

21. Penalties, Proceedings and Costs

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Introduction

21.1 The *Royal Commissions Act 1902* (Cth) includes a number of offences, and specifies the maximum penalties that apply to them. The offences are examined in Chapters 19 and 20. In those chapters, the ALRC recommends that the following three offences should apply to Royal Commissions and Official Inquiries—the offence of refusing or failing to comply with a requirement of a Royal Commission or Official Inquiry; the offence of contravening a direction of a Royal Commission or Official Inquiry; and the offence of causing substantial disruption to the proceedings of a Royal Commission or Official Inquiry.

21.2 This chapter examines the penalties that should apply to the offences recommended in those chapters. It also examines ss 10 and 15 of the *Royal Commissions Act*. Section 10 deals with the way in which a proceeding for an offence under the Act may be instituted, while s 15 confers a power on a court to award costs in relation to such a proceeding.

Setting penalties

21.3 The two main forms of penalties are monetary penalties or a term of imprisonment. Provisions creating federal offences typically specify the maximum penalty for the offence, which is intended for the worst type of case covered by the offence.¹ Parliament determines the maximum penalties, and courts in sentencing federal offenders are required to determine the sentence or order ‘that is of a severity appropriate in all the circumstances of the case’.²

21.4 Those setting maximum penalties are guided by two main principles, namely, proportionality and consistency.³ These principles inform the discussion of penalties in this chapter.

21.5 The principle of proportionality requires that the penalty bears a reasonable, or proportionate, relationship to the criminal conduct in question. That is, a maximum penalty should be ‘adequate and appropriate to act as an effective deterrent to the commission of the offence to which it applies, and reflect the seriousness of the offence in the relevant legislative scheme’.⁴ In particular, a ‘heavier penalty is appropriate where there are strong incentives to commit an offence, or where the consequences of the commission of the offence are particularly dangerous or damaging’.⁵

21.6 The principle of consistency requires that the penalty for an offence should be consistent with penalties for offences of a similar kind or seriousness, and that the penalties within a given legislative regime should reflect the relative seriousness of the offences within that scheme.⁶

21.7 One way of ensuring a degree of consistency in penalties in federal legislation is through the setting of ‘penalty benchmarks’, which establish the appropriate penalty for a given type of offence in Commonwealth law. Some penalty benchmarks are set out in the Australian Government Attorney-General’s Department’s *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)*.⁷

21.8 The *Crimes Act 1914* (Cth) also includes a number of provisions relating to penalties. These provisions adjust some of the penalties in the *Royal Commissions Act*. They also provide general principles for ensuring consistency in the setting of penalties

1 *Ibbs v The Queen* (1987) 163 CLR 447, 451–452; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 478.

2 *Crimes Act 1914* (Cth) s 16A(1).

3 These are discussed in detail in the related context of sentencing in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 5.

4 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 38.

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*, 47–48.

in federal legislation, which should apply unless there is a good reason to depart from them.⁸

21.9 The *Crimes Act* converts monetary penalties specified in dollars into ‘penalty units’, which are then amended to reflect changes in the value of the dollar.⁹ A penalty unit is currently \$110.¹⁰ If no monetary penalty is specified, the *Crimes Act* also applies a maximum monetary penalty by multiplying the number of months in the maximum term of imprisonment by five.¹¹ For example, if the maximum penalty is imprisonment for 12 months and no monetary penalty is specified, the applicable monetary penalty is 60 penalty units or \$6,600.

21.10 The *Crimes Act* also provides that a court may impose a maximum monetary penalty upon a body corporate that is five times the monetary penalty payable by a natural person.¹² A term of imprisonment for 12 months, where no penalty is specified, therefore, would enable a court to impose a monetary penalty on a body corporate of 300 penalty units or \$33,000.

21.11 The *Crimes Act* makes provision for indictable and summary offences. An offence may be tried either on indictment (that is, by a trial before a judge or jury in a County Court, District Court or Supreme Court) or summarily (that is, by a magistrate without a jury). Summary offences are typically less serious than indictable offences.

21.12 The *Crimes Act* provides that, if not otherwise stated, an offence with a maximum penalty of 12 months or less is a summary offence,¹³ which means that offences with a maximum penalty exceeding 12 months are usually indictable offences. The *Crimes Act* provides, however, that, unless otherwise stated, indictable offences with a maximum penalty of 10 years imprisonment or less may be tried summarily, if the prosecutor and defendant consent.¹⁴

21.13 If an indictable offence with a maximum penalty of five years imprisonment or less is tried summarily, then a maximum penalty of 12 months imprisonment or 60 penalty units applies, unless otherwise stated.¹⁵ If an indictable offence with a higher maximum penalty is tried summarily, then the maximum penalty is two years imprisonment or 120 penalty units, unless otherwise stated.¹⁶

8 Ibid, 40–41, 44, 46.

9 *Crimes Act 1914* (Cth) s 4AB.

10 Ibid s 4AA(1). This has the effect of increasing the specified monetary penalties in the *Royal Commissions Act 1902* (Cth) by 10%.

11 *Crimes Act 1914* (Cth) s 4B(2).

