

17. Privileges and Public Interest Immunity

Contents

Introduction	433
Privileges under the <i>Royal Commissions Act</i>	434
Client legal privilege	435
Application to Official Inquiries	438
Privilege against self-incrimination	439
Background	439
The privilege and use immunity under the <i>Royal Commissions Act</i>	440
The privilege and use immunity in other jurisdictions	441
Options for reform	442
Submissions and consultations	444
ALRC's view	446
Pending charges or penalty proceedings	447
ALRC's view	448
Scope of use immunity	449
Type of proceedings	449
Scope of material	451
The exceptions	454
Privilege against spousal incrimination	456
Parliamentary privilege	457
ALRC's view	459
Public interest immunity	460
Submissions and consultations	462
ALRC's view	462
Statutory privileges	463
Submissions and consultations	464
ALRC's view	465

Introduction

17.1 A fundamental purpose of many inquiries is to establish the facts of an incident or issue, without the limitations on evidence and procedure that apply to courts. In Chapter 11, the ALRC discusses the powers of a Royal Commission to compel a person to attend or appear to give evidence, and produce documents or other things. In

that chapter, the ALRC recommends that similar powers should be conferred on a new form of statutory inquiry called Official Inquiries.¹

17.2 These powers to require information, however, may be subject to a number of exemptions from disclosure. That is, a person required to provide the information may have a lawful claim for refusing to comply with the requirement. Exemptions from disclosure exist both to protect fundamental human rights or important individual interests, as well as to serve broader public interests such as national security. Such exemptions from disclosure, however, may impede the investigative function of inquiries by suppressing relevant evidence, hampering the effectiveness of investigations, and delaying or frustrating investigations.²

17.3 In this chapter, the ALRC discusses the common law privileges of: client legal privilege;³ the privilege against self-incrimination; spousal incrimination;⁴ and parliamentary privilege. The chapter also considers public interest immunity, which is technically distinct from a privilege but also enables a person to resist disclosure. Finally, the chapter considers whether other statutory privileges available under the *Evidence Act 1995* (Cth) should apply. The procedures for claiming such privileges are discussed in Chapters 14 and 19.

Privileges under the *Royal Commissions Act*

17.4 Until relatively recently, the *Royal Commissions Act 1902* (Cth) did not refer to privileges or public interest immunity at all.⁵ Nevertheless, with the exception of the privilege against self-incrimination,⁶ commentators generally have been of the view that common law privileges and public interest immunity did apply to Royal Commissions.⁷

1 Recommendation 11–1.

2 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.9]–[6.39].

3 This is also known as legal professional privilege. The term ‘client legal privilege’ is preferred here because it is used in the *Evidence Act 1995* (Cth) pt 3.10, div 1, and it reflects the nature of the privilege as one belonging to the client, rather than the lawyer: *ibid.*, [1.16]–[1.17].

4 As discussed below, at common law the privilege against spousal incrimination protects only those in a legally recognised marriage, and does not extend to those in a de facto relationship: *S v Boulton* (2006) 151 FCR 364, [50], [119], [171].

5 As noted below, ss 2(5) and 6AA of the *Royal Commissions Act 1902* (Cth), dealing with client legal privilege, were introduced in 2006, and s 6A, dealing with the privilege against self-incrimination, was introduced in 1982.

6 This was on the basis of s 6DD which, as discussed below, provides a use immunity. It is clear from the parliamentary debates, however, that this section was not introduced to abrogate the privilege, as the then Attorney-General expressly affirmed that the privilege applied: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1187 (W Hughes—Attorney-General).

7 See, eg, S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.10]; H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [8.2]–[8.10], [9.4]–[9.5].

17.5 There are three possible bases for this conclusion. First, there is the ‘well settled [rule] that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect’.⁸

17.6 Secondly, the Act provides for a defence of ‘reasonable excuse’ for failing to attend before a Royal Commission, or for failing to produce documents or other things under s 3 of the Act. Section 1B of the Act defines reasonable excuses in terms of justifications that would excuse an equivalent person in a court of law, and this may therefore include privileges and public interest immunity.⁹ The defence of ‘reasonable excuse’ is discussed in Chapter 19, with the ALRC recommending that the applicability of the privileges and public interest immunity be clarified in the defence of ‘reasonable excuse’.

17.7 Thirdly, s 7 of the Act provides witnesses with the ‘same protection’ as a witness in a case tried before the High Court.¹⁰ In 1912, the then Attorney-General offered the opinion that this section enabled witnesses to claim privileges and public interest immunity.¹¹ This view has been expressed more recently in a number of cases.¹²

Client legal privilege

17.8 Client legal privilege is a doctrine of both common law and statute which

provides that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.¹³

8 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553.

9 This was the view of Professor Enid Campbell: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [8.2]. The Second Reading debates when this section was inserted, however, indicate that the intention was to confine ‘reasonable excuse’ solely to physical and practical excuses: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1185 (W Hughes—Attorney-General).

10 Section 7 is discussed in more detail in Ch 12.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1912, 1388 (W Hughes—Attorney-General).

12 See *Royal Commission Re A Brisbane Hotel (No 2)* [1964] QWN 29; *Sorby v Commonwealth* (1983) 152 CLR 281, 300; *Re Clyne; Ex parte Deputy Commissioner of Taxation* (1986) 15 FCR 128, 136–137. See also the opinion of the Secretary to the Attorney-General’s Department, cited in H Coombs and others, *Royal Commission on Australian Government Administration* (1976), [9.4]–[9.5], which expressed the view that s 7 of the *Royal Commissions Act* preserved public interest immunity.

13 S McNicol, ‘Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?’ in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48.

17.9 As the ALRC stated in its 2007 report, *Privilege in Perspective* (ALRC 107):

the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients—both individual and corporate, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.¹⁴

17.10 As noted above, until recently it was unclear whether client legal privilege constituted a ‘reasonable excuse’ for refusing to answer questions or produce documents,¹⁵ although a number of commentators considered that client legal privilege did apply to Royal Commissions.¹⁶

17.11 In 2006, the position was clarified when the Act was amended to include provisions relating to client legal privilege.¹⁷ These provide that a Royal Commission may require the production of documents even if they are subject to client legal privilege.¹⁸ Further, a claim of client legal privilege is not a reasonable excuse to fail to produce a document to a Royal Commission, unless:

- a court has found the document to be privileged; or
- a claim is made to the member of the Commission who required production of the document within the time required for its production.¹⁹

17.12 Where a claim of client legal privilege is made to a Royal Commission, the Commission may require the document to be produced for inspection in order to determine the claim of privilege.²⁰ If the claim is accepted, the document is disregarded for the purposes of any report or decision of the Royal Commission.²¹

17.13 In ALRC 107, the ALRC made a number of recommendations concerning the application of client legal privilege to Royal Commission proceedings. As these are presently under consideration by the Australian Government, the Terms of Reference for this Inquiry exclude re-consideration of the application of client legal privilege to

14 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [2.118].

15 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.9].

16 See, eg, E Campbell, *Contempt of Royal Commissions* (1984), 27; S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [5.21].

17 The amendment was sought by the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006), as a result of the decision in *AWB Ltd v Cole* (2006) 152 FCR 382. See Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.

18 *Royal Commissions Act 1902* (Cth) s 2(5). However, this section contains a note that under s 6AA client legal privilege might still be a reasonable excuse for refusing to produce the document.

19 *Ibid* s 6AA(1).

20 *Ibid* s 6AA(2), (3).

21 *Ibid* s 6AA(4).

Royal Commissions. One issue for this Inquiry, however, is the application of client legal privilege to Official Inquiries. It is useful, therefore, to describe briefly the recommendations made in ALRC 107.

17.14 In ALRC 107, it was stated that:

The ALRC supports the doctrine of client legal privilege as a fundamental principle of common law that facilitates compliance with the law. The ALRC agrees ... that, in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator.²²

17.15 The ALRC recommended that client legal privilege should apply to the coercive information-gathering powers of federal bodies, in the absence of any clear, express statutory statement to the contrary.²³ Further, if Parliament was to legislate to abrogate the privilege, it should consider the following factors:

- the subject of the Royal Commission of inquiry, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community;
- whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and *especially*
- the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the Royal Commission and, in particular, whether the legal advice itself is central to the issues being considered by the Commission.²⁴

17.16 The ALRC was of the view, however, that a strong case could be made for abrogating client legal privilege in the context of Royal Commissions, observing that

the discovery of the truth has been described as a prime function of a Royal Commission. Royal Commissions are established only where a particular area of public concern has been identified for which the usual investigations and proceedings would not suffice, and their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations.²⁵

17.17 Rather than simply abrogating the privilege, however, the ALRC recommended that the Act should enable the Governor-General, by Letters Patent, to determine that client legal privilege should not apply, in relation to either the whole inquiry or particular aspects of the inquiry. This determination should be guided by the same three factors generally considered to be relevant to the determination that client legal

22 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.133].

