

# ALRC Review of the Royal Commissions Act

Liberty's submission<sup>1</sup> to the ARLC Review is divided into the following topics.

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## 1. Overview

Royal Commissions have a strong tradition in both Australia and the United Kingdom. For the most part, they have provided an effective and popular means of inquiry into important issues of the day. The early enactment of a Royal Commissions Act (just after federation) is evidence of a general distrust by the public of government administered inquiries into government actions. Despite the passage of time, the public's distrust in government administered inquiries remains the same, and in some cases, has increased. Thus the need for a strong and independent form of non-executive non-judicial ad hoc public inquiry (hereafter referred to as 'public inquiry' or 'inquiry' in this submission) is just as important today as it was in 1902.

Civil liberties are the framework upon which society and therefore government should be built. Like people, governments which are not held accountable for their actions will inevitably abuse the powers entrusted to them. Independent inquiry and public review of government is an important way of holding governments to account. However, it is important to ensure that the civil liberties upon which government is formed are not eroded in the process.

Although there are many possible models for effective public inquiries, to be effective, they must all have a few common features; they must be well funded, independent and have sufficient power (both to compel information and protect those who provide it). These qualities are discussed in more detail below.

## 2. Funding and Administration

The funding and administration of public inquiries is absolutely critical to their success. Any inquiry, no matter how well administered, will falter if it does not have sufficient funding. Equally, a well funded but poorly administered inquiry will also founder. Unfortunately there are many examples of

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

inquiries which have either been financially starved (deliberately or not) or so badly administered that they have proved counterproductive to the purpose for which they were ostensibly created. To avoid such an outcome, it is suggested that funding and administration should be legislatively supported.

## **Funding**

One method of limiting the effectiveness of a public inquiry is to restrict its access to funds. An inquiry which doesn't have the funds to attend or interview witnesses may be unable to obtain the information it needs. In extreme cases, an inquiry may be unable to afford even basic office equipment and services. Unfortunately this can be exploited by governments to 'close down' politically unpopular inquiries. The use of a standing appropriation is on the face of it tempting, but not without its own pitfalls. Not only does it run the risk of wasting taxpayer dollars by sitting idle, but its administration (in particular, the allocation of funds) would be subject to the same political pressures. Nonetheless, a standing appropriation which is administered independently or which has its funds allocated to a particular inquiry by Parliament has merit. The alternative would be to have Parliament allocate the funds directly at the time of the inquiry (which could be done regardless of whether there was a standing appropriation fund or not). Alternatively, funding could be allocated based upon an independent auditor's estimate of the funds required.

In Liberty's view, there are number of possible solutions, but whichever one is adopted should be legislatively protected to reduce the government's ability to control inquiries by their purse strings.

**Level of government funding.** By their nature, public inquiries are unlikely to obtain funding from any other source than government.<sup>2</sup> Consequently, allocated funds must include funds for legal advice, administrative support and the reasonable expenses of witnesses. In particular, witnesses could be entitled to funded legal advice where their interests are materially affected (e.g. where compelled to give self incriminating evidence). Unreasonable expenses (incurred by witnesses, inquiry staff or anyone else) should not be met by the inquiry. Dispute over expenses or other financials should be arbitrated by an independent auditor or other appropriately qualified person.

**Financial Reporting.** Liberty believes that, like government, inquiries should be accountable for the funds they spend. In practice this means that inquiries should have a budget and be required to provide a financial report at the end of the inquiry; including summaries for funds spent on legal advice, administration, witnesses, travel, etc. Although Liberty does not oppose the disclosure of all costs, summary information should suffice. For instance:

Legal Advice:	\$120,000
Office equipment:	\$15,000
Office staff:	\$45,000
Office space:	\$20,000
Travel:	\$20,000
Witness Expenses:	\$22,000

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<sup>2</sup> An inquiry's independence may be questioned where it received funding from another source.

Such financial accountability would not only increase public confidence, but would also encourage inquiries to reduce costs and reflect upon the expertise of the inquiry administrator. The use of summary reporting would also avoid privacy concerns except where a summary category was specific to a single person.<sup>3</sup>

**Costs orders.** Liberty does not believe a non-judicial inquiry should have the power to make a costs order against a person. Rather, the inquiry may make certain recommendations or may apply to a court to have such an order made, but should not have such a power itself. However, it may be appropriate for an inquiry to have the power to order a government body or agency to pay certain expenses (e.g. witness expenses), but only where the power is clearly defined and there exists a right of appeal.

