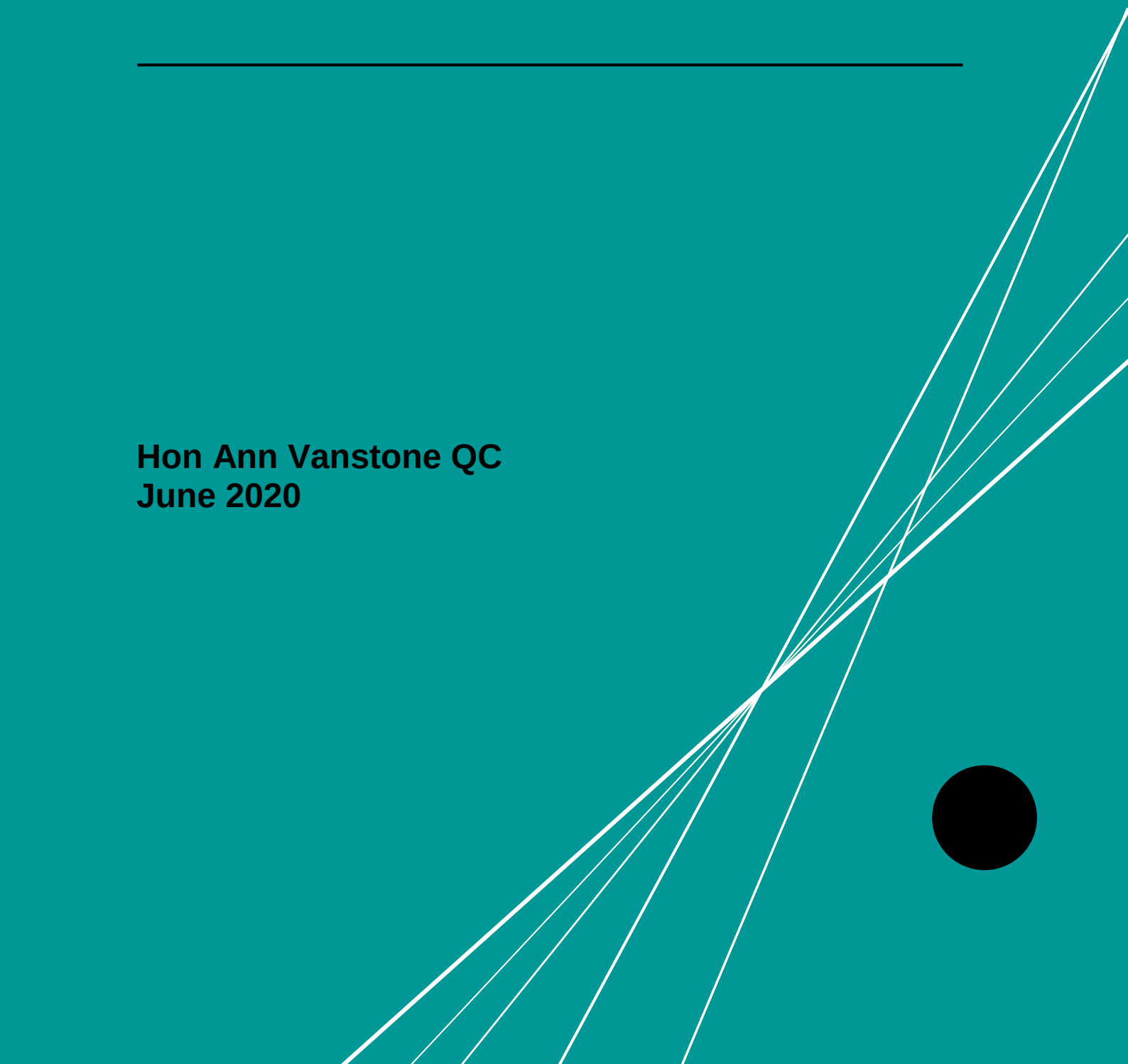
REVIEW OF THE ROYAL COMMISSIONS ACT 1917 (SA)

REPORT TO THE ATTORNEY-GENERAL

Hon Ann Vanstone QC
June 2020



26 June 2020

The Hon. Vickie Chapman MP
Attorney-General

Dear Attorney

By letter of 10 February 2020 you appointed me to conduct a review and provide a written report in relation to the *Royal Commissions Act 1917.*

I have concluded that review and now provide you with my report and recommendations.

Yours sincerely,

Ann Vanstone

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TERMS OF REFERENCE

(1) The legislative provisions for constituting and conducting Royal Commissions and other inquiries (referred to hereafter as 'Commissions') in other States (particularly the *Inquiries Act 2014* (Vic)), including the powers and protections of Commissions.

(2) Whether any of the powers and protections in the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) should be included within any legislation providing for constituting and conducting Commissions.