23 *Ibid.*, Rec 6–1.

24 *Ibid.*

25 *Ibid.*, [6.155].

privilege should be abrogated—namely, the importance and impact of the subject of inquiry; the availability of alternative means of obtaining the information; and the degree to which lack of access would hamper or frustrate the inquiry.

Application to Official Inquiries

17.18 The ALRC recommends in this Report the creation of another form of statutory inquiry, called Official Inquiries.²⁶ As discussed in Chapter 5, there should be a number of distinctions between Royal Commissions and Official Inquiries to ensure that each has the necessary tools to carry out its investigation without inappropriately infringing on the rights of persons involved with, or affected by, its processes.

17.19 Importantly, Royal Commissions should have a wider range of coercive powers than Official Inquiries. The model recommended by the ALRC, therefore, envisages that Royal Commissions should be reserved for more serious matters that require the full range of coercive powers. The issue is whether, in line with the recommendation in ALRC 107 in relation to Royal Commissions, there should be a power to abrogate client legal privilege in relation to some or all Official Inquiries. The ALRC notes that there was significant opposition to the abrogation of client legal privilege in the Royal Commissions context by many stakeholders in submissions to the previous inquiry.²⁷

ALRC's view

17.20 In the ALRC's view, Official Inquiries should not have the power to abrogate client legal privilege. The model recommended by the ALRC is designed to ensure that an inquiry has the necessary tools to carry out its investigation without inappropriately infringing on the rights of those involved.

17.21 As discussed in Chapters 5 and 11, extraordinary coercive powers should be reserved for Royal Commissions. Similarly, the abrogation of client legal privilege should be reserved for Royal Commissions, given the importance of the privilege to the protection of rights and the administration of justice.

17.22 Client legal privilege provides an essential protection to clients and facilitates compliance with the law. In the course of ordinary investigatory activities, the importance of the privilege outweighs the benefits of abrogation to the investigator.²⁸ This conclusion also applies to the investigatory activities of Official Inquiries. Finally, the ALRC has recommended in this Report that, in the appropriate circumstances, an Official Inquiry may be converted into a Royal Commission.²⁹ If it becomes necessary to abrogate client legal privilege in an Official Inquiry, the appropriate course would be to convert the Official Inquiry into a Royal Commission.

26 Recommendation 5-1.

27 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.108]–[6.111].

28 *Ibid.*, [2.118], [6.133].

29 Recommendation 5-3.

Privilege against self-incrimination

Background

17.23 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if the answer or the document would tend to incriminate that person.³⁰ Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).³¹

17.24 The privilege has been described by the High Court as a human right ‘which protects personal freedom, privacy and dignity’.³² It is also a human right protected by the *International Covenant on Civil and Political Rights*.³³ Other rationales for the privilege include: preventing the abuse of power and convictions based on false confessions; protecting the quality of evidence and the requirement that the prosecution prove the offence; and avoiding putting a person in a position where the person will be exposed to punishment whether they tell the truth, lie, or refuse to provide the information.³⁴

17.25 The privilege applies in non-judicial proceedings, such as inquiries, unless it is abrogated expressly or by the necessary implication of the wording of the governing statute.³⁵ In Australia, the privilege applies only to natural persons and does not apply to corporations.³⁶ Further, it protects only against self-incrimination and cannot be invoked to shield others from incrimination.³⁷

30 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382.

31 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

32 *Ibid*, 498 quoting Murphy J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150. See also *Sorby v Commonwealth* (1983) 152 CLR 281; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 135; *Thomson Newspapers v Canada* [1990] 1 SCR 627, [61].

33 Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides that in the ‘determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... not to be compelled to testify against himself or to confess guilt’. It is said also to be an inherent right in art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: *Murray v UK* (1996) 22 EHRR 29, [50]–[51].

34 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination* (2004), Ch 3.

35 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382, 340–341, 344; *Sorby v Commonwealth* (1983) 152 CLR 281, 309.

36 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681, following *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

37 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385.

17.26 The privilege protects individuals from answering questions or producing documents. It does not cover physical evidence that may be obtained from a person, such as fingerprints,³⁸ or evidence that may be obtained by means other than by requiring a person to produce it (for example, by a search warrant or by intercepting telecommunications).³⁹

17.27 It is an increasingly common trend for the privilege against self-incrimination to be abrogated by statute in order to assist regulators and administrators with investigation and enforcement. Commonly, the statute provides that, while individuals are not entitled to refuse to answer or produce documents because of the privilege, those answers or documents cannot be used in subsequent proceedings (typically referred to as a ‘use immunity’). Use immunities tend to take one of three forms:

- a ‘use’ or ‘direct use’ immunity—the incriminating evidence itself is inadmissible in subsequent proceedings;
- a ‘derivative use’ immunity—the incriminating evidence and any evidence obtained as a result of that evidence is inadmissible in subsequent proceedings; or
- a ‘transactional’ or ‘personal’ immunity—a person who is compelled to testify about an offence may never be prosecuted for that offence, no matter how much independent evidence is obtained.⁴⁰

The privilege and use immunity under the *Royal Commissions Act*

17.28 Section 6A of the *Royal Commissions Act* provides that it is not a reasonable excuse for a person to refuse or fail to produce a document or thing, or to answer a question, on the ground that doing so might incriminate the person or make the person liable to a penalty. As discussed below, the section does not apply if the production or answer might tend to incriminate the person in relation to continuing criminal or penalty proceedings.⁴¹

17.29 Section 6A was introduced to ensure that the privilege against self-incrimination was abrogated in Royal Commission proceedings.⁴² Although the *Royal Commissions*

38 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

39 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385. The powers of Royal Commissions to search and seize evidence, and to receive intercepted information, is discussed in Ch 11.

40 See discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 19.

41 *Royal Commissions Act 1902* (Cth) s 6A(3), (4).

42 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337. This amendment was part of a number of amendments to Royal Commission powers sought during the Royal Commission into the Activities of the Federated Ships Painters and Dockers Union (1984). The amendment was upheld as constitutionally valid in *Sorby v Commonwealth* (1983) 152 CLR 281.

Act had long been interpreted as abrogating the privilege, the High Court had cast doubt upon this interpretation in *Hammond v Commonwealth*.⁴³

17.30 Section 6DD provides that statements or disclosures made by a person in the course of giving evidence to a Royal Commission, or the production of a document or thing in response to a summons or notice to produce, are not admissible in evidence in ‘any civil or criminal proceedings’ in any Australian court, unless the proceedings are for an offence against the *Royal Commissions Act*. A similar provision applies to evidence that is taken outside Australia pursuant to s 7B of the Act.⁴⁴ Section 6DD, therefore, provides a direct use immunity.

17.31 The effect of ss 6A and 6DD is that evidence otherwise subject to the privilege against self-incrimination may be used in subsequent proceedings in certain circumstances. In particular, the evidence may be used as a basis for further investigations; in proceedings brought against another person; in proceedings against a corporation;⁴⁵ and in administrative or disciplinary proceedings.⁴⁶ In the HIH Royal Commission (2003), Commissioner Owen expressed the view that the immunity did not extend to the documents themselves, but only to the fact of the production of those documents.⁴⁷

17.32 Under the *Director of Public Prosecutions Act 1983* (Cth), the Commonwealth Director of Public Prosecutions (CDPP) is empowered to provide an undertaking of derivative use immunity to a person in specified proceedings (including an inquiry conducted under the laws of the Commonwealth), in respect of any civil or criminal proceedings in an Australian court.⁴⁸ If such an undertaking is made, it may remove the risk of self-incrimination so that the person cannot rely upon the privilege against self-incrimination.⁴⁹

The privilege and use immunity in other jurisdictions

17.33 The privilege against self-incrimination is likewise abrogated in the legislation governing inquiries in all but two Australian jurisdictions,⁵⁰ and in legislation governing standing crime commissions.⁵¹ These laws provide for a direct use immunity

43 *Hammond v Commonwealth* (1982) 152 CLR 188, 202–203.

44 *Royal Commissions Act 1902* (Cth) s 7C.

45 See N Owen, *Report of the HIH Royal Commission* (2003), [1.3.4].

46 *Bercove v Hermes [No 3]* (1983) 74 FLR 315. See also *Attorney-General (Vic) v Riach* [1978] VR 301, 305.

47 N Owen, *Report of the HIH Royal Commission* (2003), [1.3.4]. As discussed further below, however, it is arguable that some documents could be characterised as a ‘disclosure’ protected by the use immunity.

48 *Director of Public Prosecutions Act 1983* (Cth) s 9(6), (6A).

49 *Registrar, Court of Appeal v Craven* (1994) 77 A Crim R 410.