12 Ibid s 4B(3).

13 Ibid s 4H.

14 Ibid s 4J.

15 Ibid s 4J(3)(a).

16 Ibid s 4J(3)(b).

Present penalties

21.14 The *Royal Commissions Act* sets a maximum penalty of six months imprisonment or 10 penalty units (presently \$1,100) for failing to attend or produce documents, or for refusing to be sworn or make an affirmation, or answer a question. The Act sets a maximum penalty of 12 months imprisonment or 20 penalty units (\$2,200) for making any publication contrary to a direction of a Royal Commission. All of these offences are summary offences.¹⁷

21.15 The *Royal Commissions Act* also includes a number of offences penalising interference with evidence or witnesses. As discussed in Chapter 19, there are parallel offences in the *Crimes Act* that apply to Royal Commissions, which also would apply to the Official Inquiries recommended in this Report.¹⁸ The offence in the *Royal Commissions Act* dealing with false or misleading evidence also parallels offences in the *Criminal Code* (Cth), which also apply to Royal Commissions and would apply to Official Inquiries.¹⁹ In Chapter 19, the ALRC recommends that the offences in the *Royal Commissions Act* dealing with interference with evidence or witnesses should not be included in the *Inquiries Act*, and instead reliance should be placed on the offences in the *Crimes Act* and *Criminal Code*.²⁰

21.16 This recommendation makes it unnecessary to deal in this chapter with the penalties relating to those offences, since the maximum penalties in the *Crimes Act* and *Criminal Code* would apply. The table below sets out the maximum penalties applicable under the *Royal Commissions Act* and the maximum penalties applicable to the equivalent offences under the *Crimes Act* or *Criminal Code*, with differences between the penalties indicated in bold type.²¹ These are the maximum penalties applicable to a natural person, where the offence is tried on indictment.

17 *Royal Commissions Act 1902* (Cth) s 6D(4).

18 *Crimes Act 1914* (Cth) s 31.

19 *Criminal Code* (Cth) ss 137.1(1)(c)(ii), 137.2(1)(c).

20 Recommendation 19–9.

21 The Model Criminal Law Officers Committee (MCLOC), a committee of the Standing Committee of the Attorneys-General, is developing a Model Criminal Code in an ongoing project of harmonising Australian criminal laws. MCLOC has recommended alteration of some of these maximum penalties, with two levels of maximum penalty: 5 years or 7 years. See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 7: Administration of Justice Offences* (1998), Appendix 2.

Table 21.1: Penalties

Offence	Penalty under the <i>Royal Commissions Act</i>	Penalty under the <i>Crimes Act</i> or <i>Criminal Code</i> (differences between penalties are in bold type)
False or misleading evidence	5 years, or 200 penalty units	5 years, or 300 penalty units for false evidence (<i>Crimes Act</i> , s 35)
		12 months , or 60 penalty units for false or misleading information or documents (<i>Criminal Code</i> ss 137.1, 137.2)
Bribery of witness	5 years, or 300 penalty units	5 years, or 300 penalty units (<i>Crimes Act</i> , s 37)
Fraud on witness	2 years, or 120 penalty units	2 years, or 120 penalty units (<i>Crimes Act</i> , s 38)
Destroying documents or other things	2 years or 100 penalty units	5 years , or 300 penalty units (<i>Crimes Act</i> , s 39)
Fabricating evidence	Not an offence in the Act	5 years , or 300 penalty units (<i>Crimes Act</i> , s 36)
Preventing witnesses from attending	1 year, or 60 penalty units	1 year, or 60 penalty units (<i>Crimes Act</i> , s 40)
Injury to witness	1 year, or 10 penalty units	5 years , or 60 penalty units (<i>Crimes Act</i> , s 36A)
Dismissal by employers of witness	1 year, or 10 penalty units	5 years , or 60 penalty units (<i>Crimes Act</i> , s 36A)

Submissions and consultations

21.17 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there should be any changes to the penalties in the *Royal Commissions Act* and what penalties, if any, should apply to other forms of public inquiries established by statute.²² In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed a number of maximum penalties for specific

22 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 9–8, 9–9.

offences, based on the general principles underlying the sections in the *Crimes Act* discussed above.²³

21.18 Few stakeholders addressed the issue of penalties in either submissions or consultations. In consultations, some stakeholders indicated a concern that the penalties for non-compliance were too low and therefore ineffective. There was very little comment from stakeholders on whether different penalties ought to apply to other forms of inquiry established by legislation.

21.19 The Law Council of Australia was the only stakeholder to address the issue in its submissions. It expressed the view that there was no justification for the variation in the penalties between the *Royal Commissions Act* and the *Crimes Act* or *Criminal Code*, and that the offences for non-compliance should attract the same maximum penalty.²⁴ It also expressed its support for harmonisation of penalties in line with penalty benchmarks in the *Guide to Framing Commonwealth Offences*.²⁵

Penalties for Official Inquiries

21.20 The ALRC has considered whether different levels of penalty ought to apply to Royal Commissions and Official Inquiries. For example, offences of refusing or failing to comply with the requirements of a Special Commission of Inquiry in New South Wales (NSW) attract a higher maximum penalty than in relation to Royal Commissions in that jurisdiction, although in both cases the penalties are very small.²⁶

21.21 As discussed in Part B, the statutory framework for inquiries recommended in this Report preserves Royal Commissions as the highest form of executive inquiry. Royal Commissions should be established only where the most intrusive information-gathering powers are required, and where the matter for inquiry is of substantial public importance.²⁷

21.22 It could be argued that Royal Commissions will deal with matters that justify higher penalties than Official Inquiries, because there is a higher prospect that criminal activity of a serious kind may be involved. In the ALRC's view, however, the penalties should be the same for both Royal Commissions and Official Inquiries. Whether the inquiry is established as a Royal Commission or an Official Inquiry may depend on a number of different factors, and the seriousness of the conduct that is the subject of the inquiry is only one factor.