(3) The nature and extent of Commissions' compulsive or coercive powers (or whether those powers should only be exercised by a Court) including in regard to statutory confidentiality or secrecy provisions, privilege and public interest immunity, and if so:

   (a) whether those powers should only be exercised when Commissions are constituted of a current or former judicial officer (see Part 2, Division 2 of the *Royal Commissions Act 1923* (NSW); and
   (b) consideration of the referral of any questions to a Court.

(4) Powers in relation to the making of orders for non-publication of certain materials provided in Commissions including:

   (a) the application of such provisions and status of such orders following the end of Commissions; and
   (b) whether it is necessary to establish a formal regime to provide for the management of such materials (such as access and storage) following the end of Commissions, including whether a Court should make any necessary orders. Particular regard should be had to the operation of *the Freedom of Information Act 1991* (SA) and the *State Records Act 1997* (SA).
   (c) The creation of special arrangements, powers or restrictions for inquiries involving matters such as terrorist incidents, criminal intelligence, sensitive material or any other matter in which it may be appropriate to restrict access to information or evidence and:
      (i) whether relevant evidence can be sealed by Commissions (rather than by a Court);
      (ii) if so, consideration of the appropriate procedure for sealing such documents;
      (iii) the status of such orders following the end of Commissions; and
      (iv) whether it is necessary to establish a formal regime to provide for management of any sealed materials following the end of Commissions, including whether a Court should make any necessary orders.

(5) Whether Commissions' powers should have extraterritorial application and, if so, the scope and extent of those powers.

(6) Whether there is any need to create an alternative form or forms of executive inquiry to provide greater flexibility, less formality and greater cost-effectiveness than a Royal Commission (including the arrangements and powers that should apply to any such alternative forms of inquiry).

(7) To what extent are the Acts and decisions of a South Australian Royal Commission liable to review or restraint having regard to *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, *Kaldas v Barbour* (2017) 326 FLR 122, and s 9 *Royal Commissions Act 1917* (SA).

(8) How offences in relation to Commissions should be prosecuted.

(9) Suggestions for legislative change proposed or raised by Royal Commissions previously constituted under the Act.

(10) Whether your recommendations give rise to any consequential amendments to other Acts in which an inquiry may exercise the powers of a Royal Commission, including the *Remuneration Act 1990* (SA), the *Ombudsman Act 1972* (SA) and the *Independent Commissioner Against Corruption Act 2012* (SA).

(11) Recommendations regarding any other improvements to the Act.

INTRODUCTION

In 2005, Doyle CJ, speaking for the Full Court of the Supreme Court of South Australia, described the *Royal Commissions Act 1917* (SA) as having an 'antiquated air to it', and appearing to be a 'patchwork of provisions borrowed from similar legislation elsewhere in Australia'.[1] Notwithstanding those remarks there has been no substantive amendment to the Act in the intervening years.

The provisions of the Act could be described as sparse. The powers given to a Royal Commission are described in very general terms. For instance, on its face, it is unclear whether a witness before a Commission can claim the privilege against self-incrimination, or legal professional privilege, or public interest immunity in relation to the production of documents or the giving of evidence. Power to punish contempt of the Commission – to the extent of three months imprisonment – resides in the chair of the Commission. This last is out of kilter with the modern view that contempt of a Commission, or indeed a court, should be prosecuted and dealt with independently of the offended officer. Indeed, any penalisation of a person by a Commission pursuant to s 11 of the Act would seem to involve an exercise of judicial power.

In 2009 the Australian Law Reform Commission reported to the Commonwealth Attorney-General on a reference requiring an examination of the operation and provisions of the *Royal Commissions Act 1902* (Cth). Notwithstanding the provision of a substantial report, the only significant amendment since made to the Commonwealth Act was for the purpose of enabling and facilitating the holding of private sessions by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Victoria, however, more recently passed major new legislation, the *Inquiries Act 2014* (Vic) to provide for a three-tiered system of inquiries, the Royal Commission maintaining its position at the apex of the hierarchy. This followed criticism of the lack of Victorian legislation dealing with Royal Commissions delivered by at least two Royal Commissions, one headed by Mr Lex Lasry QC, who reported in 2001 on the Victorian Ambulance Service, and the other by the Honourable Bernard Teague who, with two other Royal Commissioners, reported in 2010 on the 2009 Victorian Bushfires. The Bushfires Royal Commission formally recommended that the 'State consider the development of legislation for the conduct of inquiries in Victoria – in particular the conduct of Royal Commissions'. New Zealand, too, has modernised and further regimented its legislation – the *Inquiries Act 2013* (NZ) – also implementing a three-tiered system.

There is no shortage of academic writing dealing with the myriad aspects of Royal Commissions.