50 *Special Commissions of Inquiry Act 1983* (NSW) s 23; *Royal Commissions Act 1923* (NSW) s 17; *Evidence Act 1958* (Vic) s 19C; *Commissions of Inquiry Act 1950* (Qld) s 14A(1); *Royal Commissions Act 1968* (WA) s 20; *Royal Commissions Act 1991* (ACT) s 24; *Inquiries Act 1991* (ACT) s 19. The privilege is not abrogated in South Australian or Northern Territory legislation: see *Royal Commissions Act 1917* (SA) s 16B(2); *Inquiries Act 1945* (NT) s 15.

51 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(1).

only,⁵² except in Tasmania and the ACT.⁵³ In New South Wales (NSW), the privilege is capable of being abrogated only in relation to Royal Commissions chaired or constituted by a judge or a legal practitioner of at least seven years standing.⁵⁴

17.34 The application of the privilege in relation to inquiries in overseas jurisdictions varies. Following a review by the Law Reform Commission of Ireland, Ireland has introduced a bill that abrogates the privilege and provides for a direct use immunity.⁵⁵ This bill is currently being considered by the legislature. In contrast, the United Kingdom⁵⁶ and New Zealand⁵⁷ have not abrogated the privilege against self-incrimination in legislation governing inquiries.

Options for reform

17.35 Several issues arise in this Inquiry in relation to the privilege against self-incrimination. First, should the privilege against self-incrimination be abrogated in all, or some, Royal Commissions and Official Inquiries? Secondly, if so, what kind of use immunity should apply? Thirdly, what should be the scope of the use immunity?

Abrogation of the privilege

17.36 The Queensland Law Reform Commission (QLRC) examined the circumstances which could justify the abrogation of the privilege against self-incrimination in 2004.⁵⁸ In its view, abrogation could be justified if, among other things, the information to be compelled as a result of the abrogation concerns an issue of ‘major public importance that has a significant impact on the community in general or on a section of the community’.⁵⁹ The QLRC cited, as examples, inquiries or investigations into ‘allegations of major criminal activity, organised crime or official corruption or other

52 See, eg, *Royal Commissions Act 1923* (NSW) s 17; *Evidence Act 1958* (Vic) s 19C; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 14; *Commissions of Inquiry Act 1995* (Tas) ss 21, 26; *Royal Commissions Act 1991* (ACT) s 24; *Inquiries Act 1991* (ACT) s 19.

53 Tasmania provides for a transactional immunity, and the ACT for a derivative use immunity: *Commissions of Inquiry Act 1995* (Tas) s 23; *Royal Commissions Act 1991* (ACT) s 24(3), *Inquiries Act 1991* (ACT) s 19(3).

54 *Royal Commissions Act 1923* (NSW) ss 15, 17. See also *Special Commissions of Inquiry Act 1983* (NSW) ss 21, 23. Special Commissions of Inquiry must be constituted by a judge of a specified court in New South Wales, or by a member of the Workers Compensation Commission, or by a legal practitioner of at least seven years standing: *Special Commissions of Inquiry Act 1983* (NSW) ss 3, 4(2).

55 Tribunals of Inquiry Bill 2005 (Ireland) s 16. This section is similar in terms to s 6DD of the *Royal Commissions Act 1902* (Cth), but the intention of abolishing the privilege was stated in Parliament upon its introduction: see Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), 258–259.

56 *Inquiries Act 2005* (UK) s 22. However, the Attorney-General may give an undertaking granting derivative use immunity, which would make it difficult for an individual to refuse to answer: Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), [56]. See also United Kingdom Department of Constitutional Affairs, *Consultation Paper—Effective Inquiries* (2004), [77], [79].

57 *Commissions of Inquiry Act 1908* (NZ) ss 4C(4), 6.

58 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination* (2004), Ch 6.

59 *Ibid.*, [6.50].

serious misconduct by a public official'.⁶⁰ An additional consideration was the extent to which the information is likely to benefit the public interest.⁶¹

17.37 The QLRC also identified factors that, while not justifying abrogation as such, were relevant to the decision to abrogate the privilege. These included whether there were alternative means of obtaining the information; whether a use immunity was provided; and whether there were procedural safeguards. It was also relevant if the information was contained in a document that was already in existence, and if the extent of the abrogation was no more than necessary to achieve the intended purpose of the abrogation.⁶²

Direct use or derivative use immunity

17.38 As noted above, the *Royal Commissions Act* provides for a direct use immunity rather than a derivative or transactional use immunity.⁶³ That is, evidence given by a witness in a Royal Commission cannot be used as evidence in subsequent legal proceedings, but may be used to obtain further evidence. A derivative use immunity would not allow the evidence to be used to obtain further evidence. This would make it much more difficult to prosecute a person for offences that are disclosed during an inquiry. The primary argument against a derivative use immunity, therefore, is that it would shield witnesses from the proper consequences of their wrongdoing. Given that Royal Commissions are usually established because of the seriousness and public importance of the allegations involved, it may seem particularly inappropriate to shield witnesses of a Royal Commission from the consequences of their misconduct.

17.39 A derivative use immunity may also limit the effectiveness of Royal Commissions. For example, there have been many Royal Commissions and other inquiries in which criminal prosecutions or regulatory action have been considered an important aspect of their effectiveness. As one submission to the ALRC's inquiry into client legal privilege put it:

It would make the work of commissions of public importance appear somewhat futile if their findings could not be successfully acted upon because material available to them was not then admissible in subsequent court proceedings.⁶⁴

17.40 The primary argument for a derivative use immunity is that it may be more useful in discovering the truth than a direct use immunity, because a person's fear of the consequences of disclosure would be diminished.⁶⁵ A derivative use immunity also

60 Ibid, [6.51].

61 Ibid, [6.52].

62 Ibid, [6.59].

63 *Royal Commissions Act 1902* (Cth) s 6DD.

64 I Temby, *Submission LPP 72*, 19 July 2007.

65 The view of the Independent Commission Against Corruption, however, is that this argument 'is a myth rather than reality': Report of proceedings before Committee on the Independent Commission against Corruption, *Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 4 May 2009, Sydney, 5 (Jerrold Cripps QC, Commissioner).

can be justified by a number of the rationales for the privilege against self-incrimination discussed above—such as the interests in personal freedom, privacy and dignity, and the prevention of the abuse of power.

Submissions and consultations

17.41 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether the abrogation of the privilege against self-incrimination was appropriate in all circumstances, and if so, what protections should apply.⁶⁶

17.42 The few submissions that addressed this issue argued either that the privilege should not be abrogated, or submitted that, if abrogated, there should be a derivative use immunity.⁶⁷ The Construction, Forestry, Mining and Energy Union (CFMEU) was the strongest advocate of retaining the privilege, citing in support the observations of Castan QC:

This section runs contrary to the most fundamental principles of natural justice, by compelling persons to incriminate themselves on oath, and the protection given by Section 6DD [limited use immunity], is of no real significance, for the reasons the High Court itself has pointed out. The reasons for the abolition of Section 6A of the *Royal Commissions Act* are as compelling today as were the reasons in 1641 for the abolition of the Star Chamber.⁶⁸

17.43 The Department of Immigration and Citizenship (DIAC) suggested that the privilege against self-incrimination should apply, as it would ‘assist in ensuring the full co-operation of witnesses’, and ‘thus assist in ensuring the effectiveness of the inquiry’.⁶⁹

17.44 The Law Council of Australia (Law Council) submitted:

The Law Council believes that witnesses appearing before a Royal Commission for questioning should be able to refuse to answer a question or provide information to a Commissioner on the grounds that such information may incriminate the person. If the privilege of self-incrimination is not available under the [*Royal Commissions Act*], the Law Council believes that the witnesses should at least be entitled to both direct use and derivative use immunity in respect to any evidence or information he or she provides.⁷⁰

66 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–7.

67 Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009; Law Council of Australia, *Submission RC 9*, 19 May 2009; Construction, Forestry, Mining and Energy Union, *Submission RC 8*, 17 May 2009; Liberty Victoria, *Submission RC 1*, 6 May 2009.

68 Construction, Forestry, Mining and Energy Union, *Submission RC 8*, 17 May 2009, citing Castan QC, ‘Natural Justice in Commissions and Inquiries’ (Paper presented at the Australian Society of Labour Lawyers Seventh National Conference, Melbourne, August 1985).

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

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

17.45 Liberty Victoria similarly considered that a derivative use immunity should apply.⁷¹ While the Community and Public Sector Union (CPSU) acknowledged that it was probable the abrogation would remain, it stated that derivative use immunity should be considered.⁷²

17.46 The Inspector-General of Intelligence and Security (IGIS) suggested another option might be to require a graduated or proportionate use of coercive powers.⁷³

17.47 Nevertheless, in consultations with stakeholders, there was broad support for the existing position in relation to Royal Commissions, especially for investigatory or inquisitorial Royal Commissions. There was less support for the extension to derivative use immunity.

