

ALRC Review of the Royal Commissions Act: Liberty Victoria’s Response to DP75

Liberty’s submission¹ to the ALRC Review is divided into the following topics.

1. Overview	1
2. A New Statutory Framework	1
3. Funding	3
4. Inquiry Powers	3
5. Conduct of Inquiries	4
6. Coercive Powers.....	5
7. Conclusion.....	5

1. Overview

Liberty Victoria (Liberty) welcomes the Australian Law Reform Commission’s (ALRC) review and public consultations. Royal Commissions have a strong tradition in Australia, generally providing an effective means of inquiry into matters of public importance. Liberty believes that the need for strong and independent inquiry is just as important, if not more, than it was in 1902. The passage of time has not diminished the Public’s trust in Royal Commissions but has increased the need for legislative reform. Liberty responded to the previous Issues Paper (IP 35) and participated in consultations with the ALRC. In response to the Discussion Paper (DP 75), Liberty takes this opportunity to further contribute to the consultative process.

Society and government are built upon a framework of civil liberties and responsibilities. Abuses of power and trust arise where governments (like people) are not held accountable for their actions. Independent inquiry and public review provide a measure of accountability. Investigative powers of Royal Commissions and other Official Inquiries must be balanced against civil liberties.

2. A New Statutory Framework

Liberty generally supports the proposals for a new statutory framework for public inquiries in Australia. Specifically, the proposed two tier system (Royal Commissions and other Official Inquiries) would simplify and consolidate modes of inquiry under one Act, give leeway to apply different powers to inquiries as required and would provide clarity. Liberty endorses the retention of the title ‘Royal Commission’ as the highest mode of inquiry. Liberty agrees with the reservation of Royal

¹ Liberty would like to thank Rhys Michie and Georgia King-Siem for their assistance in preparing this submission.

Commissions for matters of 'substantial public importance' and other Official Inquiries for 'matters of public importance' although Liberty questions how and where those terms will be defined.

Liberty supports the updating the Act to reflect modern drafting practice although it reserves further comment until it can examine the exposure draft of the Bill.

Liberty previously advocated a mechanism whereby existing statutorily independent bodies such as the Commonwealth Ombudsman, the Inspector General of Intelligence and Security (IGIS) or others could be utilised to advise and assist Royal Commissions or other public inquiries by temporarily expanding their jurisdiction and powers. Such bodies have considerable experience in conducting investigations quickly and efficiently with satisfactory outcomes. Harnessing their institutional knowledge, human resources and specialised skills offers an expedient means of inquiring into particular matters relevant to Royal Commissions or Official Inquiries.

Liberty agrees that the proposed Inquiries Act should set out and delineate the specific powers that are conferred on Royal Commissions or Official Inquiries and agrees with the proposed mechanisms for converting inquiries.

Stipulating a set of specific objective criteria in the Act that the Australian Government *should* consider before establishing a Royal Commission is a prudent means of determining which tier is appropriate and the proposed criteria are sensible. However, Liberty warns that the criteria may lack flexibility in the long term, or may be used by a disingenuous government to prevent an inquiry from being endowed with the full range of powers necessary to conduct an effective inquiry (as occurred in the Clarke Inquiry into the case of Dr Mohamed Haneef).

Liberty supports the development of an *Inquiries Handbook*, although some of the criteria may be more appropriately contained in Regulations to the Act. Regardless of the vehicle, such guidelines offer many advantages including; consistency, clarity and sets out the requirements for administration. As highlighted by the New Zealand model, amendable guidelines provide greater flexibility and ease of use.

Liberty previously advocated a legislated requirement to table reports of inquiries. Liberty is pleased endorse the ALRC proposal that the Australian Government be required to table the final report, or a statement of reasons why the whole report is not being tabled, within 15 sitting days. Such a requirement provides a strong level of accountability and public transparency.