My analysis and recommendations are informed by a combination of research and discussions with persons having experience of Royal Commissions and other inquiries.

[1] *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at [112].

CHAPTER 1: COMPARISON WITH OTHER MODELS

Term of Reference 1: The legislative provisions for constituting and conducting Royal Commissions and other inquiries (referred to hereafter as 'Commissions') in other States (particularly the Inquiries Act 2014 (Vic)), including the powers and protections of Commissions.

Two tables addressing this term of reference in summary form have been provided as Appendices A and B to this Review.

I propose to make some observations and comments about some of the important features of the comparison, but to do so in relation only to the Victorian, New South Wales and Commonwealth Acts, as these provide a good representation of the various available models.

Constituting and Conducting a Royal Commission

In all jurisdictions a Royal Commission is established by the Governor (or Governor-General) issuing letters patent containing the terms of reference and the name or names of the persons who are to constitute the Royal Commission. The Victorian Act, which is the most prescriptive of the three mentioned, goes into some detail as to what must and may be included in the letters patent: s 5. All jurisdictions have provision for the appointment of more than one Commissioner. Generally, Commissioners may sit individually if authorised by the Chairman, although in South Australia that authorisation must be by the Governor: s 4(2).

There is no requirement that any Commissioner has any particular qualifications for the task. However, under the New South Wales Act, 'special powers' may be given to the Commissioner under Part 2, Division 2. If the Commissioner is a Judge, or former Judge of a superior court, or qualified to be so, it is not a reasonable excuse for a witness to decline to answer a question or produce a document on the basis of self-incrimination, privilege, a 'duty of secrecy or other restriction on disclosure, or on any other ground': s 17(1). That is so providing letters patent contain a declaration that Part 2, Division 2 applies.

In this way, provision is made for two types of Royal Commission; the one having the special powers set out in sections 15 to 18D, and the other only the more general powers applicable under other sections. It is noteworthy that New South Wales also has a *Special Commissions of Inquiry Act 1983* (NSW), where again an inquiry may or may not be given special powers comparable to those given in Part 2, Division 2 of the *Royal Commissions Act*. It is under the *Special Commissions of Inquiry Act* that Mr Bret Walker SC was appointed as Commissioner to inquire into the docking and disembarkation of the Ruby Princess in Sydney on 19 March 2020. The relevant letters patent declared that these special powers would apply to that Special Commission.

The Victorian Act makes provision for a hierarchy of inquiries comprising three levels. These are termed Royal Commissions, Boards of Inquiry and Formal Reviews. The critical distinction is in the coercive powers of each. The Royal Commission is given extensive powers. The privilege against self-incrimination is abrogated: s 33, unless there are proceedings on foot against the witness, as is legal professional privilege: s 32, and the Act outranks secrecy and confidentiality provisions grounded in other legislation: s 34. While a Board of Inquiry can also compel a witness' attendance and the production of documents or 'things', the privileges and protections just mentioned amount to 'reasonable excuse' for failing to comply with a notice to produce or provide information: s 65. A Formal Review has no coercive powers. Rather than taking evidence, it receives information.

In Chapter 6, I recommend the implementation of a three tiered hierarchy of inquiries, headed by the Royal Commission. From this point, when I refer to a second tier or third tier inquiry, I am referring to an inquiry of that level consistent with my recommendations.

All Acts provide for taking evidence in private, some being more prescriptive than others, for example the Commonwealth Act: s 60B, the New South Wales Act: s 12B, and the South Australian Act: s 6. In Victoria, the Act allows each type of inquiry to conduct itself in 'any manner that it considers appropriate': ss 12, 59, 99.

Some Acts contain provisions setting out that the rules of evidence and procedure do not apply: the South Australian Act: s 7 and the Victorian Act: s 14. That is not the case for the Commonwealth or New South Wales Acts. However, it is not clear to me that such a provision is necessary. Royal Commissions are not courts and there is no reason why those rules should apply.

All Acts have some mechanism given to Commissioners to control witnesses, including either taking steps to, or punishing for contempt. This will be examined under the heading of term of reference 9.

The rules of procedural fairness plainly apply in Royal Commissions, unless specifically and clearly excluded by the legislature: *Mahon v Air New Zealand Ltd* [1984] AC 808; *Annetts v McCann* (1990) 170 CLR 596. In the Victorian Act, the application of those rules is explicit: ss 12, 59, 99. Indeed the Victorian Act goes further. It requires that before making an adverse finding against a witness in its report, a Royal Commission must be satisfied that the witness had opportunity to answer the matter, and must consider the response, *and* must set out the witness' response in the report: s 36. I would not recommend adopting this last refinement. It is preferable to let the Commission deal with a person's responses as it sees fit.

