms of the Administrative Appeals Tribunal have been used by Royal Commissions and other inquiries on a number of occasions in recent times.¹⁴

9 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 36.

10 Ibid.

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

12 Ibid, [2.47].

13 For example, administrative assistance was provided to the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005) by the then Department of Immigration and Multicultural and Indigenous Affairs. The Department also provided secretariat support to the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005) until responsibility for completing the investigation was transferred to the Commonwealth Ombudsman: Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009.

14 For example, the HMAS Sydney II Commission, the Equine Influenza Inquiry and the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme occupied the Administrative Appeals Tribunal’s hearing rooms in Sydney.

Submissions and consultations

8.15 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC sought stakeholder views on the types of administrative assistance—such as budgeting, technological or other guidance—that may be required by Royal Commissions and other public inquiries. The ALRC also asked how such assistance should be provided, including whether a permanent central body should have a role in providing such assistance.¹⁵

8.16 Liberty Victoria submitted that the administrator of an inquiry should be someone with administrative experience outside government and, ideally, a person who had been employed outside the public sector for 12 months before their engagement by the inquiry. This would help to ensure the independence of the administrator. In addition, it recommended that such a person should be appointed by the inquiry chair and possess at least five years experience in administrative management, of which at least two years should be outside government.¹⁶

8.17 Liberty Victoria submitted that it would be more economical to have a ‘standing inquiry administrative service’, but was concerned that this may lead to bias and influence from government and other interested bodies. It noted that such a body also was unlikely to stay commercially competitive. It suggested that an independent inquiries body tasked with retaining institutional knowledge and providing cost savings could be modelled on a hybrid version of the Legal Representation Office in New South Wales and the Central Inquiries Office proposed by the LRCI. Notwithstanding this suggestion, Liberty Victoria was still of the view that inquiries should have the flexibility and independence to engage their own administrative support staff.¹⁷

8.18 The Australian Government Solicitor (AGS) submitted that in its experience, when establishing a Royal Commission or public inquiry, assistance in a broad range of areas is required, such as:

- obtaining premises, hearing room facilities and office equipment;
- obtaining and installing information technology infrastructure;
- obtaining document management systems;
- security for premises, documents and staff;
- engaging staff;

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

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

17 *Ibid.* Funding for a legal representation office is discussed in Ch 9.

- securing access to library and research services; and
- establishing media liaison.¹⁸

8.19 The AGS noted that there was often little, if any, lead time between the announcement of an inquiry and the commencement of its investigations. It noted that the development and retention of a body of knowledge within the AGD regarding the conduct and administration of inquiries had contributed very significantly to the effective establishment and conduct of recent inquiries. In the view of the AGS, it was important to preserve the ‘corporate memory’ gained from the conduct of previous inquiries. It noted that the infrequent appointment of Royal Commissions and similar inquiries was likely to be a relevant factor to consider when assessing whether the establishment of a permanent body to support such inquiries would be justified.¹⁹

8.20 The Victorian Society for Computers and the Law (VSCL) noted that information technology infrastructure for inquiries was often rushed into existence, custom built from the ground up, and, upon completion of the inquiry, torn down and disposed of. As a result, the Australian Government repeatedly had to meet the costs of new infrastructure for each Royal Commission or inquiry. The skills and experience gained by those supporting the inquiry were lost when the information management system was decommissioned.²⁰

8.21 The VSCL was of the view that these issues could be addressed by the establishment of a permanent secretariat. It suggested that such a secretariat could:

- be a repository for the knowledge required to conduct inquiries efficiently;
- develop and maintain guidelines and standards relating to the effective collection, processing, submission and management of information for inquiries;
- allow newly established inquiries to source existing knowledge and apply the necessary management controls within a short space of time; and
- develop a benchmarked project management methodology that could be applied to inquiries as required.

8.22 The VSCL noted, however, that a permanent hearing facility dedicated to Royal Commissions and public inquiries would become obsolete and be costly to maintain. Instead, the VSCL suggested that the necessary infrastructure be shared with the courts. This would also give inquiries access to experienced information technology personnel who were familiar with the demands of hearing-based systems. Finally, the

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

19 *Ibid.*

20 Victorian Society for Computers and the Law, *Submission RC 3*, 12 May 2009.

VSCL proposed that a panel of providers be established to pre-qualify potential vendors and service providers of inquiry-related systems to speed up the process of engaging contractors to support inquiries at short notice.