23 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposals 20-1, 20-2, 20-3, 20-4. Those proposals are discussed later in this chapter.

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

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

26 *Special Commissions of Inquiry Act 1983* (NSW), ss 25, 26 (10 penalty units); *Royal Commissions Act 1923* (NSW) ss 19, 20 (4 penalty units).

27 Recommendations 5-1, 6-2.

21.23 It will not necessarily be the case, for example, that a failure to comply with a notice or direction of a Royal Commission will be more serious than a failure to comply with a notice or direction of an Official Inquiry. For example, an Official Inquiry may be established to investigate an alleged systemic criminal matter because it is anticipated that the investigation will be quite confined. A Royal Commission may be established to inquire into a policy issue because of the substantial public interest of the policy involved.

21.24 Since the form of the inquiry will not necessarily dictate the seriousness of the conduct to be deterred, the same maximum penalty is recommended in relation to both Royal Commissions and Official Inquiries. The seriousness of the conduct can be considered, however, as a factor in sentencing.

21.25 This approach is adopted in other jurisdictions with different forms of inquiry. For example, the Australian Capital Territory and Victoria provide the same penalties in respect of Royal Commissions and Boards of Inquiry.²⁸ The Inquiries Bill 2008 (NZ) contains the same penalties in respect of its three different forms of inquiry.²⁹ Offences by witnesses in federal courts also attract consistent penalties.³⁰

Penalties for non-compliance

21.26 In Chapter 19, the ALRC recommends that it should be an offence under the *Inquiries Act* for a person, without reasonable excuse, to refuse or fail to:

- swear an oath or make an affirmation when required to do so by an inquiry member;
- answer a question when required to do so by an inquiry member, or a person authorised by an inquiry member to ask the question;
- comply with a notice requiring a person to attend or appear; or
- comply with a notice requiring a person to produce a document or thing, in the custody or control of that person.³¹

21.27 In Chapter 20, the ALRC recommends that inquiries also should be able to apply to the Federal Court for enforcement of their orders, as an alternative mechanism to ensure compliance.³²

28 *Evidence Act 1958* (Vic) ss 16, 19, 20; *Royal Commissions Act 1991* (ACT) s 46; *Inquiries Act 1991* (ACT) s 36.

29 *Inquiries Bill 2008* (NZ) cl 30.

30 See, eg, *Federal Magistrates Act 1999* (Cth) s 65; *Federal Court of Australia Act 1976* (Cth) s 58. There is no equivalent offence for the High Court, which punishes similar conduct as contempt: *Judiciary Act 1903* (Cth) s 24.

31 Recommendation 19–1.

32 Recommendation 20–2.

21.28 As noted above, the existing offences of non-compliance in the *Royal Commissions Act* attract a maximum penalty of six months imprisonment or 10 penalty units (\$1,100). The maximum term of imprisonment is consistent with the penalty benchmark for similar offences in the *Guide to Framing Commonwealth Offences*.³³ It is also consistent with the penalties imposed for similar conduct in federal courts³⁴ and tribunals.³⁵ It is higher than the penalty imposed for non-compliance in hearings before the Australian Securities and Investments Commission (ASIC),³⁶ although lower than the penalty imposed for non-compliance in hearings before the Australian Competition and Consumer Commission.³⁷

21.29 Existing penalties for offences of non-compliance are broadly consistent with the penalties for equivalent offences in state and territory legislation—which typically range from imprisonment for three to six months, with the highest penalty being imprisonment for one year.³⁸

21.30 The only maximum penalties for similar conduct that are significantly higher are contained in legislation governing standing crime and corruption commissions. Similar offences relating to the Australian Commission for Law Enforcement Integrity (ACLEI) attract a maximum penalty of two years imprisonment, or 120 penalty units,³⁹ while in NSW similar offences relating to the Independent Commission Against Corruption (ICAC) attract a maximum penalty of two years imprisonment.⁴⁰

21.31 Similar conduct before the Australian Crime Commission (ACC) attracts the highest maximum penalty for comparable offences—five years imprisonment or 200 penalty units. This maximum penalty was set in 2001.⁴¹ This level of penalty was recommended for Royal Commissions by the Hon Terence Cole QC, who headed the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission).⁴² Before 2001, the penalties for ACC offences were similar to those in the *Royal Commissions Act*.

21.32 The increase in penalties in 2001 was part of a package of reforms designed to overcome the problem of significant non-compliance by witnesses. In 2007, in an

33 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 47.

34 *Federal Magistrates Act 1999* (Cth) s 65; *Federal Court of Australia Act 1976* (Cth) s 58.

35 *Administrative Appeals Tribunal Act 1975* (Cth) ss 61, 62; *Migration Act 1958* (Cth) ss 370–371, 432–433; *Defence Act 1903* (Cth) ss 61CY, 86.

36 *Australian Securities and Investments Commission Act 2001* (Cth), s 219(4) (3 months).

37 *Trade Practices Act 1974* (Cth) s 160 (12 months or 20 penalty units).

38 See, eg, *Commissions of Inquiry Act 1950* (Qld) (1 year); *Royal Commissions Act 1917* (SA) s 11 (3 months); *Criminal Code* (ACT) s 721 (6 months).

39 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 78.

40 *Independent Commission Against Corruption Act 1988* (NSW) s 86.

41 *National Crime Authority Legislation Amendment Act 2001* (Cth) sch 1, cl 7.

