

## **ALRC Discussion paper: Royal Commissions and Official Inquiries**

### **Submission of the Accountability Round Table**

1. The Discussion Paper identifies two broad purposes served by Royal Commissions and other official inquiries.
  - (a) The primary purpose identified is “to inquire into, and report on, the subject matter in respect of which it is established by the government” and to make recommendations.<sup>1</sup>
  - (b) The other purpose is described as pragmatic – part of a management strategy, crisis management.

We suggest that where the latter purpose is a significant one, it is not uncommon for the government in question to use a Royal Commission or other form of official inquiry to set up an inquiry that has the appearance of independence, something critical to the acceptance of the outcome of the inquiry, while controlling the scope of the inquiry to minimise the risk of embarrassment to itself by limiting the terms of reference or the powers of the inquiry – or both.

2. When official inquiries are directed to the primary purpose they plainly serve an important and valuable accountability function and assist good government. When they are used as a management strategy they will often fall short in both areas.
3. We accept for the purposes of this submission that the initiative in setting up official inquiries probably has to rest with the government of the day. As a result, the problem will remain that it will on occasions succumb to temptation and give priority to the management strategy purpose.
4. Implementation of the detailed proposals, however, will in our view improve the functioning and effectiveness of official enquiries.<sup>2</sup> Importantly, they attempt to address concerns raised by John Clarke QC in his report of the enquiry into the Case of Dr Mohammed Haneef<sup>3</sup>. Subject to some qualifications discussed below, they also generally strikes a reasonable balance between the powers required for official inquiries and the rights of individuals called upon to produce documents and information and give evidence.
5. We also support the proposals that

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<sup>1</sup> At 2.20

<sup>2</sup> But for the interpretation of the terms of reference that has been accepted for the reference, we would have submitted that part of the solution is to have a permanent anti-corruption and misconduct Commission.

<sup>3</sup> At xi,1,2,14,16

- Reports be tabled within 15 sitting days of their receipt
  - Government publish updates on the implementation of the reports
  - The records of all official enquiries be lodged with the National Archive.
- As to the latter, the practice of retaining the records of Royal Commissions on a website hosted by the National Library should be reinforced by requiring the lodging of that material with the National Library.

6. We turn to two particular aspects of importance to the effectiveness of official inquiries and Royal Commissions

### **Independence of Persons conducting Royal Commissions and Official Enquiries.**

7. The Discussion Paper rightly stresses the importance of the appearance of independence of those conducting official enquiries. The reality of the independence of those persons as well as the appearance of it is critical to their accountability function.
8. The ALRC proposes that the Act “should provide that Royal Commissions and Official Inquiries should be independent in the performance of their functions”.
9. Plainly they should be but it is not entirely clear from the Paper how the issue is to be addressed in the proposed Act. The proposal appears to be based on the recommendation of the New Zealand Law Commission that the Act should state that they have a duty to act independently in the exercise of their functions powers and duties.<sup>4</sup> That, we suggest, is a stronger and preferable statement of the proposal. We also submit that, in this particular instance, the ALRC should draft a legislative provision to give effect to the proposal and that it be in a form that should ensure that breach of the statutory obligation would be justiciable before the courts

### **Privilege against Self incrimination**

10. The Discussion Paper explains that the effect of the present law is that the Royal Commission Act abrogates the privilege against self-incrimination in Royal Commissions<sup>5</sup> for a person producing documents, things and answering questions before a Royal Commission<sup>6</sup> except where doing so might incriminate the person in current criminal or civil penalty proceedings. It also confers on the witness concerned immunity from having the evidence, documents or information he or she gives to the Royal Commission used in court proceedings<sup>7</sup>. The privilege does not prevent physical evidence being obtained from a witness such as fingerprints, or documents being received into evidence, when they were obtained by means such as search warrants.

<sup>4</sup> A New Inquiries Act, Report No 102(2008), pp 20,54,55, para3.18

<sup>5</sup> Not other forms of official inquiry

<sup>6</sup> s 6A

<sup>7</sup> s6DD.

11. The immunity of the witness from subsequent use of the evidence is confined to the evidence and materials given before the Royak Commission. It does not prevent the use in subsequent proceedings against the witness of evidence later obtained as a result of the evidence and materials given by the witness before the Royal Commission – that is, there is no derivative use immunity for the witness. The Discussion Paper explores the issue of whether that situation should continue. It notes the following arguments for not giving derivative immunity.