17.48 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that, in respect of Royal Commissions only, the privilege should be abrogated, subject to a direct use immunity.⁷⁴ The response of the few stakeholders who addressed this proposal was mixed.

17.49 The Law Council reiterated its view that the privilege should not be abrogated. If, however, the privilege was to be abrogated, it supported the proposal to the extent that the privilege would not be abrogated in the proceedings of Official Inquiries.⁷⁵ It continued, however, to be of the view that derivative use immunity should apply.⁷⁶

17.50 In contrast, the Australian Government Solicitor (AGS) endorsed the proposal that the present position should not be altered.⁷⁷

17.51 Kym Bills expressed concerns about this proposal:

In my view Official Inquiries should be able to require production of relevant documents from persons/companies regardless of potential incrimination and liability which should be dealt with through derivative use protections. I am also concerned that if a person/company is charged with a relatively minor offence or subject to a small regulatory penalty this should not be a basis to prevent production of relevant documents. In my opinion, an Official Inquiry or Royal Commission should not be constrained by, for example, action taken by a state or territory regulator to impose an appropriate fine under its legislation.⁷⁸

71 Liberty Victoria, *Submission RC 26*, 27 September 2009; Liberty Victoria, *Submission RC 1*, 6 May 2009.

72 Community and Public Sector Union, *Submission RC 25*, 22 September 2009; Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

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

74 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 16–1.

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

76 *Ibid.*

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

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

17.52 Dr Ian Turnbull disagreed with a use immunity on principle:

Any suggestion that a person will be more honest if protected by such a provision seems to me fanciful. It looks like wilful blindness and deliberately excluding valuable evidence from the court. An application can always be made to the court to exclude such evidence and it should be a matter for the trial judge, applying the rules of evidence, and not the inquiries legislation, in my view. A better proposal might be to state that the probative value of such evidence must be considered by the court in closed session or on a voir dire and must be substantial before being admitted.⁷⁹

ALRC's view

17.53 The present abrogation of the privilege, coupled with a use immunity, strikes the right balance in relation to Royal Commissions. The function of Royal Commissions is to discover the truth, without the evidential or procedural limitations that apply to courts. The purpose of Royal Commissions is not to determine legal rights, but rather to find facts and make recommendations to the executive arm of government. As noted above, Royal Commissions are established only where a particular area of significant public concern has been identified for which the usual investigations and proceedings would not suffice.

17.54 The importance of the public interest involved in a Royal Commission outweighs the individual interests protected by the privilege—that is, ‘extraordinary circumstances justifies, and indeed requires, the establishment of a commission with extraordinary powers’.⁸⁰ In these circumstances, the public interest in compulsion generally outweighs the individual interest that justifies the privilege.

17.55 Further, a derivative use immunity would render enforcement impracticable and negate the purpose of the abrogation of the privilege.⁸¹ Royal Commissions should not be used as an obstacle to proper enforcement action, particularly given the serious subject-matter of most Royal Commissions.

17.56 Many Royal Commissions are likely to involve evidence that may incriminate a person. Although this is most probable in the case of investigatory Royal Commissions, there is no bright line between policy and investigatory types of Royal Commission. Investigations into what has happened often flow into policy recommendations, such as in the HIH Royal Commission. In light of this, it is the ALRC's view that the existing position should continue—namely, that all Royal Commissions should have the power to require a person to disclose incriminating information. It is important to note, however, that the power should be exercised only where necessary, given the subject-matter of the particular inquiry. It need not be exercised by all Royal Commissions.

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

80 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 597.

81 A similar conclusion was reached with respect to client legal privilege in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [7.143]–[7.145].

17.57 Further, the abrogation of the privilege against self-incrimination should not apply to Official Inquiries. The abrogation of the privilege should be reserved, in the two-tier model recommended in this Report, to cases of substantial public importance in which the full range of coercive powers is considered necessary.⁸² Many inquiries presently operate effectively without the abrogation of the privilege, and the abrogation of the privilege should not be extended unnecessarily. As noted earlier, if the application of the privilege hampers or frustrates an Official Inquiry, the Australian Government has the option of converting an Official Inquiry into a Royal Commission. Alternatively, an undertaking to grant a use or derivative use immunity could be sought from the CDPP.

Pending charges or penalty proceedings

17.58 Section 6A(3) of the *Royal Commissions Act* provides that the abrogation of the privilege against self-incrimination does not apply if the answer, document or thing required relates to an offence, where a person has been charged with an offence, and the proceedings have not been finally disposed of. Section 6A(4) makes similar provision in relation to proceedings in respect of a penalty.

17.59 These subsections are unusual. Section 22(2) of the *Commissions of Inquiry Act 1995* (Tas) is the only similar provision in state and territory inquiry legislation. This provides that:

A Commission must not require a person to give evidence about a matter if that person has been charged with an offence in respect of that matter.

17.60 In DP 75, the ALRC proposed that a provision similar to that in s 22(2) of the *Commissions of Inquiry Act 1995* (Tas) should be included in the *Inquiries Act*. The ALRC received no feedback on this proposal.

17.61 Subsections 6A(3) and (4) of the *Royal Commissions Act* were inserted ‘to make clear that the [introduction of s 6A abrogating the privilege against self-incrimination] will not affect the actual ground of the High Court’s decision⁸³ in *Hammond v Commonwealth*.⁸⁴ In *Hammond*, the High Court held that, in the circumstances of that case, an examination by a Royal Commission of a person charged with an offence, relating to the circumstances surrounding the alleged offence, would amount to a real risk of interference with the administration of justice. This would constitute contempt of court, which meant that the Royal Commission could not lawfully inquire into those matters.⁸⁵

82 In Ch 5, the ALRC discusses in detail the recommended new statutory framework for conducting public inquiries.

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

84 *Hammond v Commonwealth* (1982) 152 CLR 188.

85 The relationship between Royal Commissions and other public inquiries, and contempt of court in this context, is discussed in Ch 14.

17.62 In *Hammond*, Gibbs CJ stated:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence. In the *Builders Labourers' Case* I expressed the opinion that, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, generally speaking, amount to a contempt of court, and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings.⁸⁶

17.63 In the same case, Brennan J expressed the view 'that it is a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged'.⁸⁷

17.64 It would appear, however, that *Hammond* has been more narrowly interpreted in subsequent court decisions. In *Hammond*, the examination was to be attended by police officers investigating the criminal charges. This posed a risk that the police officers would use the evidence given in the examination to obtain other evidence for the purpose of the investigations in the criminal proceedings. In *ABC v Sage*, the Federal Court considered that it was this fact which posed a risk of interference with the administration of justice in *Hammond*.⁸⁸ In *ABC v Sage*, the Australian Crime Commission had taken steps to ensure that the investigation or prosecution of related criminal proceedings would not be similarly affected, by holding the examination in private and issuing non-publication orders. The Court held that these steps removed the risk of interference with the administration of justice.

ALRC's view

17.65 Sections 6A(3) and (4) of the *Royal Commissions Act* were intended to codify in statute the effect of *Hammond v Commonwealth*. Setting out this important limitation on the powers of Royal Commissions in the Act has the benefit of clarity.

17.66 The case of *ABC v Sage*, however, indicates that these sections may extend beyond the decision in *Hammond*, as inquiries may be able to take sufficient steps to ensure that there is no real risk such evidence would interfere with those criminal proceedings.

86 *Hammond v Commonwealth* (1982) 152 CLR 188, 198.

87 *Ibid*, 203–204.

88 *ABC v Sage* (2009) 175 FCR 319. See also *OK v Australian Crime Commission* [2009] FCA 1038.

17.67 As a matter of policy, however, the ALRC endorses the principle that a person should not be required to answer questions that directly relate to a matter for which that person has been charged. In the ALRC's view, it is not fair to require a person to provide evidence in an inquiry on the same matters for which that person has been charged, even though that evidence may not be used directly against the person in those proceedings.

17.68 The ALRC recommends, therefore, that a provision reflecting this position should be included in the *Inquiries Act*. In the ALRC's view, the language of s 22(2) of the *Commissions of Inquiry Act 1995* (Tas) is preferable to the language in s 6A(3) and (4) of the *Royal Commissions Act*, because the language of the Tasmanian provision is both clearer and more accurately captures the underlying principle of *Hammond*. For the reasons set out below in relation to the scope of the use immunity, this provision should extend to a person who is subject to penalty proceedings that have commenced and not been finally disposed of, as is presently provided in s 6D(4) of the *Royal Commissions Act*.

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

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

Scope of use immunity

17.69 A number of issues arise in relation to the scope of the direct use immunity recommended by the ALRC. First, in what kinds of proceedings should the use immunity be available? Secondly, what kind of material should be protected by the use immunity? Thirdly, what exceptions should apply to the use immunity?