Each of the Acts under consideration gives the Royal Commissioner the same protections and immunities as a Supreme Court Judge: South Australia s 16B; New South Wales s 6; Victoria s 39; or, in the case of the Commonwealth, s 7 – a High Court Justice. The Victorian Act also provides that a Royal Commissioner may not be compelled to give evidence in other proceedings: s 38. It is hard to see what this adds to s 39 of the Victorian Act, except for explication.

Witnesses generally have the same protections as witnesses before the Supreme Court: South Australia s 16B(2); New South Wales s 11(3); Commonwealth s 7; Victoria s 38(4).

All Royal Commissions have powers allowing them to prohibit publication of evidence and other materials: South Australia s 16A; New South Wales s 12B; Victoria s 26; Commonwealth s 6D. The South Australian provision will be examined under the heading of term of reference 4. Coercive powers of Royal Commissions will be examined when dealing with term of reference 3.

Discussion

The various Acts considered are very different in terms of drafting. The South Australian Act is sparse in the extreme, but the quite limited amendments made since it was passed tend to demonstrate that it has been generally workable. The New South Wales Act, too, follows the leaner style of drafting favoured in South Australia, but has seen more amendment, including, in 1987, the substantial amendment which inserted Part 2, Division 2, providing for the ‘special powers’ referred to earlier.

The Victorian and Commonwealth Acts are far more prescriptive, appearing to be more in the nature of codes.

It can be questioned whether the greater level of detail in the Victorian and Commonwealth Acts has efficacy. In my view, leaving aside the important provisions dealing with powers, protections, the right of representation and the creation of offences, many of the additional provisions found in the more prescriptive Acts are borne of a drafting style, rather than of necessity.

CHAPTER 2: CHILDREN IN STATE CARE INQUIRY ACT

Term of Reference 2: Whether any of the powers and protections in the Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004 (SA) should be included within any legislation providing for constituting and conducting Commissions.

Background

The Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004 (SA) (the State Care Act) was passed to establish what became known as the 'Mullighan Inquiry'. It was one of a succession of inquiries into sexual abuse of children in institutions conducted throughout Australia, culminating in the Commonwealth Royal Commission, styled 'Royal Commission into Institutional Responses to Child Sexual Abuse', established in January 2013, and which rendered its final report in December 2017.

The desirability of passing fresh legislation to facilitate the Mullighan Inquiry seems to have arisen in the first instance because it was not a Royal Commission. There was no machinery in the South Australian *Royal Commissions Act* for such an Inquiry. The State Care Act itself established the Inquiry: s 4. Additionally, the State Care Act contained some provisions not found in the *Royal Commissions Act*. Unusually, the Act stipulated that, as well as a Commissioner, two assistant Commissioners be appointed by the Governor: s 4A. One was to be male and the other female. At least one had to be of Aboriginal descent: s 4A(3). The Act also contained various provisions casting obligations on the Minister responsible for child protection. Further, it contained the terms of reference of the Inquiry.

In contrast to the way in which Royal Commissions usually operate, the Mullighan Inquiry was *required* to take evidence in private, unless the Commission considered it to be in the public interest to conduct part of the proceedings in public: s 5(2) and 5(3).

The Act introduced the concept of an 'authorised person' appointed by the Minister to assist in the conduct of the inquiry, that expression encompassing the two assistant Commissioners who were to be appointed, but able to extend further to other persons appointed to assist: s 3. This could be a social worker or senior investigator, or other persons: s 8. Authorised persons were empowered to issue a summons requesting either attendance or production of evidentiary material and to receive such material: s 6(1) and (2). Such a person could also administer an oath: s 6(3).

If a person under summons refused to attend, be sworn, or answer questions, the authorised person was empowered to apply to the Supreme Court, which could compel the attendance and giving of evidence: s7(1). Provisions of this nature will be discussed further in the context of term of reference 8.

Section 5 entitled the Commission to refer any person to any other agency for counselling or support, or to refer any matter for appropriate action to another agency. However, given that a Royal Commission may currently publish any 'information obtained in the exercise of their functions as they think fit' (s 5), this type of reference would not seem to be beyond a Royal Commission's power.

Section 14 of the State Care Act provided for a power which went beyond those given in the *Royal Commissions Act*. It abrogated the privilege against self-incrimination, at the same time providing that information or answers given would not be admissible in later proceedings in a court. The topic of the privilege against self-incrimination will be discussed under the heading of term of reference 3.