(a) It

“ would make it much more difficult to prosecute a person for offences that are disclosed during an inquiry. The primary argument against a derivative use immunity, therefore, is that it would shield witnesses from the proper consequences of their wrongdoing. Given that Royal Commissions are usually established because of the seriousness of the allegations involved, it may seem particularly inappropriate to shield witnesses of a Royal Commission from the consequences of their misconduct.”

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

It would make the work of commissions of public importance appear somewhat futile if their findings could not be successfully acted upon because material available to them was not then admissible in subsequent court proceedings.<sup>8</sup>”

We submit that the arguments are overstated, give priority to secondary concerns and compromise the primary task of Royal Commissions. The following points may be made.

- The provision of derivative immunity *may in some cases* make it more difficult prosecute people for offences disclosed in the Royal Commission but the direct immunity already does that to a considerable extent.
- On the other hand, the absence of derivative immunity may make prosecution more difficult; for its absence is likely to give rise to arguments as to whether what is sought to be used in any subsequent proceeding is the subject of the direct immunity or is derivative evidence.
- Derivative immunity will not shield witnesses from all the proper consequences of their actions. Those consequences include the public disclosure of their conduct and the resulting disgrace, damage to reputation and loss of career and employment.
- The immunity given to witnesses, including derivative immunity, does not operate to prevent them being called to give evidence in criminal and penalty proceedings against others – for example, small players called as witnesses in proceedings against the big players. Often in that situation, the small players will be given an indemnity from prosecution generally in any event.

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<sup>8</sup> I Temby, *Submission LPP 72*, 19 July 2007.

- It may also be said that a Royal Commission will be seen to be ineffective if it fails to establish the facts. We submit that that is the primary purpose of official inquiries and the primary measure by which their effectiveness or futility should be judged.<sup>9</sup>
- Giving derivative immunity might result in some persons not being prosecuted. But so too might direct immunity and, if serious misconduct is being investigated, it is highly unlikely that either direct or derivative immunity would have the result that no-one is prosecuted.

## 12. The Discussion Paper notes

“The primary argument for a derivative use immunity is that it may be more useful in discovering the truth than a direct use immunity, because a person’s fear of the consequences of disclosure would be diminished. Further, a derivative use immunity would also protect the same interests as does the privilege against self-incrimination.

It identifies submissions supporting these propositions from the CMFEU (quoting the late Ron Castan QC, DIAC, Law Council of Australia and Liberty Victoria. It then states,

“Nevertheless, in consultations with stakeholders, there was broad support for the existing position in relation to Royal Commissions, especially for investigatory or inquisitorial Royal Commissions.<sup>10</sup> There was less support for the extension to derivative use immunity.”

Assuming the reference to stakeholders is a reference to those who were consulted, the statement does not make clear whether, though there was less support for derivative immunity, there was a preponderance in favour of it or against it.

13. Whatever be the preponderant view of those consulted, the issue to be resolved is, we submit, which alternative will best serve the purposes for which Royal Commissions are established.
14. Royal Commissions are and will only be employed in matters of major public concern. As noted above, their primary function, is and will be “to inquire into, and report on, the subject matter in respect of which it is established by the government” and to make recommendations. Those recommendations may include investigation by police or other agencies and the laying of criminal

<sup>9</sup> We note that was part of the submission of the Department of Immigration and Citizenship (DIAC).

<sup>10</sup> See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

charges. To be sound, the recommendations need to be based on a full and accurate disclosure of the facts.

15. Accepting these propositions, it is essential that the rules for the conduct of Royal Commissions, including those defining the rights and immunities of witnesses, should give priority to the primary task, - establishing all the relevant facts. To that end, the rules should “assist in ensuring the full co-operation of witnesses”<sup>11</sup>. For that, we submit, derivative immunity is necessary.
16. We refer to the submission made above that the arguments advanced to the contrary are overstated, seek to give priority to secondary concerns and compromise the primary task. Derivative immunity, on the other hand, gives priority to the primary task while protecting a critical human right. We urge the ALRC to recommend its inclusion in the proposed legislation where privilege against self-incrimination is abrogated for official inquiries.

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<sup>11</sup> DIAC