Type of proceedings

17.70 Presently, the use immunity in the *Royal Commissions Act* applies to 'any civil or criminal proceedings' in any Australian court. This immunity does not extend to disciplinary proceedings.⁸⁹ There are a large number of use immunities in federal

89 *Bercove v Hermes [No 3]* (1983) 74 FLR 315.

legislation, which vary in their application.⁹⁰ Some, such as the *Australian Crime Commission Act 2002* (Cth) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth), limit the immunity to criminal proceedings and proceedings for the imposition or recovery of a penalty.⁹¹ Others are restricted to criminal proceedings only.⁹² In some Australian states and territories, the use immunity relating to Royal Commissions and similar inquiries expressly extends to administrative and disciplinary proceedings,⁹³ including proceedings for breaches of the Australian Public Service Code of Conduct.⁹⁴ Such disciplinary proceedings are also proceedings for the imposition of a penalty.⁹⁵

17.71 As noted above, the purpose of the privilege is to protect a person from self-incrimination in criminal matters, and from self-exposure to a penalty. In the 2002 report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC found that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments.⁹⁶ In that report, the ALRC recommended that, in the absence of any clear, express statutory statement to the contrary, the same protections for individuals afforded by the privilege against self-incrimination in criminal matters should apply in relation to the imposition of a civil or administrative penalty.⁹⁷

17.72 The question of the type of proceedings to which a use immunity should apply has been given extended consideration in an inquiry in the NSW Parliament underway at the time of writing this Report.⁹⁸ This inquiry is considering a proposal to remove civil or disciplinary proceedings from the scope of the use immunity that applies to Independent Commission against Corruption (ICAC) investigations.⁹⁹ In ICAC's view:

People think what is the point of exposing corruption if the people who are going to be corrupt—which, fortunately, are not the majority of public servants—know that nothing is going to happen to them.¹⁰⁰

90 See generally Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), Appendix 1.

91 *Australian Crime Commission Act 2002* (Cth) s 31(5).

92 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 30–31, 32A, 33, 41, 43; *Trade Practices Act 1974* (Cth) s 155(1).

93 *Royal Commissions Act 1923* (NSW) s 17(2); *Evidence Act 1958* (Vic) s 19C(2); *Commissions of Inquiry Act 1995* (Tas) s 21.

94 Powers and procedures to sanction breaches of the Australian Public Service Code of Conduct are set out in s 15 of the *Public Service Act 1999* (Cth).

95 *Police Service Board v Morris* (1985) 156 CLR 397. See also *Rich v Australian Securities Investment Commission* (2004) 220 CLR 129.

96 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), 652.

97 *Ibid*, Rec 19–1.

98 The question of the kinds of proceeding to which the use immunity should apply was not addressed by any stakeholders.

99 See Committee on the Independent Commission against Corruption (NSW), *Proposed Amendments to the Independent Commission Against Corruption Act 1988*, Issues Paper, 5 May 2009.

100 Report of proceedings before Committee on the Independent Commission against Corruption, *Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 4 May 2009,

17.73 The proposal to exclude disciplinary proceedings from the scope of the use immunity has been broadly supported by other standing anti-corruption commissions, although there was more concern about the exclusion of civil proceedings.¹⁰¹ Other stakeholders, including the Law Society of NSW and the NSW Bar Association, opposed this proposal, on the basis that it would discourage witnesses from coming forward and diminish the rights of witnesses.¹⁰²

ALRC's view

17.74 The recommended use immunity should apply to criminal proceedings and proceedings for the imposition or recovery of a penalty. This is consistent with the rationale of the privilege against self-incrimination and the privilege against self-exposure to penalties, as well as being in line with the views expressed in ALRC 95. It is also consistent with similar federal legislation.

17.75 The recommended use immunity is narrower than the present use immunity because it does not apply to all civil proceedings. It is broader than the present use immunity, however, because it would extend to disciplinary proceedings to the extent that these impose a penalty. In the ALRC's view, this is appropriate because the consequences of disciplinary proceedings, such as loss of employment, may be in practice as serious as the consequences of a criminal conviction. This does not mean, however, that a person can escape dismissal if an inquiry uncovers serious misconduct, since a direct use immunity only prevents the use of the person's evidence to an inquiry in such proceedings. Misconduct may be proven in the same way as it would if no inquiry had been undertaken. This applies equally in respect of other civil or criminal proceedings that may follow an inquiry.

Scope of material

17.76 Presently, the use immunity applies to a statement or disclosure made by a person in the course of giving evidence before a Royal Commission; and the production of a document or other thing by the person pursuant to a summons, requirement or notice.

Sydney, 9 (Jerrold Cripps, Commissioner). Other standing anti-corruption commissions supported this proposal in submissions.

101 Crime and Misconduct Commission (Qld), *Submission No 3 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 16 March 2009; Police Integrity Commission (NSW), *Submission No 4 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 27 March 2009; Corruption and Crime Commission (WA), *Submission No 7 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 2 April 2009; Australian Commission for Law Enforcement Integrity, *Submission No 13 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 20 April 2009.

102 NSW Bar Association, *Submission No 16 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 17 April 2009; Law Society of NSW, *Submission No 8 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 9 April 2009.

17.77 The ALRC has identified two issues relating to the scope of the material covered by the use immunity. First, should the use immunity be extended to oral or written statements provided to an officer of the Commission in connection with, or in preparation for, giving evidence to a Royal Commission? This was recommended by Commissioner Cole in the report of the Royal Commission into the Building and Construction Industry (2003).¹⁰³

17.78 Secondly, should s 6DD apply to the documents produced by summons or notice, or only to the fact of the production of a document. In Australia, the privilege against self-incrimination extends to documents as well as to oral testimony.¹⁰⁴ This is a matter of significant practical importance, as a great deal of documentary evidence is commonly gathered in Royal Commissions.

17.79 Section 6DD applies to ‘a statement or disclosure made by a person in the course of giving evidence before a Royal Commission’, and ‘the *production* of a document or other thing by the person’ (emphasis added). In contrast, the use immunity in some state and territory inquiries legislation expressly extends to all documents (and sometimes all ‘information’).¹⁰⁵ In Queensland, the use immunity explicitly excludes documents.¹⁰⁶

17.80 Arguably, the distinction drawn in the *Royal Commissions Act* between a statement or disclosure and the *production* of a document indicates that the documents so produced do not benefit from the use immunity. On the other hand, the phrase ‘statements or disclosures’ may be intended to reflect the common law notion of a ‘testimonial disclosure’.¹⁰⁷ This distinguishes ‘statements or communications made by the witness on the one hand, and real or physical evidence [such as fingerprints] provided by the witness on the other’.¹⁰⁸ Wigmore’s *Evidence in Trials at Common Law*, states that while documents are not oral and are not ‘created by virtue of a testimonial act or utterance—still there is a testimonial disclosure implicit in their production’.¹⁰⁹ For example, the production of a document may communicate the facts that the document exists and is possessed by a person.¹¹⁰

17.81 Testimonial disclosures also may be distinguished from documents that exist before a Royal Commission is established. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, Mason CJ and Toohey J explained the distinction as follows:

103 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(d).

104 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 393–394.

105 *Royal Commissions Act 1923* (NSW) s 17(2); *Evidence Act 1958* (Vic) s 19C; *Royal Commissions Act 1991* (ACT) s 24(3).

106 *Commissions of Inquiry Act 1950* (Qld) s 14A(2).

107 Thomson Reuters, *Laws of Australia*, vol 2 Administrative Law, 2.8, [43] (as at 15 July 2009).

108 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

109 J Wigmore, *Evidence in Trials at Common Law* (3rd ed, 1961), vol 8, 380–381.

110 *Doe v United States* 487 US 201, 209 (1988).

It is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt ... [documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings.¹¹¹

17.82 In the 2005 report, *Uniform Evidence Law*, the ALRC, NSW Law Reform Commission and Victorian Law Reform Commission considered the issue of the application of the privilege against self-incrimination to pre-existing documents. The issue was raised in relation to orders for compulsory information about assets or other information, or orders to permit premises to be searched. The three Commissions recommended, in that context, a use immunity which did not extend to pre-existing documents.¹¹² This recommendation is now reflected in s 128A(9)(b) of the *Evidence Act 1995* (Cth).

17.83 In DP 75, the ALRC proposed that the scope of the use immunity should be clarified. It proposed that the use immunity should apply to: statements or disclosures to a Royal Commission, whether in written or oral form; the fact of the production of a document or other thing to a Royal Commission; information provided to an officer or member of a Royal Commission in connection with, or in preparation for, giving evidence to a Royal Commission; and exclude pre-existing documents or things that were not created in order to comply with a notice of the Royal Commission.