42 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 44.

independent review of this increase in penalties,⁴³ the ACC reported that the higher penalties had facilitated the performance of its functions.⁴⁴ The statistics set out in that report show that before the amendments, the penalties imposed by courts ranged from a \$500 fine to four months imprisonment. During 2005–06, the typical penalty imposed was 12 months imprisonment.⁴⁵ The reviewer concluded that, in light of the varying circumstances of cases, the ‘best that can be said is that the prevailing range of sentences imposed by the courts ... has increased’.⁴⁶

ALRC’s view

21.33 The current maximum penalty of six months imprisonment for offences of non-compliance is an appropriate penalty. The maximum monetary penalty, however, should be adjusted to 30 penalty units (\$3,300) in line with the formula in the *Crimes Act* for converting the maximum term of imprisonment into a maximum monetary penalty. This level of penalty is consistent with a broad range of federal legislation, including legislation governing courts and tribunals.

21.34 In the ALRC’s view, while similar conduct before the ACC attracts a higher level of penalty, a maximum penalty for Royal Commissions in the range of five years imprisonment is unjustified. The ACC is a standing organisation responsible for investigating serious and organised crime. Witnesses before the ACC are likely to be facing significant criminal penalties, and a higher level of deterrence therefore may be necessary. The ACC is also subject to a much higher level of accountability than an ad hoc inquiry, with oversight mechanisms including a Board, an Inter-Governmental Committee, and a Parliamentary Joint Committee.⁴⁷ Similar considerations apply to the penalties applicable to ACLEI proceedings.

21.35 Royal Commissions and Official Inquiries, in contrast, are ad hoc bodies which are not established for the purpose of enforcing laws or investigating breaches of laws, but rather to inquire, report and make recommendations to government. The penalty required to deter non-compliance, therefore, is less than that required in investigations of serious and organised crime or corruption. Of course, Royal Commissions have in the past investigated allegations of criminal activity and corruption. Nevertheless, the purpose of a Royal Commission of this nature remains in the end very different from the purpose of bodies such as the ACC or ACLEI.

21.36 A higher level of penalty would also be out of proportion to the penalties imposed for interference with evidence or witnesses. As noted above, the *Crimes Act* imposes maximum penalties in the range of one to five years imprisonment for these offences. These offences would generally involve a more culpable interference with the

43 M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007).

44 *Ibid.*, [94].

45 *Ibid.*, [103].

46 *Ibid.*, [104].

47 *Australian Crime Commission Act 2002* (Cth) pt II, div 1; pt III.

processes of a Royal Commission or Official Inquiry than mere non-compliance, and this should be reflected in the applicable penalties.

21.37 The ALRC recommends, therefore, that the offences of refusing or failing to swear or affirm, answer a question, or comply with notices requiring attendance or the production of evidence, should attract a maximum penalty of six months imprisonment, or 30 penalty units.

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

Unauthorised publications

21.38 In Chapter 19, it is recommended that there should be an offence of contravening a direction which concerns national security information, the prohibition or restriction of public access to a hearing, or the prohibition or restriction of publication of certain information before an inquiry.⁴⁸ This recommendation extends the existing offence of publication contrary to a direction of a Royal Commission in s 6D(3) of the *Royal Commissions Act* to directions prohibiting or restricting public access to a hearing, which involve similar considerations to that of publication.

21.39 In Chapter 13, the ALRC discusses the power of an inquiry to make directions concerning national security information. In that chapter, the ALRC recommends that inquiry members may make directions relating to national security information, including specifying the forms in which national security information may be produced or otherwise used, and imposing restrictions on access, subsequent use and disclosure of such information.⁴⁹

21.40 As noted above, the existing offence in s 6D(3) of the Act attracts a maximum penalty of 12 months imprisonment, or 20 penalty units. The *Guide to Framing Commonwealth Offences* does not provide a penalty benchmark for these kinds of offences.

21.41 The maximum penalty of 12 months imprisonment is the same as that which applies to unauthorised publications in relation to ASIC,⁵⁰ the ACC,⁵¹ and ACLEI.⁵² It

48 Recommendation 19–8.

49 Recommendation 13–2.

50 *Australian Securities and Investments Commission Act 2001* (Cth) ss 55, 66.

51 *Australian Crime Commission Act 2002* (Cth) s 25A(9), (14).

52 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 90(6).

is the highest penalty provided for offences in inquiries legislation in Australia.⁵³ It is also consistent with the comparable penalty relating to ICAC proceedings.⁵⁴

21.42 The offences in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), which restrict disclosure of national security information including disclosures in breach of court orders, attract a maximum penalty of two years imprisonment.⁵⁵ Similarly, s 58 of the *Defence Force Discipline Act 1982* (Cth) imposes a maximum penalty of two years imprisonment for unauthorised disclosures by defence members or defence civilians which are likely to prejudice the security or defence of Australia.

21.43 The *Guide to Framing Commonwealth Offences* specifies a penalty benchmark of two years imprisonment or 120 penalty units for breach of secrecy provisions,⁵⁶ although higher penalties sometimes apply to secrecy offences relating to national security information.⁵⁷

21.44 The ALRC is currently conducting an inquiry into secrecy provisions, and has recommended in its 2009 Discussion Paper, *Review of Secrecy Laws* (DP 74), that a general secrecy offence be introduced. Among other things, the general secrecy offence would prohibit disclosures that harm, were reasonably likely to or were intended to harm, the national security, defence or international relations of the Commonwealth.⁵⁸ The penalties proposed in DP 74 for that offence range from two years imprisonment to seven years imprisonment.⁵⁹

21.45 In DP 75, the ALRC proposed that the appropriate maximum penalty for the offence of breaching prohibitions or restrictions on public access to hearings or publication should be 12 months imprisonment or 60 penalty units. The maximum penalty proposed for the offence of contravening directions concerning national security information was two years imprisonment or 120 penalty units.⁶⁰ The Australian Intelligence Community, which was the only stakeholder to address this issue, supported these proposals.⁶¹

ALRC's view

21.46 The offence of unauthorised publication should continue to attract a maximum penalty of 12 months imprisonment, as this is consistent with similar offences in

53 It is equivalent to the maximum penalty in *Royal Commission (Police Service) Act 1994* (NSW) s 27.

54 *Independent Commission Against Corruption Act 1988* (NSW) s 112.