8.23 Mr Graham Millar, previously the Executive Officer of the Equine Influenza Inquiry (2008) and the Deputy Secretary of the HIH Royal Commission (2003), observed that the nature of the administrative support required could vary with each inquiry. Recent practice has involved a mix of direct departmental support and contracted support, with the AGD remaining at arm's length from the day-to-day management of the inquiry. Millar submitted that the present arrangements worked well. The AGD was a readily available source of administrative support, yet still allowed the inquiry to operate with the required level of independence.²¹

8.24 The Department of Immigration and Citizenship (DIAC) provided a secretariat to two recent inquiries into immigration matters—the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005) (Comrie Inquiry) and the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005) (Palmer Inquiry). The secretariat coordinated information flows and dealings between DIAC and the inquiries. DIAC had responsibility for many of the administrative tasks, including negotiating the employment arrangements of staff that had been independently selected by the inquiries, selecting temporary office space, managing information technology issues, managing various contracts which supported the function of the inquiries, and developing the rules and procedures by which DIAC and the inquiry secretariats interacted. DIAC submitted that there would be a benefit in having resources and experience readily available in a central agency, thereby negating the set-up costs and time taken to establish inquiries.²²

8.25 The Commonwealth Ombudsman suggested that options be considered to enable inquiries to be supported through an existing agency. Such an agency could provide the expertise needed to deal with routine administration in a consistent and predictable way, and to deal with administrative matters arising from the inquiry after it had reported.²³

8.26 Civil Liberties Australia suggested an arrangement whereby staff for inquiries could be drawn from existing personnel in agencies such as coroners' courts and the various Attorneys-General departments at federal, state and territory levels.²⁴

8.27 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that a single Australian Government department, rather than a permanent administrative body, should be allocated responsibility for matters

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

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

23 Commonwealth Ombudsman, *Submission RC 13*, 4 June 2009.

24 Civil Liberties Australia, *Submission RC 17*, 19 May 2009.

pertaining to the administration of Royal Commissions and Official Inquiries.²⁵ The majority of stakeholders who addressed the issue in submissions supported the proposal.²⁶

8.28 It was suggested in consultations, however, that such an arrangement should not preclude other departments and agencies from playing a role in the administration of inquiries in appropriate circumstances. Nor should it limit the potential input from officers in other departments, especially those with previous experience in establishing and administering inquiries. To ensure that an element of flexibility was retained, it was the view of some of those consulted that the ALRC's proposal should not take the form of a legislative requirement in the *Inquiries Act*.

8.29 In DP 75, the ALRC also proposed that the *Inquiries Handbook* should provide guidance on matters pertaining to the administration of inquiries, such as records management.²⁷ The National Archives of Australia (National Archives) expressed strong support for such a proposal, noting that it should result in improved records management practices in future inquiries.²⁸ The ALRC received limited additional feedback from stakeholders on this proposal.

ALRC's view

8.30 Before the HIH Royal Commission, established in 2001, there had not been a Royal Commission since the Commission of Inquiry into the Relations between the CAA and Seaview Air (1996). After the HIH Royal Commission and the Building Royal Commission concluded in early 2003, a period of more than a year elapsed before the establishment of the Royal Commission to Inquire into the Centenary House Lease, which was conducted between June and December 2004. About one year later, in November 2005, the Australian Government announced the establishment of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (AWB Inquiry). No federal Royal Commissions have been appointed since the AWB Inquiry. Ten months after the conclusion of the AWB Inquiry, however, the Australian Government announced another major public inquiry—the Equine Influenza Inquiry—which would exercise many of the powers of a Royal Commission.

8.31 While public inquiries other than Royal Commissions have been conducted during this time, there are often significant periods during which no Royal Commission or other major public inquiry is taking place. In the ALRC's view, having regard to

25 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–2.

26 Community and Public Sector Union, *Submission RC 25*, 22 September 2009; Australian Collaboration, *Submission RC 24*, 22 September 2009; I Turnbull, *Submission RC 22*, 21 September 2009; National Archives of Australia, *Submission RC 20*, 18 September 2009. Mr Don McKenzie was in favour of using existing agencies as a basis for the administration of ad hoc inquiries such as Royal Commissions and Official Inquiries: D McKenzie, *Submission RC 27*, 28 September 2009.