Discussion

Most of the additional provisions setting out powers and protections in the State Care Act build on powers and protections already present in the *Royal Commissions Act*, or otherwise already available to a Royal Commissioner. The notable exception is the enhanced role of persons appointed to assist the State Care Inquiry as 'authorised persons'. Going back a step, there is no mention in the *Royal Commissions Act* of the appointment of assistants beyond the ability given by s 7 to refer a technical matter to an expert and to accept as evidence the resulting report. But the *Royal Commissions Act* is silent on questions of appointing counsel assisting, solicitors assisting, clerical and administrative staff, counsellors, investigators and other necessary staff. Of course all such persons are appointed as required to all Royal Commissions. The New South Wales Act contains a section which is broadly similar, although wider than s 7 of the State Care Act. But most of the Acts are silent on the question of staff. This is clearly a matter first for the Executive and later for the judgement of the Commissioner, who would have wide discretion in using his or her budget.

What is noteworthy in the context of appointing assistants are the coercive powers given to authorised persons in the State Care Act. Presumably an authorised person would not exercise such powers without the approval of the Commissioner. If that is so, then it raises the question of what need there might be to so empower the authorised person. The powers given are very significant. While there may have been a perception that a devolution of these coercive powers was appropriate in the instance of the State Care Inquiry, I would caution against importing a similar system into the *Royal Commissions Act*. This is particularly so if – as I shall recommend – the obligation to answer questions is to be expanded by the removal of some privileges now available to witnesses.

In summary, I do not consider that any provisions of the State Care Act should be incorporated into the *Royal Commissions Act*.

CHAPTER 3: COERCIVE POWERS

Term of Reference 3: The nature and extent of Commissions' compulsive or coercive powers (or whether those powers should only be exercised by a Court) including in regard to statutory confidentiality or secrecy provisions, privilege and public interest immunity, and if so:

(a) whether those powers should only be exercised when Commissions are constituted of a current or former judicial officer (see Part 2 Division 2 of the Royal Commissions Act 1923 (NSW); and
(b) consideration of the referral of any questions to a Court.

Coercive Powers

The coercive powers of a South Australian Royal Commission are given in section 10 of the Act. The Commission may:

(a) enter upon and inspect land, buildings and things;
(b) require by summons the attendance before them of persons who must answer to them;
(c) require by summons the production of books, papers, documents or records;
(d) inspect, retain and copy papers so produced;
(e) require witnesses to give evidence on oath (or affirmation).

A summons is issued under the hand of the Commissioner or the Secretary acting under his or her direction. Disobedience to a summons renders a person liable to be arrested pursuant to a warrant issued by the Commissioner and to imprisonment for up to three months by the Commissioner. Alternatively, a magistrate may be asked to issue a summons or, if satisfied that a person has failed to appear or produce materials in answer to the Commissioner's summons, a warrant. In s 3, 'record' is defined to include information stored or recorded by a computer or other means and a computer tape, disk or other device. Notably, there is no power to require production of a 'thing' as opposed to a document or record. It is not made explicit that the Commission has the power to require production ahead of a hearing as opposed to at a hearing.

There does not appear to be any power to require a person to provide information to the Commission in a form approved by the Commission and to verify it by statutory declaration. This is a tool much utilized in modern Royal Commissions. The Commonwealth Act has such a provision (s 2(3B)) although there is no reference to providing a sworn statement. The New Zealand Inquiries Act has such a provision: s 20. I understand that the Royal Commission into the Management of Police Informants (Victoria, 2020) has felt disadvantaged by the absence of such a power.

These coercive powers distinguish a Royal Commission from an *ad hoc* inquiry which any Minister (or body or person) can instigate. They also distinguish it from the lowest rung of inquiry discussed in chapter 6.

However, the power to require a person giving evidence on oath to answer questions is, in a court, subject to common law and statutory exceptions. These include the privilege against self-incrimination, legal professional privilege and parliamentary privilege, as well as public interest immunity and statutory secrecy. To what extent those limitations should be allowed to impede the work of a Royal Commission is in issue.

In *McGee's Case* the Full Court declared at [3] that the provisions of the South Australian Act did not abrogate the privilege against self-incrimination. The terms of the Act certainly did not do so expressly. The question was whether they did so by necessary implication, that is, by reference to all its provisions, as well as the subject matter and purpose of the Act. The Court expressed the view that neither was legal professional privilege abrogated.

Legal professional privilege – variously called client legal privilege and litigation privilege – has been defined as follows:

> …in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.[2]

The inability to insist on answers in the face of a valid claim of the privilege against self-incrimination or legal professional privilege puts a South Australian Royal Commission at a disadvantage compared with the position in other jurisdictions. In Victoria neither legal professional privilege nor that against self-incrimination amount to a reasonable excuse in terms of offences against Part 2, Division 13 for refusing to comply with a requirement of a Royal Commission, unless the information sought might incriminate the witness in relation to proceedings for an offence or penalty which have been commenced, but not finally disposed of: ss 32 and 33; although that is not so for a Board of Inquiry or Formal Review. In New South Wales, provided the special powers in Part 2, Division 2 are declared to apply, a witness may not refuse to answer on those grounds. With a parallel proviso, the same applies with respect to a Special Commission of Inquiry.