55 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 40–46G.

56 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 47.

57 See Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), [11.115].

58 *Ibid*, Proposal 7–1.

59 *Ibid*, Proposal 9–3.

60 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposals 20–2, 20–3.

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

federal legislation. The maximum monetary penalty should be adjusted in line with the ratio between months of imprisonment and penalty units in the *Crimes Act*, so the offence would carry a maximum monetary penalty of 60 penalty units (\$6,600) rather than the existing 20 penalty units.

21.47 This penalty is higher than the penalty for non-compliance, discussed above. This is justified because the consequences of unauthorised disclosure can be serious and damaging to the interests that are sought to be protected by a non-publication order. For example, an unauthorised publication could cause significant harm to people participating in an inquiry, such as a threat to their safety or a significant breach of their privacy. The potential for harm as a result of unauthorised publication, therefore, is greater than the potential for harm caused by other forms of non-compliance.

21.48 In the ALRC's view, no distinction should be made in terms of the penalty between the offence of unauthorised publication and the offence of contravening a direction prohibiting or restricting public access to hearings. Both directions not to publish and directions restricting public access to hearings are designed to minimise the same kinds of harm, and the contravention of a direction restricting public access has the potential to cause the same kinds of harm as a direction restricting publication.

21.49 The offence of contravening a direction concerning national security information, however, should attract a higher penalty of two years imprisonment, or 120 penalty units. National security information involves a critical public interest, and disclosure of such information may cause substantial damage to national interests, members of the security and intelligence agencies, and others. The maximum penalty of two years imprisonment is consistent with that applicable in court proceedings under the *National Security Information (Criminal and Civil Proceedings) Act*. The seriousness of the conduct and the prospect of harm are similar whether such disclosures contravene the orders of courts and tribunals or the directions of inquiries.

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

Recommendation 21–3 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of contravening a direction concerning national security information is two years imprisonment or 120 penalty units.

Offence of substantial disruption

21.50 Section 6O of the *Royal Commissions Act* prohibits a range of conduct such as disturbing or interrupting proceedings, or using insulting language towards a Royal Commission. This offence is discussed in Chapter 20. Section 6O is subject to a maximum penalty of three months imprisonment, or two penalty units (\$220).

21.51 In Chapter 20, the ALRC recommends that s 6O should be replaced by a more limited offence of causing substantial disruption to a proceeding of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.⁶² The ALRC also recommends that members of Royal Commissions or Official Inquiries should have the power to exclude a person from the proceedings of an inquiry if that person is disrupting the inquiry.⁶³

21.52 In the Building Royal Commission, Commissioner Cole criticised the penalty for s 6O as ‘manifestly inadequate’ and recommended it be increased to at least \$5,000.⁶⁴ As noted above, the *Guide to Framing Commonwealth Offences* specifies that the ratio of months of imprisonment to penalty units in s 4B(2) of the *Crimes Act*—namely, that one month of imprisonment should equate to five penalty units—should generally apply when setting penalties. If this advice was followed, a maximum penalty of \$5,000 would require a maximum term of imprisonment of at least 10 months.

21.53 The maximum penalty of three months is also contrary to the advice in the *Guide to Framing Commonwealth Offences*, which directs those framing Commonwealth offences to refrain from imposing terms of imprisonment of less than six months. It states that:

Avoiding provision for short term prison terms underlines the message that imprisonment is reserved for serious offences and also avoids the potential for burdening State/Territory correctional systems with minor offenders.⁶⁵

21.54 In contrast, in its report, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103), the ALRC recommended that sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.⁶⁶ The ALRC expressed the view that the federal sentencing regime protects

62 Recommendation 20–4.

63 Recommendation 20–1.

64 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 44.

65 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 42–43.

66 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 7–8.

against the inappropriate imposition of short sentences.⁶⁷ The ALRC noted anecdotal evidence that suggests that the abolition of short sentences may have perverse consequences, resulting in offenders receiving longer sentences of imprisonment than would otherwise have been warranted.⁶⁸

21.55 The penalty of three months imprisonment is also shorter than in comparable legislation. In ACLEI and ASIC proceedings, similar conduct attracts a maximum penalty of six months imprisonment and 12 months imprisonment respectively.⁶⁹ In the ACT, conduct of this kind before a Royal Commission would attract a maximum penalty of 12 months imprisonment.⁷⁰ Similar conduct before the ACC would attract a penalty of two years imprisonment, although the offence also covers other conduct such as obstruction.⁷¹

ALRC's view

21.56 A maximum penalty of six months imprisonment and a maximum monetary penalty of 30 penalty units—in line with the ratio in the *Crimes Act*—would be appropriate for the offence of causing substantial disruption. It is consistent with the penalty recommended for offences of non-compliance. In the ALRC's view, the act of causing substantial disruption to the proceedings of an inquiry may be as serious an obstruction to its proceedings as refusing to comply with notices requiring production of documents.