27 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–1.

28 National Archives of Australia, *Submission RC 20*, 18 September 2009.

recent trends, there is unlikely to be a consistent and continuing need for a permanent administrative body to support inquiries.

8.32 While some stakeholders advocated the establishment of a permanent administrative body, their concerns generally focused on the following:

- the need to retain institutional knowledge in relation to the administration of inquiries to ensure that inquiries can be established rapidly and conducted efficiently and effectively;
- the need for inquiries to access to appropriately skilled personnel to provide administrative and technical assistance; and
- the need for inquiries to have flexibility and control over their own administration to ensure their independent operation.

8.33 In the ALRC's view, these concerns can be addressed without establishing a permanent administrative body for Royal Commissions and Official Inquiries. Institutional knowledge about the administration of inquiries can be captured through the development of written guidance to be included in the *Inquiries Handbook*.²⁹ Even if there are extended periods during which no inquiries are held, or if personnel who have previous experience in the administration of inquiries are unavailable, the *Inquiries Handbook* will provide a framework for those conducting and administering inquiries that can be adapted to the particular circumstances of the inquiry.³⁰

8.34 It would be appropriate for the Australian Government to engage a person with substantial experience in the administration of inquiries to prepare guidance in consultation with relevant stakeholders. Such guidance should be included in the *Inquiries Handbook* and should address matters pertaining to the administration of inquiries, for example:

- recruitment;
- accommodation;
- budget and finance;

29 The ALRC discusses the recommended *Inquiries Handbook* in Ch 6.

30 The reports of previous Royal Commissions and inquiries are another useful source of information relating to the administration of inquiries: see T Morling, *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House* (1994); N Owen, *Report of the HIH Royal Commission* (2003), [2.1]–[2.21]; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22; D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004), Appendix H; T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10; M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), Appendix B.

- information and communication technology; and
- records management, including archiving.

8.35 In the ALRC's view, the current arrangement—namely, that an Australian Government department is allocated responsibility for providing administrative support to Royal Commissions and certain other inquiries—appears to work satisfactorily. It is recommended, therefore, that the Australian Government should continue to allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department. While that department—presently the AGD—may change from time to time, administrative responsibility for Royal Commissions and Official Inquiries should be allocated to a single department rather than be shared by multiple departments.

8.36 The ALRC envisages that this department, while retaining primary responsibility for an inquiry, could delegate particular administrative or technical tasks to other departments or agencies in appropriate circumstances, having regard to the subject matter and operational requirements of that inquiry. In this regard, the ALRC notes the need for flexibility expressed by some stakeholders. As such, the ALRC does not consider that this arrangement, if adopted, requires statutory action. Consistent with existing practice, it would be appropriate for a single department, such as the AGD, to be nominated under the *Administrative Arrangements Order*. In appropriate circumstances, the responsible department could arrange for administrative assistance and support to be provided by existing permanent bodies, such as the Commonwealth Ombudsman, if resources are available.

8.37 An appropriate section within the AGD, or suitably experienced officers within the department, should continue to be allocated the task of providing administrative, technical and other assistance to Royal Commissions and Official Inquiries established under the *Inquiries Act*. While this need not be their sole task, the section or officers should have the capacity to prioritise the provision of such assistance at short notice to ensure the efficient and expedited establishment and operation of Royal Commissions and Official Inquiries as they are appointed. The ALRC notes that the tasks involved in providing administrative assistance to inquiries are already well understood within the AGD and may include the following:

- assisting with matters preparatory to the formal establishment of the inquiry;
- providing assistance to inquiry members and staff to ensure an efficient and expedited establishment process and the conduct of the inquiry; and

- at the conclusion of the inquiry, facilitating the prompt transfer of an archival copy of the records of the inquiry to the National Archives.³¹

8.38 In addition, the ALRC recommends that the role also include responsibility for monitoring and updating the *Inquiries Handbook*. This may involve communication with relevant departments on specific matters, for example, seeking advice from National Archives on the management of inquiry records for inclusion in the *Inquiry Handbook*.