The situation with respect to self-incrimination is similar under the Commonwealth Act. It is not a reasonable excuse for the purposes of offences provided in the Act to refuse to produce a document or thing, or give information, or answer questions on the ground of self-incrimination, unless there are current proceedings in relation to the document, information or answers: s 6A. A claim that a document is subject to legal professional privilege is a reasonable excuse for failing to produce it, provided a court has found it to be so subject, or the Commission, upon receiving the claim and inspecting the document for the purposes of assessing it, accepts the claim: s 6AA. The document is then returned.

So far as statutory secrecy is concerned, the Victorian Act provides that it is not a reasonable excuse for refusal to comply with a Royal Commission's requirement that another Act prohibits compliance, unless that other provision is specifically aimed at Royal

[2] Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege - The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (LexisNexis, 2003) 48.

Commissions: s 34 Victorian Act. New South Wales has a comparable provision: s 17 New South Wales Act. The Commonwealth Act appears to be silent on statutory secrecy. However, like the South Australian position, a witness is not obliged to disclose any 'secret process of manufacture': s 6D Commonwealth Act; s 14 South Australian Act. This last seems to me to be anachronistic and should not reappear in a new Act.

I turn briefly to the topic of parliamentary privilege. The Houses of the South Australian Parliament and their committees, members and officers enjoy the same privileges as those of the House of Commons as at 24 October 1856.[3]

Article 9 of the English Bill of Rights provides:

> That the freedom of speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place outside of Parliament.

For present purposes the parliamentary privilege of freedom of speech in Parliament is the most significant of the parliamentary privileges. The scope of the operation of the privilege has been a matter of enduring debate,[4] but South Australian authority holds that it precludes inquiry into the motives, intention or truthfulness of a speaker in Parliament or cross examination of witnesses in relation to words spoken and documents tabled in Parliament.[5]

The privilege may be waived only by Parliament.[6]

From time to time Royal Commissions which touch on proceedings in Parliament are established. It is conceivable that parliamentary privilege could impinge upon the ability to undertake the commanded inquiries.

The Royal Commission into the Use of Executive Power (the Easton Commission) established in Western Australia in 1995 provides an example. There, the Commission was required to investigate the circumstances and events preceding and following the presentation of a petition in the Western Australian Legislative Council. The Commissioner had the benefit of a ruling from the President of the Legislative Council and, sought the understanding of the Clerk of the Journals, House of Commons, London, about the effect of the ruling. A challenge to the Commission in the Full Court of the Western Australian Supreme Court led to the Court declining to interfere in the Commission's proceedings on the basis that it was for Parliament, not the Court, to determine whether its privileges had been breached.[7] Ultimately the Commission did not assert that parliamentary privilege had prevented a proper examination of the terms of reference. The Court challenges ultimately gave rise to no more than delay and interruption to its work.

None of the Australian Acts of Parliament under consideration expressly or impliedly abrogates parliamentary privilege.

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[3] *Constitution Act 1934* (SA) s 38.
[4] Stephen Donoghue, *Royal Commissions and Permanent* Commissions (LexisNexis Butterworths, 2001) [6.14]-[6.17].
[5] *Rann v Olsen* (2000) 172 ALR 395 at [407], [457].
[6] *Sankey v Whitlam* (1978) 142 CLR 1 at [36]-[37].
[7] *Halden v Marks* (1996) 17 WAR 447 at [462].

It is not suggested by commentators[8] that it should be abrogated. Indeed, Hogan-Doran SC strongly argues that it must be maintained.[9] The Australian Law Reform Commission argues that any modification to the application of parliamentary privilege should be a decision taken by Parliament in the context of a particular inquiry.[10]

I make no recommendations as to the abrogation of parliamentary privilege.

Turning to the issue of public interest immunity, the South Australian Act makes no mention of it and presumably such a claim would be available to a witness, for the reasons given by the Full Court in *McGee's Case*.

Public interest immunity is essentially a claim that production of a document, or the giving of evidence, should not be insisted upon because 'extraneous public interest against disclosure outweighs the need for disclosure to ensure justice in the individual case'.[11] The availability of the claim is not confined to judicial or quasi-judicial proceedings.[12] This immunity covers Cabinet deliberations, high level advice to Governments, police investigation methods, activities of ASIO, police informers and covert operations.[13] This is not a privilege as such, and arguably may not be waived.

Such a claim demands a balancing exercise between the public interest against disclosure and the public interest favouring disclosure, that is, the importance of the information in a given cause. Governments make such claims in relation to various matters, but those include police informants and police investigation methods, both topics which might very well be relevant in the context of a Royal Commission.