21.57 The offence of causing substantial disruption does not justify the same penalty as the offence of unauthorised publication which, as discussed above, should attract a maximum penalty of 12 months imprisonment, or 60 penalty units. The offence of causing substantial disruption causes harm to the inquiry itself, while the offence of unauthorised publication has the potential to cause harm to a wide range of interests such as the physical safety and privacy of those participating in an inquiry.

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

67 The *Crimes Act 1914* (Cth) s 17A provides that a sentence of imprisonment should not be imposed for a federal offence unless the court is satisfied that no other sentence is appropriate in the circumstances of the case.

68 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [7.70]–[7.72].

69 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94; *Australian Securities and Investments Commission Act 2001* (Cth) ss 66, 200, except for s 220 (which applies to such conduct before a Disciplinary Board).

70 *Royal Commissions Act 1991* (ACT) s 46.

71 *Australian Crime Commission Act 2002* (Cth) s 35.

Proceedings

21.58 Offences may be prosecuted in one of two ways—either summarily (that is, before a magistrate without trial by jury) or on indictment (before a judge or jury in the County, District or Supreme Court). As noted earlier, the *Crimes Act* provides that, unless otherwise stated, the procedure for prosecution depends on the level of the maximum penalty that applies to the offence.

21.59 Under the recommendations made in this chapter, all of the offences under the *Inquiries Act* will be summary offences. The exception to this is the recommended offence of contravening a direction concerning national security information, which would be an indictable offence but could be tried summarily if the prosecutor and defendant consent.⁷²

21.60 Federal offences are typically prosecuted in the criminal courts of Australian states or territories, and the procedure for prosecution in that state or territory normally applies.⁷³ Usually, summary proceedings may be initiated by any person by laying a charge, information or complaint.⁷⁴

21.61 In proceedings on indictment, before a person is tried before a judge or jury, there is usually a committal hearing before a magistrate.⁷⁵ The function of the committal hearing is to determine whether there is a sufficient case against a person to warrant a trial.⁷⁶ While any person may institute a committal proceeding, the person cannot be tried on indictment unless the prosecution is in the name of the Attorney-General or such other person as the Governor-General has appointed in that behalf.⁷⁷ The Commonwealth Director of Public Prosecutions (CDPP) also has the power to prosecute a person on indictment, or take over a prosecution of an offence commenced by another person.⁷⁸

Section 10 of the Royal Commissions Act

21.62 Section 10 of the *Royal Commissions Act* outlines the way in which proceedings for summary offences against the Act may be instituted. It provides as follows:

proceedings in respect of any offence against this Act (other than an indictable offence) may be instituted by action, information, or other appropriate proceeding, in

⁷² Recommendation 21–3; *Crimes Act 1914* (Cth) s 4J.

⁷³ These rules are applied to Commonwealth offences under the *Judiciary Act 1903* (Cth) s 68.

⁷⁴ *Crimes Act 1914* (Cth) s 13(b).

⁷⁵ The Attorney-General or the Director of Public Prosecutions may also present an ex officio indictment, in which case a committal hearing is unnecessary, although this practice is discouraged: *Barton v The Queen* (1980) 147 CLR 75. There are guidelines as to when such a practice may be appropriate: see the Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [6.28]–[6.32].

⁷⁶ Thomson Reuters, *Laws of Australia*, vol 11 Criminal Procedure, 11.5, [1] (as at 29 June 2009).

⁷⁷ *Judiciary Act 1903* (Cth) s 69.

⁷⁸ *Director of Public Prosecutions Act 1983* (Cth) s 9(1), (3), (5). The CDPP, however, cannot take over a prosecution for an indictable offence commenced by the Attorney-General or Special Prosecutor.

the Federal Court of Australia by the Attorney-General or the Director of Public Prosecutions, or by information or other appropriate proceeding by any person in any court of summary jurisdiction.

21.63 In addition to the usual procedure for summary offences, this section expressly empowers the Attorney-General or CDPP to initiate proceedings in the Federal Court. The CDPP also may take over a summary prosecution commenced by another person.⁷⁹

21.64 It is unusual for the Federal Court to have jurisdiction over these kinds of offences. The Federal Court does not have jurisdiction over offences that prohibit similar conduct in other federal bodies. As a practical matter, proceedings for offences under the *Royal Commissions Act* generally are not instituted in the Federal Court, but, rather, are instituted in state and territory courts.⁸⁰

21.65 Originally, this provision of the *Royal Commissions Act* provided that proceedings in respect of an offence under the Act, other than an indictable offence, could be brought in the High Court of Australia. The Federal Court was substituted for the High Court in 1979.⁸¹ The section, in its original form, was inserted in 1912 as a result of a prosecution for non-attendance before a Royal Commission which had taken 10 or 11 weeks in a court of summary jurisdiction by the time the amending Act was introduced. The then Attorney-General emphasised that the amending Act provided for a direct reference to the High Court in order to expedite matters, because the High Court then despatched business much more quickly than courts of summary jurisdiction.⁸²

Consent requirements

21.66 In some overseas jurisdictions, the legislation provides that prosecutions for these kinds of offences can be instituted only with the consent of the CDPP.⁸³ The primary justification for a requirement for the Attorney-General or the CDPP to consent to a prosecution is that it provides an additional safeguard to ensure that prosecutions are brought only in appropriate circumstances.⁸⁴ The CDPP's *Prosecution Policy of the Commonwealth* advises that a consent provision may be included, for example, where 'it was not possible to define the offence so precisely that it covered the mischief aimed at and no more' or for offences that 'involve a use of the criminal

79 Ibid s 9(5).

80 For example, the prosecution of Martin Kingham following the Building Royal Commission was conducted in the Melbourne Magistrates Court: S Balogh, 'Unions Aim to Build on First Round Win', *The Australian* (Sydney), 8 May 2003, 4.