8.39 Streamlining administrative arrangements for inquiries under the *Inquiries Act* could also be achieved by ensuring that the roles and responsibilities of those involved in the administrative aspects of an inquiry—including inquiry staff and departmental officers within the responsible department—are clearly defined in the *Inquiries Handbook*. In particular, the ALRC notes the importance of the role of the executive officer in ensuring the efficient and effective conduct of an inquiry. Executive officers facilitate and coordinate administrative or technical assistance provided by the responsible department. They administer the inquiry at the direction of the inquiry members and at arm's length from the Australian Government. In the ALRC's view, the selection criteria and responsibilities of the executive officer of an inquiry should be set out in the *Inquiries Handbook*.

8.40 As discussed in Chapter 6, inquiries are to be independent in the exercise of their powers and the performance of their duties and functions.³² This has been, and should continue to be, reflected in the manner in which the Australian Government delivers administrative, technical and other assistance to inquiries. Inquiry members should exercise overall control over inquiry administration and should be capable of engaging their own staff and contractors.

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

- (a) recruitment;
- (b) accommodation;
- (c) budget and finance;
- (d) information and communication technology; and
- (e) records management, including archiving.

31 Recommendations regarding the archiving of inquiry records are discussed later in this chapter.

32 Recommendation 6–5.

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

- (a) assisting with matters preparatory to the formal establishment of the inquiry;
- (b) providing assistance to inquiry members and staff to ensure an efficient and expedited establishment process and conduct of the inquiry;
- (c) at the conclusion of the inquiry, facilitating the transfer of an archival copy of the records of the inquiry to the National Archives of Australia; and
- (d) monitoring and updating the recommended *Inquiries Handbook*.

Inquiry records

8.41 Inquiry records may fall into the following broad categories:

- administrative records concerning the setting up and operation of the inquiry;
- financial records of the inquiry;
- hearings records, such as transcripts;
- investigative records, including written statements where the inquiry is compiling evidence or taking evidence from witnesses;
- documents either produced to, or seized by, an inquiry; and
- working papers of the inquiry members and legal team.

8.42 In this section, the ALRC considers issues relating to the records of completed Royal Commissions and Official Inquiries including custody, use, public access and archiving.

Custody and use of inquiry records

8.43 Provisions dealing with the custody and use of records of a Royal Commission were inserted into the *Royal Commissions Act 1902* (Cth) in 2006.³³ Section 9(1) defines ‘Royal Commission record’ as a record that was produced by, given to or obtained by a Royal Commission and is no longer required for the purposes of the Commission, including copies of such records. Section 9(2) enables regulations to be made in relation to the custody, use and transfer of, and access to, records of Royal Commissions.

8.44 Following the insertion of s 9 into the *Royal Commissions Act*, reg 8 of the *Royal Commissions Regulations 2001* (Cth) was made to deal specifically with the records of the AWB Inquiry (other than those records relating to the administration and financial management of the inquiry and the report itself). The regulation provided that the records were to be kept in the custody of the Secretary of PM&C. It set out the circumstances in which PM&C, as custodian of the records, could provide the records to other persons or bodies, including for law enforcement purposes and to provide advice on the administration of a law of the Commonwealth, state or territory.³⁴

8.45 The provisions in s 9 of the *Royal Commissions Act* were modelled on earlier legislation that was specifically enacted to enable the transfer of certain records of the HIH Royal Commission to the Australian Securities and Investments Commission.³⁵ In essence, s 9 obviates the need to provide procedural fairness to persons who could be adversely affected if documents obtained by a Royal Commission for its purposes were to be made available to other persons or agencies and used for other purposes.³⁶

Archiving of inquiry records

8.46 The records of Royal Commissions are Commonwealth records and as such are subject to the provisions of the *Archives Act 1983* (Cth). Section 22 of the *Archives Act* provides that:

(2) The Commonwealth is entitled to the possession of records kept by a Royal Commission ... that are no longer required for the purposes of the Commission, and all such records shall be deemed to be Commonwealth records for the purposes of this Act.

(3) Records referred to in subsection (2) shall be kept in such custody as the responsible Minister directs and the Archives is not entitled to the care of any such records except in accordance with such a direction.

(4) A direction given by a Royal Commission ... prohibiting the publication of any document or matter does not apply to the provision of public access under this Act to

33 *Royal Commissions Amendment (Records) Act 2006* (Cth).

34 *Royal Commissions Regulations 2001* (Cth) reg 8(5).

35 *HIH Royal Commission (Transfer or Records) Act 2003* (Cth).