The Victorian Act provides that it is a reasonable excuse to fail to comply with a notice to produce or a notice to attend that the information sought is the subject of public interest immunity: s 18(2).

The Commonwealth Act does not specifically mention public interest immunity. However, the offences constituted by s 3, being of failure to attend, or to produce a document as required by summons, or to give information or a statement, do not apply if the person has a 'reasonable excuse'. Section 1B(1) aligns 'reasonable excuse' with an excuse available to a witness before a court of law. It seems clear, then, that a claim of public interest immunity is available before a Commonwealth Royal Commission.

The New South Wales Act appears to modify public interest immunity, although it is not specifically mentioned. The terms of s 17 of that Act appear to be wide enough to oust it as an excuse for refusing to answer:

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[8] Donaghue (n 4) [6.12]-[6.23]; Dominique Hogan-Doran, 'Lessons for Government from Recent Royal Commissions and Public Inquiries' (Paper presented at the Government Solicitors' Conference 2019, Law Society of New South Wales, 3 September 2019).
[9] Hogan-Doran, ibid at [79].
[10] Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, (Report No. 111, October 2009) 459 ('*Making Inquiries*').
[11] Andrew Ligertwood and Gary Edmond, *Australian Evidence* (LexisNexis Butterworths, 6th ed, 2017) at [604].
[12] *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at [52].
[13] *Making Inquiries* (n 10) 460.

17—Answers and documents

(1) A witness summoned to attend or appearing before the commission shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on the ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

Discussion

The power given in s 10(a) of the South Australian Act to enter upon and inspect land, buildings and things appears to be anachronistic. It goes further than the other Acts examined. In Victoria, a Royal Commission may apply to a magistrate for a search warrant: s 28. In my view this is the preferable position.

The case for abrogating the privilege against self-incrimination before Royal Commissions seems clear. South Australia and Northern Territory are the only states or territories where the privilege stands. The Australian Law Reform Commission considered abrogation was appropriate. It is not suggested that removing the privilege would result in witnesses willingly making wholesale confessions with respect to their conduct. Rather, absent the privilege, a potentially large area of claim/debate/legal advice and decision-making is removed from the arena, hopefully allowing a much more direct approach to the contentious issues with which the Commission is dealing.

The more contentious issue is what kind of 'use immunity' should accompany the abrogation. Should it be a direct use immunity only, or the wider derivative use immunity? (A derivative use immunity would not allow the evidence to be used to obtain further evidence). The Australian Law Reform Commission noted[14] that the purpose of a Royal Commission was to discover the truth, rather than determining legal rights; that Royal Commission were established in relation to matters of significant public interest and that this interest generally outweighed an individual's right to the protection. To allow more than a use immunity would potentially frustrate that end and negate the purpose of abrogation.[15]

However, it is accepted that the abrogation should *not* extend to a situation where a person is facing a charge which has not been finally dealt with. The Commonwealth Act (s 6A(3)) and the Victorian Act (s 33(2)) acknowledge this limitation. In my view it is well grounded in principle.

The use immunities provided in the Victorian Act (s 40) and the New South Wales Act (s 17) have much in common. Each is broadly similar, though a little wider than the Australian Law Reform Commission's preferred position.[16]

Turning to legal professional privilege, as seen, in Victoria, a Royal Commission or, in New South Wales, a Royal Commission or Commission of Inquiry having the additional

[14] Ibid 446.
[15] Ibid.
[16] Ibid 453-456.

powers of Part 2, Division 2, may insist on production, or answers, despite a claim of legal professional privilege. The Commonwealth legislation takes a more complicated view of legal professional privilege, allowing that, if a Court has determined that a document is legally professionally privileged or the Commissioner has determined on inspection that the document is so privileged, then the privilege will apply and the document will be returned: s 6AA. However, for similar reasons as apply to the privilege against self-incrimination, I consider the privilege should be abrogated. It would be expected that a Royal Commission would be slow to insist on production or answers in the face of such a claim, unless they are centrally relevant. The search for truth seems to me to transcend such considerations as legal professional privilege.

In relation to statutory secrecy, similar considerations apply. The Australian Law Reform Commission expressed this view:

> The interests protected by statutory privileges are important, and an inquiry should only compel such information if it is absolutely necessary for the purposes of the inquiry. Nevertheless, the purpose of establishing Royal Commissions and Official Inquiries is to ascertain the truth without the restrictions on evidence imposed by Courts. They are investigatory bodies, rather than judicial bodies, and the restrictions on evidence that apply to inquiries should not necessarily be consistent with those that apply in the courts. Further, the addition of privileges is likely to reduce flexibility, increase formality, and increase the likelihood of legal challenge of inquiry decisions. The ALRC therefore does not recommend that these privileges should apply to Royal Commissions or Official Inquiries.[17]

The Official Inquiries referred to were the second tier inquiry recommended by the Australian Law Reform Commission.