Liberty also advocated the public tracking of Government implementation of recommendations. Although ALRC has not adopted our recommendation of creating a small administrative body for this purpose, it has recommended a 12 month post tabling report by Government. However, the proposal only provides that the government *should* and not *must* publish a 12 month post tabling update. Liberty reiterates that the Government should be *required* to provide post tabling updates; ideally after 1, 2 and 5 years and responding to each and every recommendation within a given Report. Finally, Liberty urges that any requirement to provide progress reports be applied to tabled, partially tabled and non-tabled reports.

3. Funding

Liberty agrees with the ALRC recommended mechanism for determining whether the costs of legal and related assistance to witnesses and other inquiry participants should be met by the Australian Government. The proposed factors to be considered by the Attorney General's Department (AGD) are appropriate and consistent with Liberty's previous submission; individuals and organisations should be paid a sufficient sum to meet their reasonable expenses to comply with notices to produce documents or things or to appear.

Guidance as to the engagement and remuneration of legal practitioners assisting the inquiry should be contained in the *Inquiries Handbook*. Terms should, as far as practicable, be negotiated on a commercially competitive basis and the listed factors in the proposal that may be relevant to negotiating these terms are appropriate.

Consistent with its previous submission, Liberty supports the proposal to include financial reporting requirements in the *Inquiries Act*. Liberty endorses the requirement for summary financial reporting to be published within a reasonable period of time upon receipt of the final report.

4. Inquiry Powers

The powers of Royal Commissions and Official Inquiries are essential to their function. These powers must be clearly defined and civil liberties must be protected. Both forms (tiers) of inquiry require sufficient powers to achieve the purpose for which they were created. Where a person obfuscates an inquiry, coercive powers are appropriate, but must be tempered with appropriate protection of civil liberties. The proposed *Inquiries Act* should include appropriate penalties for non-compliance along with defences and avenues of appeal. Persons subject to coercive powers should be reasonably compensated and protected. Liberty generally agrees that Royal Commissions require the full plethora of coercive powers whereas Official Inquiries may only require a subset of those powers.

Liberty agrees that both Royal Commissions and Official Inquiries should be empowered to issue notices requiring a person to attend or appear before an inquiry, administer an oath or affirmation, require evidence on an oath or affirmation, require the production of documents or other things, require information in an approved form, inspect retain and copy any documents or other things, make inquiries and take evidence outside Australia and communicate information relating to contravention of a law. However, inquiries should only take and retain items if absolutely necessary and should compensate or otherwise ensure individuals and organisations are not unduly inconvenienced (i.e. the retention of a person's or organisation's computer(s) or other items may be fatal to the operation of the business or other interests).

As previously submitted, it is appropriate that Royal Commissions be empowered to apply to a judge for a warrant to exercise powers of entry search and seizure. It may also be appropriate, in some circumstances, for an inquiry member to prohibit the disclosure of a notice, or a matter concerned with it; but only where it is demonstrably necessary to do so. Liberty recommends that the Act allow inquiry members to obtain suppression orders where there is a reasonable suspicion of damage to relevant information or evidence and as balanced against any detriment to the subject of the application.

As the pinnacle form of inquiry, it is appropriate for Royal Commissions to be empowered to receive intercepted information, exercise concurrent powers and functions under state and territory law and apply to a judge for a warrant for the apprehension of a person who fails to appear or attend.

In order to carry out their functions, members of Royal Commissions and Official Inquiries, legal practitioners assisting, legal representatives of inquiry participants, experts advisors, and inquiry staff require protection from legal liability for acts done in good faith. Civil proceedings should not lie against a person for loss, damage or injury of any kind suffered by another person by reason of the provision of any information or statement done in good faith. The *Inquiries Handbook* should address liability for defamation and other court action in the case of electronic communications. Members of Royal Commissions and Official Inquiries should not be compellable to give evidence of those inquiries without leave of the court.

As previously advocated, the proposed *Inquiries Act* should contain provisions for the protection of national security information. Ultimately, the procedures that will apply to a particular inquiry should be determined by that inquiry. Consistent with its previous submission, Liberty argues that members of inquiries must have security clearances adequate to the level of the inquiry.