36 Explanatory Memorandum, *Royal Commissions Amendment (Records) Bill 2006* (Cth). Issues relating to procedural fairness and inquiries are discussed in Chs 15 and 16.

any records that are in the open access period or to the publication by any person of any records that are available for public access in accordance with this Act.

8.47 As a result of s 22(3), there is no mechanism for the automatic transfer to National Archives of the records of Royal Commissions. There must be a ministerial direction to effect a transfer.

8.48 As a matter of practice, the records of recent Royal Commissions relating to their administration (such as those relating to organisation, staffing, financial matters and travel arrangements) have been transferred to the AGD, while the substantive records of Royal Commissions (such as transcripts, exhibits, submissions, research papers and interim and final reports) have been transferred to PM&C.³⁷ There is no timeframe within which departments with custody of inquiry records must transfer the records to the care of National Archives, subject to the open access requirements of the *Archives Act* which generally provides for access after 30 years.³⁸

8.49 There appears to be no consistent practice as to when the transfer of Royal Commission records to National Archives takes place. For example, the records of the Royal Commission on Espionage (1955) were not transferred to National Archives until 1984, shortly before the open access period was due to commence.³⁹ In contrast, some digital records of the AWB Inquiry and the Royal Commission of Inquiry into the Centenary House Lease were transferred by PM&C to National Archives in 2006–2007.⁴⁰

Other methods of access to inquiry records

8.50 National Archives facilitates online access to selected Royal Commission and inquiry records in the open access period including reports, transcripts, audio recordings and exhibits.⁴¹

8.51 Most Royal Commissions and other major inquiries conducted in recent years have individual websites that contain the report of the inquiry and other material such as terms of reference, exhibits, witness statements, submissions and background

37 Department of the Prime Minister & Cabinet and the Attorney-General's Department, *Consultation RC 41*, 15 May 2009.

38 In some cases approval has been given for the special or accelerated release of Royal Commission records before they are 30 years old: P Nagle and R Summerrell, *Aboriginal Deaths in Custody, The Royal Commission and its Records, 1987–91—Research Paper No 2* (2002) National Archives of Australia.

39 National Archives of Australia, *Series notes for series A6216—Original Signed Copy of the 'Report of the Royal Commission on Espionage'*, <www.naa.gov.au> at 9 July 2009.

40 National Archives of Australia and National Archives of Australia Advisory Council, *Annual Reports 2006–07*, 132.

41 Selected records of a number of Royal Commissions are available electronically on the National Archives of Australia website, including records of the Royal Commission into British Nuclear Tests in Australia (1985), the Royal Commission on Television (1954), the Royal Commission into Aboriginal Deaths in Custody (1991) and the Royal Commission on Espionage (1955): Australian Government, *National Archives of Australia—Homepage*, <www.naa.gov.au> at 9 July 2009.

papers.⁴² Public access to these websites is maintained following the completion of the inquiry either by an Australian Government department, such as PM&C or the AGD, or through PANDORA, which is an Australian web archive hosted by the National Library of Australia.⁴³

8.52 Access to Royal Commission and inquiry reports is facilitated through legal deposit requirements and the Commonwealth Library Deposit and Free Issue Schemes.⁴⁴ These arrangements, however, would not generally extend to inquiry records.

8.53 In addition to the *Archives Act*, which regulates access to records older than 30 years, there are a number of different pieces of Commonwealth legislation that may affect access to inquiry records. In particular, the *Freedom of Information Act 1982* (Cth) provides for public access to documents kept by Australian Government departments which are less than 30 years old.⁴⁵

Submissions and consultations

8.54 In response to IP 35, the AGS noted that a myriad of issues could arise in the period following the completion of an inquiry relating to the retention, management and use of records and information arising from an inquiry. The AGS observed that the AGD, together with PM&C, had experience in dealing with such issues and it was important to maintain corporate memory regarding the retention and use of Royal Commission records. Any uncertainty or inefficiency regarding the transfer, retention and use of records could limit the effectiveness of Royal Commissions and other inquiries.⁴⁶

42 See, eg, *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 4 August 2009; *Royal Commission into the Building and Construction Industry* (2003) <www.pandora.nla.gov.au/pan/24143/20040427-0000/www.royalcombc.gov.au/index.html> at 4 August 2009; *Inquiry into the Centenary House Lease* (2004) <www.ag.gov.au/agd/www/centenaryhome.nsf> at 4 August 2009; *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009; *Equine Influenza Inquiry* (2008) <www.equineinfluenza inquiry.gov.au/> at 4 August 2009; *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 4 August 2009.