## **Administration**

Ensuring an efficient and effectively run inquiry is inherently difficult, but some possible reforms include: ensuring administrators are appropriately qualified and experienced. In the same manner inquiries should be headed up by someone with appropriate judicial experience, the administration of inquiries should be headed by someone with non government administrative experience. Administrators should, in the 12 months prior to their appointment, have been employed outside the public sector to ensure first their independence and second, to ensure a commercial, fiscal approach to administration.

Liberty recognises that it would be more economical to have a standing inquiry administrative service, but is concerned this may also lead to biases and influence from government and other interested bodies.<sup>4</sup> It is recommended that inquiries retain the flexibility to engage their own administrative support. It may also be possible to have an independent Inquiries body modelled on a hybrid NSW Legal Representation Office (which provides legal assistance to individuals involved in inquiries) and the recommended Irish Central Inquiries Office (that provides administrative guidance), with the objective of providing retention of institutional knowledge and cost savings. However inquiries would be given the flexibility to engage their own support.

Ultimately any public inquiry should have the flexibility and independence to engage its administrative support.

**Qualifications.** Liberty believes that those with carriage of a public inquiry must have minimum qualifications and experience:

- The person responsible for the inquiry's investigation should have at least 5 years post admission legal experience or ideally 5 years judicial experience. Given the nature of an inquiry, investigative experience would also be desirable such as with an investigative body (e.g. OPP, AFP, Intelligence, ACCC, etc). To avoid conflict, the inquiry investigator would be

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<sup>3</sup> Although Liberty strongly advocates a right to privacy, it recognises that there is a public interest in knowing how public funds are spent. Ideally such disclosures would not relate to funds paid to individuals, but in some instances, this may not be avoidable.

<sup>4</sup> In addition, any government body created to provide support services is unlikely to stay commercially competitive.

responsible for appointing the inquiry administrator and would have ultimate authority and responsibility for all aspects of the inquiry.

- The person responsible for administration of the inquiry should have at least 5 years experience in administrative management of which at least 2 years (including the preceding 12 months) must be from the outside government.
- Where applicable, those with access to secret or highly confidential materials must have security clearance to do so. This would ensure inquiries have adequate access to classified information where relevant to the inquiry (and prevent governments from withholding information on the basis of 'national security' or other interests).

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

### **3. Powers and Offences**

In order to conduct an inquiry, it is apparent that certain powers are required. These powers must be as clearly defined as possible to avoid confusion and/or abuse. The power to obtain information necessary to an inquiry may be categorised as:

- Coercive powers
- Search and seizure powers
- Power to obtain other information
- Power to refer questions or seek advice

#### **Coercive Powers**

The use of coercive powers by government (even by way of public inquiry) often raises civil liberties concerns. However, if those powers are matched by equal protections and if those powers are necessary to ensure a proper investigation, then they may be appropriate. So when are such powers necessary and if so, what protections ensure that they are not abused?

Unfortunately there are many examples of persons obfuscating inquiries for various reasons. In some instances, they do so to protect their own interests and in other instances, they do so to protect the interests of others. Unless an inquiry can obtain the information it needs, it cannot achieve the purpose for which it was created. Many inquiry reports cite their lack of power to obtain information as a major failing which undermines the usefulness of the inquiry. At best, an inquiry's conclusions may be flawed because of it and at worst; it is a complete waste of taxpayers' money and destroys the public's faith in both government and the inquiry.

Liberty believes it is essential that inquiries have sufficient powers to achieve their purposes. Most Royal Commissions touch on sensitive issues and require information not willingly disclosed by some of those involved. This means coercive powers may be a prerequisite to an effective inquiry.

Coercive powers when coupled with adequate correlative protections provide a powerful ‘carrot and stick’ approach to obtaining information.

The *Royal Commissions Act* provides an appropriate example of coercive powers. The power to require a person or organisation to attend an oral hearing or produce documents or information is, in Liberty’s view, a necessary power. However, that power should be tempered with appropriate protections of the person or organisation involved. Where an inquiry compels a person to attend or produce information, it should also be required to reasonably compensate that person for their attendance or the production of the information.<sup>5</sup> Such powers are ineffectual if not supported by corresponding penalties,<sup>6</sup> but should also contain appropriate defences (i.e. reasonable excuse) and avenues of appeal.