17.84 The only stakeholder to address this proposal in submissions, the AGS, ‘strongly endorsed’ this proposal, referring in particular to the exclusion of pre-existing documents or things.¹¹³

ALRC’s view

17.85 The ALRC supports the extension of the use immunity to preparatory witness statements, as recommended by Commissioner Cole. In Chapter 15, the ALRC discusses information-gathering procedures used by Royal Commissions and other inquiries. It may be appropriate to gather information other than through formal hearings in a variety of circumstances. Similar protections should apply whether information is gathered informally or in formal hearings. This would facilitate the information-gathering process by minimising the need for formal hearings.

111 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.

112 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15–10. Similarly, the New Zealand Law Commission also recommended that the privilege against self-incrimination should not apply to pre-existing documents in its review of evidence law: New Zealand Law Commission, *Evidence*, Report No 55 (1999), vol 1, [279]–[281]. This recommendation is implemented by the *Evidence Act 2006* (NZ), ss 51(3), 60.

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

17.86 The scope of the use immunity in relation to documents also should be clarified. The scope of the use immunity should not extend further than the purpose of the privilege against self-incrimination warrants—that is, it should extend only to protect a person from being compelled to testify against him or herself. An extension of the use immunity to all documents or information is likely to hamper the effectiveness of any subsequent legal proceedings, without protecting the interests served by the privilege. Rather, only documents that may be considered a testimonial disclosure—for example, a written statement, or a statutory declaration, prepared in response to a question—should be protected. It follows that the use immunity should not extend to pre-existing documents.

The exceptions

17.87 The use immunity in s 6DD does not apply to ‘proceedings for an offence against this Act’. For example, the use immunity would not apply to proceedings under the *Royal Commissions Act* for giving false or misleading evidence to an inquiry,¹¹⁴ or bribing a witness.¹¹⁵ The exception, however, does not extend to similar kinds of offences in either Australian state or territory legislation or other Commonwealth criminal legislation, such as the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth). This is so even though the use immunity applies to all Australian courts.

17.88 This inconsistency had a significant impact in one case where a Royal Commission was jointly constituted by the Commonwealth and Victoria.¹¹⁶ A witness was charged with perjury under the Victorian legislation. Since the exception to the use immunity was not available, the evidence of the witness’s perjury was not admissible and he had to be acquitted. The High Court noted in that case that it seemed ‘likely that the draftsman failed to advert to the possible operation of s 6DD in its application to evidence given before a commissioner acting in a dual capacity’.¹¹⁷

17.89 The most relevant offences in the *Crimes Act* and *Criminal Code* are discussed further in Chapter 19. These include offences against the administration of justice that are similar to the offences provided for in the *Royal Commissions Act*, such as bribery of witnesses. These offences already apply to Royal Commissions. In Chapter 19, the ALRC recommends that the existing offences in the *Royal Commissions Act* should be removed, and reliance placed instead on the general offences under the *Crimes Act* and *Criminal Code*.¹¹⁸ As well, in Chapter 20 the ALRC recommends that there should be a power to apply to the Federal Court for enforcement of its directions.¹¹⁹

114 *Royal Commissions Act 1902* (Cth) s 6H.

115 *Ibid* s 6I.

116 *Giannarelli v The Queen* (1983) 154 CLR 212, 227. See Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984).

117 *Ibid*, 220.

118 Recommendation 19–8.

119 Recommendation 20–1.

17.90 In DP 75, the ALRC recommended broadening the exceptions to apply to court proceedings in a federal, state or territory court relating to the falsity or the misleading nature of the evidence, and for offences relating to the obstruction of Royal Commission proceedings.¹²⁰ In its response to DP 75, Liberty Victoria expressed support for this proposal.¹²¹

ALRC's view

17.91 The present exception for offences 'under the Act' in the *Royal Commissions Act*, s 6DD, is framed too narrowly. The policy underlying that provision is that evidence may be used to prove offences prohibiting the obstruction of Royal Commission proceedings, such as giving false evidence. That policy is equally applicable to similar offences under an Australian state or territory law, and to proceedings for enforcement of directions, as recommended in Chapter 20. Further, since the ALRC is proposing the removal of most of the offences in the *Royal Commissions Act*, and recommends instead to rely upon similar offences prohibiting interference with evidence or witnesses in *Crimes Act* or *Criminal Code*, it is necessary to ensure that the evidence may be used to prosecute offences brought under the *Crimes Act* or *Criminal Code*.

17.92 The ALRC recommends that there should not be a use immunity that applies to any proceeding in an Australian court in respect of: offences or proceedings for enforcement of directions under the *Inquiries Act*; the falsity or the misleading nature of the evidence; or offences prohibiting interference with evidence or witnesses in Royal Commission proceedings, such as the bribery of witnesses.

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

- (a) apply to statements or disclosures to a Royal Commission, whether in oral or written form;
- (b) apply to the fact of the production of a document or other thing to a Royal Commission;

120 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 16–3.

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

- (c) apply to information provided to an officer or member of a Royal Commission in connection with, or in preparation for, giving evidence to a Royal Commission; and
- (d) exclude pre-existing documents or things that were not created in order to comply with a notice of the Royal Commission.

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

- (a) in respect of offences under the recommended *Inquiries Act*, or proceedings for enforcement under the *Inquiries Act*;
- (b) in respect of the falsity or the misleading nature of the evidence; or
- (c) for offences prohibiting interference with evidence or witnesses in relation to Royal Commission proceedings.

Privilege against spousal incrimination

17.93 The courts have recognised the existence of a long-standing common law privilege against spousal incrimination.¹²² That is, the common law recognises that a husband or wife cannot be bound to give evidence against his or her spouse.¹²³ This privilege does not, however, apply to de facto spouses.¹²⁴

17.94 This privilege is distinct from, although it overlaps with, the protection of a person against being compelled to give evidence against his or her spouse or other family members.¹²⁵ Under s 18 of the *Evidence Act 1995* (Cth), a person may object to being compelled to give evidence in criminal proceedings against a person's spouse, de facto partner, parent or child. The court must balance the harm likely to be caused to that person or the relationship against the desirability of the evidence being taken. Section 18 of the *Evidence Act*, therefore, recognises a broader range of relationships as justifying protection than the common law privilege against spousal incrimination.

122 *Callanan v B* (2004) 151 A Crim R 287; *Stoten v Sage* (2005) 144 FCR 487; *S v Boulton* (2006) 151 FCR 364.

123 See generally D Lusty, 'Is There a Common Law Privilege Against Spouse-Incrimination?' (2004) 27 *University of New South Wales Law Journal* 1.

124 *S v Boulton* (2006) 151 FCR 364.

125 This was discussed by the ALRC in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [4.90]–[4.116].

17.95 There are two modern rationales for this common law privilege: first, that it furthers society's interest in preserving marital harmony; and secondly, that it advances the same policies as the privilege against self-incrimination.¹²⁶

17.96 This common law privilege, like the privilege of self-incrimination, applies in non-judicial contexts, unless abrogated by statute. In *S v Boulton*, a majority of the Full Court of the Federal Court held that the *Australian Crime Commission Act 2002* (Cth) abrogated the privilege against spousal incrimination, because it abrogated the privilege against self-incrimination and this privilege 'was an extension of the privilege against self-incrimination'.¹²⁷

17.97 As the ALRC is recommending that the privilege against self-incrimination should continue to be abrogated in respect of Royal Commissions, the consequence is that the privilege against spousal incrimination is likely to be abrogated in respect of Royal Commissions as well. The interpretation of the Federal Court in *Boulton* makes unnecessary a recommendation that the privilege against spousal incrimination should not apply to Royal Commission proceedings.

17.98 Given that the policy considerations underlying the privilege against spousal incrimination are similar to those underlying the privilege against self-incrimination, it is the ALRC's view, for the reasons noted above, that the privilege against spousal incrimination also should be abrogated in Royal Commissions. The privilege should remain, however, for Official Inquiries. This is consistent with the reasons given above for the application of the privilege against self-incrimination in Official Inquiries.

Parliamentary privilege

17.99 Parliamentary privilege refers to

the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.¹²⁸

17.100 The single most important parliamentary privilege is the privilege of freedom of speech in Parliament.¹²⁹ This privilege provides legal immunity to Members of Parliament, and other participants in parliamentary proceedings, for anything they may say or do in the course of parliamentary proceedings, or anything that is incidental to

126 David Lusty, 'Is There a Common Law Privilege Against Spouse-Incrimination?' (2004) 27 *UNSW Law Journal* 1, 39.

127 *S v Boulton* (2006) 151 FCR 364, 387 (Black CJ dissenting). See also *Stoten v Sage* (2005) 144 FCR 487. In *Callanan v B* (2004) 151 A Crim R 287, the privilege was held to apply, but only because 'privilege' had been legislatively defined in the Act: *Callanan v B* (2004) 151 A Crim R 287, 291–292.