43 PANDORA is an acronym for the phrase 'Preserving and Accessing Networked Documentary Resources of Australia'. Titles in the archive are selected according to selection guidelines developed by the National Library of Australia and its partners and the guidelines are published on the PANDORA website: National Library of Australia and Partners, *PANDORA—Australia's Web Archive*, <<http://pandora.nla.gov.au>> at 1 July 2009.

44 Under s 201 of the *Copyright Act 1968* (Cth) and various state Acts, a copy of any work published in Australia must be deposited with the National Library of Australia and the appropriate state library.

45 For the purposes of the *Freedom of Information Act 1982* (Cth), records of a Royal Commission that are in the care of National Archives are taken to be documents of an agency and to be in the possession of the Department administered by the Minister administering the *Royal Commissions Act 1902*, currently the PM&C: see *Freedom of Information Act 1982* (Cth) s 13.

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

8.55 In DP 75, the ALRC proposed that the provisions for the custody and use of records equivalent to those in s 9 of the *Royal Commissions Act* should be included in the *Inquiries Act*.⁴⁷

8.56 National Archives submitted that the records of Royal Commissions, as part of the archival resources of the Commonwealth, should be preserved in such a way that they can be made available for public access in accordance with the *Archives Act*. It submitted that the *Inquiries Act* should make it clear that subsequent public access to such records is to be governed by the relevant provisions of the *Archives Act*, notwithstanding any interim directions of the Inquiry.⁴⁸

8.57 The ALRC also proposed that there should be a legislative requirement for the transfer of an archival copy of the records of Royal Commissions and Official Inquiries to National Archives at the conclusion of the inquiry, unless directed otherwise by the relevant minister.⁴⁹

8.58 National Archives agreed that such records should be placed in its care as soon as practicable after the completion of an inquiry. It recognised, however, that it was sometimes necessary for interim custody and access arrangements to be made for these records. As such, National Archives submitted that records should be transferred as soon as practicable after completion of the inquiry and, in any case, within five years of completion of the inquiry.⁵⁰

8.59 National Archives also highlighted that inquiry records are increasingly available in electronic form on existing document management systems. In the view of National Archives, this would streamline the prompt transfer of inquiry records, including inquiry websites. It suggested that an ‘access copy’ of inquiry records could be kept by the responsible department to enable any residual matters to be dealt with.

8.60 The Australian Collaboration and the Accountability Round Table agreed that inquiry records should be lodged with National Archives. In addition, they submitted that there should be a requirement that inquiry material also be lodged with the National Library of Australia.⁵¹

47 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–3.

48 National Archives of Australia, *Submission RC 20*, 18 September 2009.

49 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–4.

50 National Archives of Australia, *Submission RC 20*, 18 September 2009.

51 Accountability Round Table, *Submission RC 29*, 30 September 2009; Australian Collaboration, *Submission RC 24*, 22 September 2009.

8.61 In DP 75, the ALRC's final proposal with respect to inquiry records was that Royal Commissions and Official Inquiries be required to comply with the standards determined, or record-keeping obligations imposed, by National Archives.⁵²

8.62 National Archives supported this proposal, noting that it would ensure that inquiry records were managed in an effective and efficient manner and, where possible, in electronic formats. It would also enable the transfer of archival records to take place electronically and allow for the efficient destruction of any remaining records.

8.63 National Archives suggested that general advice on records management should be provided in the *Inquiries Handbook*. In addition, National Archives noted that it could provide specific advice on records management and archiving issues to inquiry staff at all stages of an inquiry.⁵³

ALRC's view

8.64 Issues relating to the retention and subsequent use of records of concluded Royal Commissions and other inquiries are critically important. Inquiry records may have a significant impact on the extent to which the findings and recommendations of such bodies can be used for the purposes of law enforcement, advice on the administration of laws, and implementation of inquiry recommendations.⁵⁴

8.65 The ALRC has not identified any shortcomings in the existing arrangements in the *Royal Commissions Act* and the *Royal Commissions Regulations* introduced in 2006. These arrangements have facilitated the effective transfer of custody of the records of both the HIH Royal Commission and the AWB Inquiry, and have provided necessary clarification of the purposes for which those records may be used by other persons and bodies. In the ALRC's view, it is appropriate that provisions equivalent to those in s 9 of the *Royal Commissions Act*—including the power to make regulations in relation to specific inquiries—be incorporated in the *Inquiries Act* to govern the transfer, custody and use of the records of both Royal Commissions and Official Inquiries.