One option is to take a scaled approach to coercive powers whereby a public inquiry’s powers and protections vary according to its nature. However, it is foreseeable that any given public inquiry may find itself lacking the requisite powers and protections as the matter unfolds.<sup>7</sup> Moreover, inadequate powers and protections could be used in the same way that inadequate funding can be used to curtail an inquiry.

It is therefore recommended that public inquiries have broad powers which may only be exercised as necessary and reasonable. For instance, a witness may only be compelled to give evidence where the information is reasonably necessary to the objects of the inquiry and there is a further reasonable belief that he or she is in possession of that information.

In the event that a single approach is unworkable, the scaled approach should scale or rate public inquiries within one framework according to their powers and level of funding (i.e. Royal Commissions would have the highest rating and smaller, more confined inquiries would have a lower rating). The rating framework would be publicly available and allow the public to readily understand and comment on the appropriateness of the type of inquiry selected by government.

## **Search and Seizure**

Invasive coercive powers such as search and seizure may sometimes be necessary, but must be balanced against civil liberties. Although government bodies do not have civil liberties, the individuals employed by them do. Accordingly, any search and seizure powers should be subject to judicial review. Liberty endorses the current provisions under section 4 of the *Royal Commissions Act* which requires an inquiry to apply to a Judge to obtain a search warrant. Liberty does not support inquiries having inherent search and seizure powers.

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<sup>5</sup> This should also extend to minimising any loss arising from compliance (i.e. if production of a computer is required, the relevant data should be copied and the computer returned as quickly as possible to minimise inconvenience or loss to the person or organisation involved).

<sup>6</sup> Such as those outlined at 7.12.

<sup>7</sup> One of the problems with the UK view expressed at 7.8 is that it will not always be apparent at the outset whether an inquiry will deal with ‘matters of vital public importance ...’. Instead, Liberty agrees with the ALRC at 7.4 that broad powers are required since Royal Commissions are by their nature fishing expeditions and require such powers to ensure the issues and facts are fully canvassed.

## Other Information

Following the issues raised in question 7-3, Liberty believes all level of inquiries should have a broad discretion (power) in how and what they obtain as evidence. This includes the ability to take evidence relating to foreign laws, inspect and copy documents or things and to authorise persons or organisations to appear before it.

Liberty also believes that inquiries should be able to access classified information where relevant to the inquiry and where appropriate protections are in place to ensure security is maintained. In particular, Liberty endorses the ALRC recommendations as contained at 7.55 and believes that framework under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) should be available to inquiries.

## Referrals and Advice

It is foreseeable that at various times, inquiries may be faced with legal questions which are best determined by the courts rather than seeking tentative legal advice. A similar power to that of section 16 of the *Commissions of Inquiry Act 1995* (Tas) as discussed at 7.70 of IP 35 has particular appeal. To ensure Constitutional validity and in keeping with *Mellifonts Case*, it is suggested that any provision require that the question be drawn up as a dispute between the parties. Where there is only one party, it may be possible for the Attorney-General or the Solicitor-General to take the place of a second party. Liberty supports a general power for inquiries to refer questions of law to the Federal Court where those questions are formulated as a determinative dispute between one or more parties. Where a second party is required, it may be possible to implement a similar program to the Australian Tax Office's Test Case Litigation Program whereby the inquiry subsidises the second party's costs of the litigation; particularly where the second party is not a government agency.

Another issue raised by IP 35 is the communication of information regarding the contravention of a law and the subsequent use of information obtained by an inquiry against persons (i.e. *Giannarelli v The Queen*). Liberty is of the view that this power should be subject to safeguards.<sup>8</sup> Inquiries should be able to communicate information to other bodies, but only where it does not breach a person's civil liberties or where adequate protections are in place. For instance, information obtained by an inquiry which reveals criminal conduct should be referred to police for further investigation, but depending on how it was obtained, should not be admissible in later proceedings. This is to ensure that witnesses and other persons do not withhold information from inquiries due to a fear of how that information will be used against them at a later date.

## 4. Witnesses

Witnesses are integral to any public inquiry and for any public inquiry to succeed, it must be able to protect those witnesses from any repercussions that flow for their evidence. In some cases this will mean immunity and in others, it may require evidence to be taken in camera.<sup>9</sup> In general, Liberty believes all public inquiries should be open, but recognises that this must be weighed against the protection of individual liberties.

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<sup>8</sup> Discussed further in section 4 below.