128 E May, *Parliamentary Practice* (22nd ed, 1997), 65.

129 Parliament of United Kingdom—Joint Committee of the House of Lords and House of Commons, *Parliamentary Privilege—First Report* (1999), 26.

those proceedings.¹³⁰ The source of the privilege is art 9 of the Bill of Rights 1688,¹³¹ which is incorporated into Australian law by s 49 of the *Australian Constitution* and the *Parliamentary Privileges Act 1987* (Cth).

17.101 The power in the Royal Commissions Act to compel a person to give or produce evidence is subject to parliamentary privilege.¹³² Section 16(3) of the *Parliamentary Privileges Act* provides that, in a court or tribunal, it is:

not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of,

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

17.102 A ‘tribunal’ is defined in s 3 of that Act as including a Royal Commission or other commission of inquiry of the Commonwealth or of a state or territory having that power.

17.103 Since the privilege is that of the Parliament, it may not be waived by individual members of the Parliament.¹³³ It may be waived by Parliament as a whole, although Professor Enid Campbell has suggested that legislation is necessary to waive the privilege, and that it is not sufficient to waive privilege by a motion of Parliament.¹³⁴

17.104 The privilege of freedom of speech may prevent Royal Commissions or the recommended Official Inquiries from investigating allegations of misconduct made in Parliament. In practice, however, a number of inquiries have investigated such claims or conducted investigations touching on the proceedings of Parliament.¹³⁵ Although courts have differed on the issue, it appears that Royal Commissions or Official Inquiries will infringe parliamentary privilege if they inquire into the motives, intentions or truthfulness of a speaker in Parliament, or allow witnesses to be cross-examined in relation to words spoken or documents tabled in Parliament.¹³⁶

130 Ibid.

131 *Bill of Rights 1688* 1 Wm & M (England) s 2 c 2 (Eng).

132 *Hammond v Commonwealth* (1982) 152 CLR 188, 200.

133 *Sankey v Whitlam* (1978) 142 CLR 1, 36–37.

134 E Campbell, ‘Investigating the Truth of Statements Made in Parliament: The Australian Experience’ [1998] *Public Law* 125, 126.

135 For a list, see S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.12].

136 Ibid, [6.16].

17.105 Claims of parliamentary privilege have impeded some Royal Commissions, such as the Western Australian Royal Commission into Commercial Activities of Government and Other Matters (1992). This Royal Commission wished to use the testimony of persons called as witnesses by related parliamentary committees, but the Western Australian Parliament refused to waive the privilege. The Royal Commission, constituted by three members with judicial experience, criticised this refusal, and recommended that the law be examined with a view to permitting proceedings in Parliament to be questioned in a court or like place while preserving the principle of free speech in Parliament.¹³⁷

17.106 In 1997, the issue of parliamentary privilege arose in the context of a Special Commission of Inquiry in NSW. In Parliament, a Member of Parliament alleged misconduct by other members of Parliament. The NSW Parliament amended the *Special Commissions of Inquiry Act 1983* (NSW) to enable a Special Commission of Inquiry into these allegations.¹³⁸ The amending Act expired six months after its commencement.¹³⁹

17.107 The validity of this amending legislation was challenged on a number of grounds, but was upheld by the NSW Court of Appeal and the High Court refused special leave to appeal.¹⁴⁰

ALRC's view

17.108 The appropriateness of any modification of the application of parliamentary privilege in a Royal Commission or Official Inquiry should be a decision taken by Parliament itself in the context of the particular inquiry, as was done in NSW. It would be undesirable to empower an inquiry established by the executive to override a privilege afforded to the whole Parliament.

17.109 Consequently, the ALRC does not make any recommendations modifying the application of parliamentary privilege in relation to Royal Commissions and the recommended Official Inquiries. The ALRC notes, however, that where the application of the privilege is clearly foreseeable, it may be desirable to clarify the operation of the privilege in that context. The precedent set by the *Special Commissions of Inquiry Amendment Act 1997* (NSW) is likely to be a useful one.

137 R Davis, 'Parliamentary Privilege—Parliament and the Western Australian Royal Commission' (1993) 67 *Australian Law Journal* 671. See also *Easton v Griffiths* (1995) 69 ALJR 66; *Halden v Marks* (1995) 17 WAR 447.

138 *Special Commissions of Inquiry Amendment Act 1997* (NSW), inserting pt 4A. The circumstances are discussed in E Campbell, 'Investigating the Truth of Statements Made in Parliament: The Australian Experience' [1998] *Public Law* 125, 126.

139 *Special Commissions of Inquiry Act 1983* (NSW) s 33E.

140 *Arena v Nader* (1997) 42 NSWLR 427; *Arena v Nader* (1997) 71 ALJR 1604. The grounds of appeal included that the legislation impaired the institutional integrity of Parliament; the legislation breached the right to freedom of expression, as protected by implication in the *Australian Constitution*; and that it amounted to a retrospective change to the state's Constitution which was prohibited by the *Australian Constitution*.

17.110 In Chapter 19, the ALRC recommends that the kinds of ‘reasonable excuses’ that might justify refusing to give or produce evidence should be stated clearly in legislation.¹⁴¹ The protection of parliamentary privilege is included as a reasonable excuse in that recommendation.

Public interest immunity

17.111 Public interest immunity is a rule of substantive law that enables documents or information to be withheld in the public interest from a party to criminal or civil proceedings. Pursuant to the rule, a court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it.¹⁴² The ‘public interest’ in this context refers to ‘the conduct of governmental functions’¹⁴³ or ‘the proper functioning of government’.¹⁴⁴ It is clear, however, that public interest immunity is not confined to judicial or quasi-judicial proceedings.¹⁴⁵

17.112 In essence, public interest immunity operates as a balancing test. Courts limit the disclosure of information or documents on the basis that the public interest against disclosure outweighs the need for disclosure to ensure justice in a particular case. Public interest immunity differs from a legal privilege in that: the immunity can be claimed by the state, a non-governmental party, or by the court on its own motion; the immunity cannot be waived;¹⁴⁶ and evidence related to the relevant information, including secondary evidence held by third parties, is excluded.¹⁴⁷

17.113 Claims for public interest immunity are made most commonly by the government in relation to: Cabinet deliberations; high-level advice to governments; communications or negotiations between governments; police investigation methods; and the activities of Australian Security Intelligence Organisation officers, police informers and other types of informers or covert operatives.¹⁴⁸

17.114 Public interest immunity is also commonly claimed in relation to national security information. This is discussed separately in Chapter 13.¹⁴⁹ As noted in that chapter, past inquiries have had difficulties in obtaining access to national security information. A claim of public interest immunity in relation to other types of information in a Royal Commission, however, appears quite rare.

141 Recommendation 19–5.

142 *Sankey v Whitlam* (1978) 142 CLR 1, 38.

143 *R v Young* (1999) 46 NSWLR 681, [54].

144 *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85, [34].

145 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

146 *Rogers v Home Secretary* [1973] AC 388, 406–407.

147 *National Tertiary Education Union v Commonwealth* (2001) 111 FCR 585, 595.

148 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].

149 See also Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004).

17.115 The *Royal Commissions Act* does not refer expressly to public interest immunity. Most commentators agree, however, that it is likely to be a ‘reasonable excuse’ for refusing to produce documents under s 3 of the Act.¹⁵⁰ The considerations of public interest underlying a claim for public interest immunity apply equally to Royal Commissions.¹⁵¹ The same considerations apply to Official Inquiries.

17.116 Most Australian and overseas legislation governing Royal Commissions, and legislation governing standing crime and corruption commissions, are similarly silent on the application of public interest immunity. However, some Acts do address the application of public interest immunity expressly. For example, in the United Kingdom the *Inquiries Act 2005* (UK) provides that the law of public interest immunity applies to inquiries as it would in civil proceedings.¹⁵² The *Crime and Misconduct Act 2001* (Qld) expressly provides that public interest immunity is a ‘reasonable excuse’ for non-compliance with certain requirements.¹⁵³

17.117 In contrast, most other Australian legislation governing Royal Commissions and standing crime and corruption commissions which address public interest immunity appear to abrogate public interest immunity.¹⁵⁴

17.118 For example, the *Law Enforcement Integrity Commissioner Act 2006* (Cth) provides that a person is not excused from answering a question or producing a document or thing on the ground (among others) that it ‘would be otherwise contrary to the public interest’.¹⁵⁵ There is a similar provision in the *Building and Construction Industry Improvement Act 2005* (Cth).¹⁵⁶

17.119 The *Royal Commissions Act 1923* (NSW) also appears to override the public interest immunity. A power can be vested in Royal Commissions, when constituted or chaired by a judge or legal practitioner of seven years standing, which prevents excuses on the basis of the privilege against self-incrimination, ‘or on the ground of privilege or on any other ground’.¹⁵⁷ The legislation relating to NSW standing crime and corruption commissions provides that it is not an excuse to refuse to disclose information at a

150 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 619; S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.10]. It was assumed to apply in relation to a Western Australian Royal Commission in *Halden v Marks* (1996) 17 WAR 447, 464–465. It was accepted as a valid ground for a ‘reasonable excuse’ in relation to a similar provision in the *New South Wales Crime Commission Act 1985* (NSW): *Z v NSWCC (No 2)* [2005] NSW 1388.