8.66 Arrangements should be in place to ensure an appropriate level of ongoing public access to the reports and records of completed inquiries—for example, by maintaining inquiry websites. In particular, it is highly desirable to continue the practice of developing and maintaining a public website for Royal Commissions and other inquiries, both during and after their completion. As the current arrangements for hosting and maintaining inquiry websites are ad hoc, the responsible Australian Government department should allocate responsibility for this task to an appropriate

52 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–5.

53 National Archives of Australia, *Submission RC 20*, 18 September 2009.

54 The use that can be made of inquiry records during the currency of the inquiry, including the power of an inquiry to make referrals of information or evidence to other agencies, is discussed in Ch 11.

agency or service provider and set out any such arrangements in the *Inquiries Handbook*.⁵⁵

8.67 The *Inquiries Handbook* and the *Inquiries Act* should include arrangements for the conservation and preservation of records of completed inquiries. These records form part of the existing and future archival resources of the Commonwealth and should be made available for public access in accordance with the *Archives Act*.

8.68 First, the ALRC recommends that the arrangements for the transfer of inquiry records to National Archives be streamlined by amending the *Archives Act* to enable the transfer of a copy of those records for archival purposes as soon as practicable after the completion of the inquiry. There should be a consistent approach to the transfer of such records and there should be a presumption that National Archives receive an archival copy of those records at the completion of the inquiry. This will not prevent an access copy of the records being kept by the department or body nominated as custodian by regulation. It will, however, preserve an archival copy of inquiry records and avoid the risk of their becoming interspersed with those of the department or body with custody of the records.

8.69 In DP 75, the ALRC proposed that the presumption that an archival copy of the records be transferred to National Archives after the conclusion of an inquiry should only be reversed if the relevant minister directs otherwise. On further consideration, the ALRC prefers the approach put forward by National Archives—namely, that if the transfer of an archival copy cannot take place immediately after the conclusion of the inquiry, there should be a requirement that the transfer be facilitated within five years of the conclusion of the inquiry.

8.70 In forming this view, the ALRC notes the willingness of National Archives to provide advice and assistance to Royal Commissions and Official Inquiries in relation to records management and archiving issues. The ALRC has also taken into account the increasing use of sophisticated information and communication technology systems for records management and document processing by inquiries, and the capacity of National Archives to manage transfers of inquiry records in electronic formats. This should ease the administrative burden of transferring inquiry records to National Archives.

8.71 Secondly, the ALRC recommends that the record-keeping and document management systems used by inquiries should conform to guidance and standards issued by National Archives. This will ensure that inquiry records are appropriately administered during their active life and are transferred to the care of National Archives in a form that enables their preservation and public access as part of the

55 The ALRC recommends that the Australian Government should allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department: Recommendation 8–2.

archival resources of the Commonwealth. As noted by National Archives, any advice that it develops for Royal Commissions and Official Inquiries could be included in full in the *Inquiries Handbook* or, alternatively, in summary form with links to detailed advice on the National Archive's website. This, in turn, could be updated from time to time.

8.72 It is appropriate for Royal Commissions and Official Inquiries to seek advice and assistance from National Archives—in accordance with its statutory functions under the *Archives Act*—in relation to creating, keeping and managing inquiry records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth.⁵⁶ The *Archives Act* also enables National Archives to provide, on request, training of staff responsible for keeping current inquiry records.⁵⁷

8.73 Finally, the ALRC notes that a large volume of material—including reports, witness statements, exhibits and submissions—remains available to the public through archived inquiry websites on the internet. Australian library and information services provide a good level of internet access services to members of the public who cannot otherwise access the internet. In these circumstances, the ALRC is not persuaded that a new legislative requirement for inquiry records to be lodged with the National Library of Australia is necessary.

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

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

- (a) as soon as practicable after the conclusion of the inquiry, subject to any directions made by the minister to whose ministerial responsibilities the records most closely relate; and
- (b) in any event, within five years of the conclusion of the inquiry.

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

⁵⁶ *Archives Act 1983* (Cth) s 5(2)(c).

⁵⁷ *Ibid* s 6(1)(j)–(k).