<sup>9</sup> Particularly where it may pose a risk to the witness's health or wellbeing or is overly privacy invasive.

For instance, Liberty supports the broadening of section 6D to include a public interest test as recommended by the NZLC and similar to section 16A of the *Commissions of Inquiry Act 1950* (Qld) which would evidence to be adduced in camera where it is in the public interest to do so.<sup>10</sup>

In keeping with a public inquiry's coercive powers, any abrogation of the privilege against self-incrimination must have attendant immunity and derivative use immunity protections. These protections should extend across criminal, civil and administrative matters. Liberty further advocates a consistent approach which protects witnesses in a uniform manner regardless of the public inquiry. Clear and unambiguous legislated protections are likely to reduce the need for legal advice; minimising cost and time.

Unlike the Uniform Evidence Act, the Royal Commissions Act does not currently recognise statutory privileges such as professional and religious confidential relationships. Liberty believes that a consistent approach should be adopted (across both State and federal legislation). The public interest in protecting professional privileges must be weighed against the public interest in strong and effective public inquiries. 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. Additionally, the same immunity and derivative immunities should apply. Liberty believes this issue requires further consideration.

In contrast, Liberty does not support the (increasing) use of statutes to impose non-disclosure duties on public servants. While a general prohibition is appropriate to ensure public servants do not disclose confidential or private information inappropriately, disclosures made to courts and formal inquiries (including public inquiries) should be specifically excluded. Unfortunately there are many examples of disclosure prohibitions being used by governments to stymie inquiries. Liberty believes that public inquiries' powers to obtain information should override secrecy and other prohibition provisions to the extent required to obtain information reasonable and necessary to the inquiry and where adequate provision is made for the protection of that information.<sup>11</sup>

## **5. Models of Commonwealth Public Inquiry**

IP 35 notes the inherent limitations on any public inquiry under the Commonwealth Constitution. Although more recent interpretations of the Constitution have broadened the Commonwealth's powers, Liberty believes that the Commonwealth and States should work together to develop a complementary framework for public inquiries. Public inquiries may be formed by statute or on an ad hoc basis by Government. Those without a statutory basis often lack appropriate power.<sup>12</sup> Statutory inquiries may be created either by legislation which:

- a) confers on a particular inquiry specific powers; or

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<sup>10</sup> This also highlights why it is essential that the person selected to head up a public inquiry be of good character and be appropriately qualified, experienced and entirely impartial in their conduct of the inquiry.

<sup>11</sup> Further consideration should be given to the application of other forms of privilege such as executive privilege (i.e. cabinet-in-confidence) and the public interest.

<sup>12</sup> See discussion at IP 35: 4.15-4.18.

b) provides the executive with particular powers (to create inquiries).

Furthermore, inquiries established by Regulations may only exercise those powers conferred by the enabling legislation. Finally, there are also standing bodies which conduct public inquiries such as this inquiry by the ALRC. In each case, the nature of the inquiry and the purpose for which it is created will dictate the model of inquiry used.

This array of models is confusing and poorly understood (if at all) by the general public. It is suggested that a simplified and more systematic approach to models of public inquiry would increase public understanding and promote public confidence and participation. At present, the *Royal Commissions Act* is used as a reference point for other forms of inquiry. While this is a useful device, it also leads to a great deal of confusion as it dilutes the image of Royal Commissions and confuses the public as to the nature and powers of those public inquiries which exercise some, but not all, of the powers under the *Royal Commissions Act*. Liberty recommends significant consideration be given to simplifying and consolidating models of public inquiry into one overarching framework.

Ideally one piece of legislation (e.g. a 'Public Inquiries Act' or an amended *Royal Commissions Act*) would provide sufficient powers and protections for public inquiries of all types.<sup>13</sup> It would then create a number of categories of public inquiry which would broadly equate to existing models. Government would then be able to select the category (level) of inquiry appropriate to the issue. Ideally all such public inquiries would be created by reference to the one piece of legislation. This would avoid confusion and allow the public (and anyone involved in an inquiry) to understand the nature of the inquiry and its place within the broader scheme of public inquiries. This may lead to cost savings for all involved and would streamline the formation and conduct of inquiries.