81 *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (Cth) sch.

82 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1187 (W Hughes—Attorney-General).

83 *Inquiries Act 2005* (UK) s 35(6); *Commissions of Investigation Act 2004* (Ireland) s 49.

84 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [2.25].

law in sensitive or controversial areas, or must take account of important considerations of public policy'.⁸⁵

21.67 In 1996, with respect to the repeal of certain provisions requiring the Attorney-General's consent to prosecution, the then Attorney-General, the Hon Daryl Williams QC MP, observed that consent provisions were originally enacted for the purpose of deterring private prosecutions brought in inappropriate circumstances—particularly for offences relating to national security or international treaty obligations.

However, since establishing the office of the Commonwealth Director of Public Prosecutions the retention of those provisions is difficult to justify. That is particularly so now that the Director of Public Prosecutions has the power to take over and discontinue a private prosecution brought in relation to a Commonwealth offence.⁸⁶

21.68 Consent requirements also may raise concerns about whether the decision to institute proceedings is politicised, as the ALRC noted in its inquiry into federal sedition laws.⁸⁷

21.69 The application of s 10 to offences under the *Royal Commissions Act*, other than indictable offences, raises a minor issue. As noted above, the ALRC recommends a maximum penalty of two years imprisonment for the offence of contravening directions concerning national security information, which would make that offence an indictable offence. There is no reason why s 10 should not apply to that offence, however, if that offence is prosecuted summarily with the consent of the prosecutor and defendant. If a provision similar to s 10 is to be included in the *Inquiries Act*, therefore, it should apply to any offence under the Act tried summarily.

21.70 No stakeholder in this Inquiry addressed the ways in which proceedings were instituted.

ALRC's view

21.71 There are no compelling reasons why the usual practice of allowing any person to initiate a summary proceeding should not apply to Royal Commissions or Official Inquiries offences. In particular, there is no reason why the consent of the Attorney-General or Director of Public Prosecutions should be necessary in relation to prosecutions in state or territory courts. The kinds of offences in the *Inquiries Act* do not raise any of the special considerations that might justify such a requirement.

21.72 While it is unusual to confer jurisdiction on the Federal Court in these cases, there appears to be no reason why the Federal Court should not have this jurisdiction.

85 Ibid, [2.27].

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1996, 7714, (D Williams—Attorney-General). Under s 9(5) of the *Director of Public Prosecutions Act 1983* (Cth), the CDPP can take over a private prosecution and terminate it.

87 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), Ch 13.

The ALRC acknowledges, however, that in practice it is likely that such offences will continue to be prosecuted in state or territory courts.

21.73 A provision equivalent to s 10 of the *Royal Commissions Act* should be retained in the *Inquiries Act*. As noted above, this section should apply to all offences under the Act which are tried summarily, so that it also applies consistently to the offence of contravening a direction relating to national security when that offence is prosecuted summarily.

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

Costs

Costs in criminal proceedings generally

21.74 Like most federal offences, the offences under the *Royal Commissions Act* are normally prosecuted in state or territory courts, and the costs of these proceedings are determined by the laws of the state or territory in which the offence is prosecuted.⁸⁸ The rules relating to the recovery of costs of proceedings under the *Royal Commissions Act*, therefore, may differ depending on where the charges are heard.

21.75 A range of competing interests need to be considered when determining who should bear the costs of criminal proceedings. On the one hand, it is ordinarily unjust if an innocent person suffers financial hardship as a result of being unable to recover the costs of a successful defence. On the other hand, the administration of criminal justice may be adversely affected if the initiation and conduct of prosecutions are unduly influenced by the risk of an adverse costs order.

21.76 In all Australian states or territories, different costs rules apply depending on whether the offence is prosecuted summarily or on indictment. In summary proceedings, the court usually has a broad power to award such costs to either party as it thinks is just and reasonable in the circumstances of the case.⁸⁹ The purpose of the award is to reimburse the successful party for the reasonable costs the party has incurred, rather than to punish the unsuccessful party.⁹⁰ The discretion, however, is subject to different conditions in each state and territory.

88 *Judiciary Act 1903* (Cth) ss 68(1), 79.

89 *Criminal Procedure Act 1986* (NSW) ss 116, 212–218; *Magistrates' Court Act 1989* (Vic) s 131(1); *Justices Act 1886* (Qld) ss 157, 158; *Criminal Procedure Act 2004* (WA) s 67; *Summary Procedure Act 1921* (SA) s 189; *Justices Act 1959* (Tas) s 77(1), (2), (2A); *Justices Act 1928* (NT) ss 77–79.

90 *Latoudis v Casey* (1990) 170 CLR 534, 543.