151 S McNicol, *Law of Privilege* (1992), 381; H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [9.4]–[9.5].
152 *Inquiries Act 2005* (UK) s 22(2).

153 *Crime and Misconduct Act 2001* (Qld) s 196(5).

154 Although public interest immunity differs from a privilege in that it is not a right of an individual, it appears that it may be abrogated by statute. See, in the UK, *A Metropolitan Borough Council v S (A Child by His Guardian)* [2003] EWHC 976.

155 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)(e).

156 *Building and Construction Industry Improvement Act 2005* (Cth) s 53(1).

157 *Royal Commissions Act 1923* (NSW) s 17(1).

hearing on the ground of the privilege against self-incrimination, ‘or on the ground of a duty of secrecy or other restriction on disclosure’.¹⁵⁸

17.120 The *Independent Commission Against Corruption Act 1988* (NSW) specifically provides that before a hearing, a person must comply with requirements despite an objection that disclosure of the information ‘would otherwise be contrary to the public interest’.¹⁵⁹ The *Police Integrity Commission Act 1996* (NSW) goes further by requiring that a person must comply with a requirement of the Commission despite:

- (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
- (b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law ...¹⁶⁰

Submissions and consultations

17.121 Only two stakeholders addressed this issue in submissions. In its submission to IP 35, DIAC stated that documents that may be protected by public interest immunity should either not be disclosed, or if disclosed, protected from subsequent publication.¹⁶¹

17.122 In response to DP 75, the Australian Intelligence Community strongly supported the ALRC’s position that there should be no modification of public interest immunity.¹⁶²

ALRC’s view

17.123 In principle, there appears to be no reason to modify the application of public interest immunity in relation to Royal Commissions or the recommended Official Inquiries. The rationale of the immunity—to protect the public interest—applies equally to both kinds of inquiries. As outlined above, the immunity is not a blanket protection, but requires a balancing test to be undertaken. Accordingly, the public interest in full and frank disclosure to an inquiry will be given due weight.

17.124 In this respect, public interest immunity is quite different from the privileges discussed elsewhere in this chapter. The other privileges do not include a balancing test, and so in determining whether they should apply, it is necessary to balance the interests those privileges protect against the public interest in disclosure to a public inquiry. This balancing test is, however, performed in the application of the test for public interest immunity itself.

158 *Police Integrity Commission Act 1996* (NSW) s 40(2); *Independent Commission Against Corruption Act 1988* (NSW); *New South Wales Crime Commission Act 1985* (NSW) s 18B(1). A similar blanket provision applies in the *Corruption and Crime Commission Act 2003* (WA) s 157(b).

159 *Independent Commission Against Corruption Act 1988* (NSW) ss 24(3), 25(3).

160 *Police Integrity Commission Act 1996* (NSW) s 27(3). The Commission interprets these provisions as abrogating public interest immunity: Police Integrity Commission (NSW), *Guidelines* (October 2007).

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

162 Australian Intelligence Community, *Submission RC 12*, 2 June 2009.

17.125 The ALRC notes the practical difficulties that have arisen regarding public interest immunity in the context of national security information. In Chapter 13, the ALRC makes several recommendations relating to national security information.¹⁶³ There is no evidence, however, that public interest immunity causes practical difficulty in any other context. The ALRC, therefore, does not propose any modification to the application of such immunity.

17.126 It is desirable, however, to clarify that public interest immunity does apply to Royal Commissions and Official Inquiries. In Chapter 19, therefore, the ALRC includes public interest immunity as a ‘reasonable excuse’ for refusing to comply with a notice to produce, or refusing to answer a question.¹⁶⁴

Statutory privileges

17.127 The *Evidence Act 1995* (Cth) contains a number of privileges beyond those available under the common law. These include:

- confidential professional relationships privilege—which protects a communication made by a person in confidence to a journalist. The privilege is not absolute, and will protect the communication only where the court is satisfied that the harm that would or might be caused to the confider if the evidence was given outweighs the desirability of the evidence being given,¹⁶⁵
- religious confessions privilege—which allows a member of the clergy (of any religion and religious denomination) to refuse to divulge that a religious confession was made, or the contents of the confession,¹⁶⁶ and
- exclusion of evidence of settlement—which protects communications made in connection with an attempt to negotiate a settlement of a dispute.¹⁶⁷

17.128 These privileges do not apply to Royal Commissions at present. The New Zealand Law Commission, in its recent report on *A New Inquiries Act*, recommended that statutory privileges of a similar kind should apply to inquiries.¹⁶⁸

163 Recommendations 13–1 to 13–7.

164 Recommendation 19–5.

165 *Evidence Act 1995* (Cth) div 1A. On 19 March 2009, the Australian Government introduced the Evidence Amendment (Journalists’ Privilege) Bill 2009 (Cth). The Bill amends div 1A to require the courts to consider whether the information was passed contrary to a law (for example, was passed on by a whistleblower) and if there will be potential harm to the source or the journalist if the information is given in evidence. At the time of writing in October 2009, the bill was before the Senate.

166 *Ibid* s 127.

167 *Ibid* s 131. The rationale for such privileges was canvassed in detail in the ALRC reports concerning evidence law: Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Ch 16; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 15.

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

17.129 In practice, the privilege protecting journalists' sources is most likely to be relevant to inquiries. For example, a journalist was required to disclose a source in *Independent Commission Against Corruption v Cornwall*, notwithstanding claims of a 'reasonable excuse' based on a code of ethics.¹⁶⁹ In the view of the Royal Commission on Tribunals of Inquiry (1966) in the United Kingdom, such tribunals should insist upon such sources only if it was of vital importance.¹⁷⁰

Submissions and consultations

17.130 Stakeholders expressed a variety of views concerning the question of whether statutory privileges, such as religious confessions privilege and professional confidential relationships privilege (including journalists' privilege) should apply to Royal Commissions and other public inquiries.¹⁷¹ Liberty Victoria argued for a consistent approach:

Consequently statutory and common law privileges should be protected, but subject to waiver where there is an overriding public interest in obtaining the information required. In each case, the public inquiry must be satisfied that there is no other reasonable way in which to obtain the information and that the public interest in waiving the privilege outweighs the public interest in protecting that privilege.¹⁷²

17.131 Civil Liberties Australia similarly argued for the recognition of the statutory privileges. In its view, these

provide a check and balance on the coercive powers of commissions and other inquiries. By protecting individual's liberties, these investigatory bodies enhance their credibility and mitigate the 'star chamber' argument.¹⁷³

17.132 In consultations, some stakeholders agreed that consistency was preferable, and considered that, given the limited circumstances in which such claims would arise, the application of the privileges to Royal Commissions and Official Inquiries posed no real difficulty. Other stakeholders, however, expressed concern that these privileges would encourage proceedings for judicial review, could stymie inquiries, or would be inconsistent with the abrogation of other privileges in relation to Royal Commissions.

17.133 In DP 75, the ALRC expressed the view that these statutory privileges should not apply to inquiries. The only stakeholder who addressed this issue subsequently, Liberty Victoria, reiterated their support for the application of statutory privileges to inquiries.¹⁷⁴

169 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207. The Court also rejected claims of public interest immunity or privilege, and rejected an argument of incompatibility with the implied constitutional right to freedom of communication.

170 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 41, Rec 46.

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

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

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

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

ALRC's view

17.134 The interests protected by the statutory privileges are important, and an inquiry should only compel such information if it is absolutely necessary for the purposes of the inquiry. Nevertheless, the purpose of establishing Royal Commissions and Official Inquiries is to ascertain the truth without the restrictions on evidence imposed by courts. They are investigatory bodies, rather than judicial bodies, and the restrictions on evidence that apply to inquiries should not necessarily be consistent with those that apply in the courts.¹⁷⁵ Further, the addition of privileges is likely to reduce flexibility, increase formality, and increase the likelihood of legal challenge of inquiry decisions. The ALRC therefore does not recommend that these privileges should apply to Royal Commissions or Official Inquiries.

17.135 As a number of stakeholders noted, however, inquiries can be expected to recognise the importance of the interests protected by the statutory privileges, and exercise their discretion appropriately by, for example, not requiring the information or taking the evidence in private. These are more flexible procedural methods of ensuring that such interests are appropriately recognised and protected. In Chapter 15, the ALRC recommends that the suitability and use of different procedures should be addressed in an *Inquiries Handbook*.¹⁷⁶ It also may be appropriate to discuss the interests protected by statutory privileges in the relevant section on the *Inquiries Handbook*.

175 It also should be noted that these privileges are treated differently in different jurisdictions: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 15.

176 Recommendation 15–5.