Liberty therefore supports the creation of a general public inquiries act. Nonetheless, 'Royal Commission' is an inquiry title which has high public recognition and respect. Accordingly, the highest level of public inquiry may retain the title of a 'Royal Commission' whilst falling within the general public inquiries scheme; and obviate the need for a dualistic statutory structure.<sup>14</sup>

Depending on the nature of the public inquiry, there is also merit in the use of standing bodies such as the ARLC, Ombudsman and others. However, such bodies must be independent and have guaranteed funding to ensure their independence (perceived and actual) from government.<sup>15</sup>

It is recommended that all public inquiries be required to provide a written report to be tabled in Parliament.<sup>16</sup> Ideally the government would also be required to provide a written response within 90 days of any report.

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<sup>13</sup> Similar to the Canadian *Inquiries Act 1985* and the proposed New Zealand Inquiries Bill 2008.

<sup>14</sup> See discussion at IP 35: 5.9-5.11.

<sup>15</sup> Funding would need to comprise an adequate base level with further funding on a per inquiry basis (to avoid them being stretched beyond their resources whether deliberately or not).

<sup>16</sup> Where issues of national security or other sensitive matters are dealt with, those parts may be redacted or an expedited version tabled, but only to the degree absolutely necessary to protect Australia's interests or individual civil liberties.



Another issue is how to track later progress on inquiries once they have completed (i.e. implementation of recommendations or other developments). Consideration should be given to the creation of a small administrative body which would be tasked with coordinating and tracking all public inquiries. This would include the creation of a public inquiries website which would publish for each public inquiry:

- Its creation
- Terms of reference
- Timeline
- Submissions and other evidence (where open)
- Financial Reports (initial budget and final financial report)
- Final Report (findings and recommendations)
- Government Response
- Implementation of Recommendations
- Current status

The same body would also be well placed to provide administrative support to inquiries (but only if the individual inquiry chooses to use that support). Inquiries would also be required to provide the information required in a timely fashion (up until the inquiry completes). Inquiries (while active) and Government would be required to provide the above information in a timely manner.

## **6. Conclusion**

Independent inquiry and public review of government is an important way of holding governments to account. Liberty believes it is important that civil liberties are not eroded in the process. In this submission Liberty has identified a number of features that are significant.

Liberty believes that ideally and following the Canadian and proposed New Zealand models, all forms of public inquiry should fall under one general public inquiries statute. It is suggested that it retain as its highest level of public inquiry, Royal Commissions.

Funding of public inquiries should be legislatively protected and include funds for legal advice, administrative support and the reasonable expenses of witnesses. Correspondingly, public inquiries should have a budget and be required to provide a financial report at the end of the inquiry. Liberty does not believe a non-judicial inquiry should have the power to make a costs order against a person. Rather, the inquiry may make certain recommendations or may apply to a court to have such an order made.

Public Inquiries should be headed up by someone with appropriate judicial experience and where relevant, his or her selection sensitive to the nature of the inquiry.<sup>17</sup> Administrators should be appropriately qualified and experienced with non-government administrative experience. Where

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<sup>17</sup> For instance, public inquiries concerned with indigenous issues should be headed by an indigenous person or if that is not possible, by someone with significant and relevant indigenous experience.

applicable, those conducting a public inquiry should have the requisite security clearance to review secret or highly confidential materials.

Coercive powers can infringe civil liberties. The power to compel a person to attend an oral hearing or produce documents or information is, in limited circumstances, in the public interest. However, that power must be tempered with appropriate protections of the person or organisation involved and should only be exercised where they are necessary and reasonable in the circumstances. Moreover, qualified immunity and derivative immunities should flow from any abrogation of a witness's privileges. Liberty endorses the current provisions under section 4 of the *Royal Commissions Act* which requires an inquiry to apply to a Judge to obtain a search warrant.

Liberty believes all level of public inquiry should have broad powers in how and what they obtain as evidence. This includes the power to refer questions of law to the courts and to communicate information to other bodies (where adequate protections are in place). Moreover, inquiries should be able to hear evidence in camera or receive confidential submissions, but only where there is a clearly identified public interest in doing so (otherwise all hearings and evidence should be open).

Similarly, reports from public inquiries should be tabled in Parliament (redacted or amended as necessary) and require a formal government response within 90 days. Ideally both the report and the government's response should be available online. Liberty recommends the creation of a coordinating administrative body charged with monitoring and publishing information on all public inquiries.

Liberty recognises the strong tradition and the effectiveness of Royal Commissions and thanks the ALRC for its consultation with stakeholders as part of its review. Liberty believes that the protection of civil liberties is consistent with strong public inquiries such as Royal Commissions and believes such public inquiries can continue to serve the people of Australia in the future.