21.77 Although these statutory discretions are often framed broadly, they must be exercised in accordance with the principles outlined by the High Court in *Latoudis v Casey*.⁹¹ In that case the High Court ruled that, in summary proceedings, ‘in ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs’.⁹² In exceptional cases, however, it may be just and reasonable to deprive a successful defendant of his or her costs—for example, where the defendant’s conduct, after the alleged offence took place, brought the prosecution upon himself or herself.⁹³

21.78 In indictable proceedings, the successful defendant is entitled to recover his or her costs only in exceptional circumstances. In most jurisdictions, no costs may be awarded for or against the prosecution in trials, although in some jurisdictions the relevant statutes may allow costs to be recovered in limited circumstances.⁹⁴

21.79 In its report, *Costs Shifting—Who Pays for Litigation* (ALRC 75), the ALRC examined the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction.⁹⁵ In relation to costs for criminal proceedings, the ALRC recommended that there should be no distinction between summary and indictable proceedings.⁹⁶ The ALRC recommended that, in criminal proceedings, the prosecution should pay the reasonable costs of an accused who is successful in obtaining a dismissal, acquittal or withdrawal of charges, unless the court was satisfied in all the circumstances of the case that some other order should be made.⁹⁷ The ALRC listed a number of factors which might indicate that some other order should be made.⁹⁸ These were similar to those identified by the courts as reasons for depriving a successful defendant of his or her costs in summary proceedings. This recommendation has not yet been implemented.

21.80 The Law Reform Commission of Western Australia, considering the same issue in the context of a review of the criminal justice system, recommended that no costs should be awarded to successful defendants in either summary or indictable proceedings.⁹⁹

Costs in the Royal Commissions Act

21.81 Section 15 of the *Royal Commissions Act* provides that a court ‘may award costs against any party’ in any proceedings for an offence against the Act, other than proceedings for the commitment for trial of a person charged with an indictable

91 Ibid.

92 Ibid, 542.

93 Ibid, 544.

94 *Costs in Criminal Cases Act 1967* (NSW) ss 2, 4; *Costs in Criminal Cases Act 1976* (Tas) ss 4, 5.

95 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation?*, ALRC 75 (1995).

96 Ibid, 91.

97 Ibid, Rec 23.

98 Ibid, Rec 23.

99 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92 (1999), [31.15]–[31.17].

offence. A similar provision in s 8ZN of the *Taxation Administration Act 1953* (Cth) has been interpreted as conferring a general power to award costs according to the principles outlined in *Latoudis v Casey*.¹⁰⁰ That is, costs in a summary proceeding ordinarily should be awarded to a successful defendant, although in exceptional circumstances a successful defendant may be deprived of the costs.

21.82 Importantly, the Court also held that s 8ZN was directly inconsistent with, and therefore rendered invalid, a state provision which set out criteria to be satisfied before the making of a costs order.¹⁰¹ Applying this reasoning, s 15 of the *Royal Commissions Act* will also render invalid any state provision that restrains in any way the discretion of the court to order costs.¹⁰²

21.83 One difference between s 15 of the *Royal Commissions Act* and s 8ZN of the *Taxation Administration Act* is that s 15 also appears to apply to proceedings on indictment, other than committal proceedings. The power to award costs in indictable proceedings is unusual, in light of the general provisions restricting recovery of costs in indictable proceedings. As noted earlier, the ALRC's recommendation that reliance be placed on general offences under the *Crimes Act* and *Criminal Code* prohibiting interference with evidence or witnesses means that there is only one indictable offence under the *Inquiries Act*, namely the contravention of directions relating to national security information.¹⁰³ Consistently with s 10 of the *Royal Commissions Act*, discussed above, if a provision equivalent to s 15 is to be retained in the *Inquiries Act*, it should apply to all offences under the Act, where tried summarily.

21.84 Section 15 also provides that 'all provisions of this Act relating to the recovery of penalties, except as to commitment to gaol, shall extend to the recovery of any costs adjudged to be paid'. This part of the provision is redundant as there are no longer any provisions in the Act dealing with the recovery of penalties.¹⁰⁴ The *Crimes Act* provides that a law of an Australian state or territory relating to the enforcement or recovery of fines applies to a person convicted in the state or territory of an offence against the law of the Commonwealth.¹⁰⁵

21.85 In this Inquiry, no stakeholder addressed the issue of costs of criminal proceedings under the *Royal Commissions Act*.

100 *Commissioner of Taxation v MacPherson* [2000] 1 Qd R 496.

101 Under s 109 of the *Australian Constitution*.

102 The provisions of state and territory legislation that operate to constrain discretion were discussed in *Latoudis v Casey* (1990) 170 CLR 534, 546–557.

103 Recommendation 21–3.

104 Sections 12 and 14 of the Act, dealing with the recovery of pecuniary penalties imposed for offences against the Act, were repealed by the *Royal Commissions Amendment Act 1982* (Cth).

105 *Crimes Act 1914* (Cth) s 15A.

ALRC's view

21.86 A provision similar to s 15 of the *Royal Commissions Act* should be retained in the *Inquiries Act*. In most cases, the power to award costs will be conferred on the state or territory court in which the offence is prosecuted. There are, however, differences between the jurisdictions in relation to the approach taken to costs, and it is desirable that someone charged with a federal offence is not disadvantaged in recovering costs because of the place in which he or she is prosecuted.

21.87 A provision similar to s 15 of the *Royal Commissions Act* would apply the prevailing rules relating to costs in summary proceedings. All of the offences under the recommended *Inquiries Act*, with one exception, are summary offences. This is consistent with the policy underlying the ALRC's earlier recommendation concerning costs for criminal proceedings.

21.88 Some changes, however, ought to be made to any provision replicating s 15. The provision should apply to offences under the Act tried summarily so that it applies consistently to all of the offences under the Act, and to ensure it does not apply to indictable proceedings. It should omit the part of s 15 dealing with the recovery of penalties, which is now redundant.

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