It is also appropriate for inquiry members to request advice or assistance from the IGIS. The proposal to repeal s 34A of the *Inspector-General of Security and Intelligence Act 1986* (Cth) is supported. The *Inquiries Handbook* should contain information on the handling and storage of national security information by inquires and the Australian Government should provide appropriately trained personnel to advise the inquiry on the handling and storage of national security information if requested by the inquiry.

5. Conduct of Inquiries

In Liberty's previous submission, it supported the referral of questions of law to the Federal Court. Furthermore, in the case of concurrent legal proceedings, inquiries should only be suspended to the extent necessary; inquiries should stay on foot for those aspects not directly involved in the court proceedings.

Subject to the Act, the *Inquiries Handbook* and the rules of procedural fairness, Liberty agrees that an inquiry should be conducted as its members consider appropriate. Consistent with that, all reasonable steps should be taken to give that person a right of reply prior to a report making an adverse finding against them. Moreover, the person's response, or a summary thereof, should be included in the report.

While Liberty believes in transparent and open inquiries, Liberty supports closed hearings and restrictions on publication where the proposed grounds are made out. Where an inquiry is investigating matters which may have significant impact on a particular group (e.g. Indigenous peoples), the *Inquiry Act* should provide that the inquiry consult with relevant individuals, groups or organisations to inform the development of appropriate procedures. Inquiries should also be required to provide interpreter or other assistant services to witnesses and other persons assisting inquiries.

6. Coercive Powers

As discussed above, Liberty supports the limited use of coercive powers where civil liberties are also protected. Empirically Royal Commissions require the power to compel a person to answer questions or produce documents or things, notwithstanding that it may incriminate them or have other adverse impacts. However, coercive powers cannot be applied to a person who has been charged with an offence, or is subject to proceedings for the imposition or recovery of a penalty. Coercive powers are only justified where the coerced are adequately protected from the consequences of that coercion (i.e. immunity or inadmissibility of evidence). Liberty agrees with the ALRC that such protections not extend to proceedings regarding the falsity or misleading of evidence, or offences relating to the obstruction of inquiries (Proposal 16-3). In contrast, Liberty disagrees with the ALRC that privileges and immunities should be limited to direct use and to Royal Commissions. Rather, privileges and immunities should be commensurate with the coercive powers of the relevant inquiry.

Similarly, as discussed in its previous submission, Liberty supports the existing statutory privileges contained in the *Evidence Act 1995* (Cth) This encourages consistency, protects important interests and provides a mechanism for exercising discretion.

Liberty supports repealing s 6D(1) of the *Royal Commissions Act 1902* (Cth). We concur that the *Inquiries Act* should require a person to answer questions or produce documents or things, notwithstanding that any secrecy provision, in accordance with the proposed exceptions. This would result in more evidence being adduced, thus enabling the inquiry to fulfil its function.

7. Conclusion

The proposed *Inquiries Act* represents an innovative and contemporary means of holding Government to account. It is important that civil liberties are not eroded by the process of inquiry and Liberty believes the ALRC's proposals largely succeed in balancing civil liberties against effective public inquiries. If properly drafted, the proposed Act will simplify and consolidate modes of inquiry under one Act, give leeway to apply different powers to inquiries as required and provide greater clarity. Liberty urges the ALRC to consider its further recommendations, particularly those concerned with:

- a. ensuring Government accountability (i.e. criteria for inquiry powers, definition of terms, reporting requirements);
- b. protecting civil liberties (i.e. use of information obtained coercively, retention of documents or things, procedural fairness, consultation with affected minority or vulnerable groups).

Liberty endorses the establishment of a two tier system under the one legal framework. If implemented in their entirety, the proposed reforms should continue the strong tradition of effective inquiry into matters of public importance. Liberty again thanks the ALRC for inviting contributions to this important inquiry.