I consider that, unless another enactment specifically states that it is to have effect notwithstanding the powers of a Royal Commission, then the *Royal Commissions Act* should prevail over that other Act. This formula follows the New South Wales position: s 17(1) and (1A).

Turning to public interest immunity, many Australian Acts establishing standing crime and corruption commissions modify public interest immunity. Examples are the *Law Enforcement Integrity Commissioner Act 2006* (Cth) and the *Building Industry Improvement Act 2005* (Cth). Each overrides a claim of public interest immunity. So does the *Independent Commissioner Against Corruption Act 1988* (NSW) and the *Police Integrity Commission Act 1996* (NSW). Interestingly, the South Australian *Independent Commissioner Against Corruption Act 2012* does not specifically address public interest immunity; but none of the Schedule 2 qualifications to the obligation to appear, answer questions and produce documents or things extend to public interest immunity.

It may be observed that so far as the standing crime and corruption commissions are concerned, it would be most unlikely that any available claim of public interest immunity would go beyond the perceived need for secrecy of police investigation methods, covert operations and informers. Such bodies would be expected to be investigating police conduct, perhaps regularly. However, it is hard to envisage a corruption commission needing to

[17] Ibid 465.

examine Cabinet deliberations or intergovernmental advice. Therefore, the modification of the rules relating to public interest immunity in that context goes, in practical terms, to the abrogation of only part of the potential ambit of public interest immunity claims. Similarly, it would not be expected that a state based Royal Commission would seek access to national security information, high level advice to governments, or negotiations between governments. On the other hand, Cabinet discussions were examined during the Easton Commission, without any claim for immunity being made.

The Australian Law Reform Commission considered whether a Commonwealth Royal Commission Act should abrogate public interest immunity. Although it noted that access to national security information had proved difficult in the past, it expressed the view that a 'claim of public interest immunity in relation' to other types of information in a Royal Commission, however, appears quite rare.[18] It also said: 'There is no evidence, however, that public interest immunity causes practical difficulty in any other context'.[19] Holding that view, the ALRC recommended against abrogating public interest immunity; although it recommended that for the sake of clarity public interest immunity be specifically included as a claim which might provide a reasonable excuse for refusing to comply with a Royal Commission notice to produce or to answer questions.

It appears from the website of the Royal Commission into the Management of Police Informants (2020, Victoria) that the Commission has been beset by claims of public interest immunity coming from Victoria Police and other law enforcement agencies. The Interim Report of the Commission reported that 'operational sensitivities and associated claims of public interest immunity had affected the Commission's ability to obtain and disclose documentation'. [20] In a press release of 20 May 2020, the Commission referred to 'thousands' of public interest immunity claims to limit public disclosure of information.

From discussion with the Royal Commissioner, the Hon. Margaret McMurdo AC, dealing with innumerable claims of public interest immunity has indeed been an issue for the Commission. Early in the investigation stage Victoria Police relied on a claim of public interest immunity for refusal to produce some documents. Later in the term of the Commission the arguments were confined to issues of publication. However, the availability of the claim made the Commission's processing of the required documents more difficult.

In my view public interest immunity should not be a reasonable excuse for declining to comply with a requirement of a Royal Commission. If the Commission's terms of reference require examination of matters usually kept from the public forum, it should be able to obtain the relevant information. That is not to say it will publically release that information. Advice that such material would usually be protected will lead to great care in the way in which the Commission treats the material.

[18] Ibid 460.
[19] Ibid 463.
[20] 'Progress Report', *Royal Commission into the Management of Police Informants* (Web Page) 42 <https://www.rcmpi.vic.gov.au/>.

Capacity to refer questions of law

Of the Acts examined in detail, only the Victorian Act gives an inquiry the power to refer a question of law to the Supreme Court. Indeed, each level of inquiry is so empowered: ss 41, 81 and 113.

Such a reference could not be made without a statutory power being given.

Although the decision in the South Australian case of *McGee* resulted from an application for a declaration, it demonstrates how efficacious a power to refer questions of law can be. In my view there is nothing to be said against providing such a power, and much in its favour.

Recommendation number 1

The Royal Commission's power (and that of the second tier inquiry) to require production of books, papers, documents or records be supplemented by addition of the words: 'or other thing'.

Recommendation number 2

The power given to a Royal Commission in s 10(a) (and that of the second tier inquiry) to enter upon land be replaced by the power to apply to a magistrate for a search warrant.

Recommendation number 3

The Royal Commission (and the second tier inquiry) be empowered to require a person to provide information to the inquiry, in a form approved by the inquiry, including by statement verified by statutory declaration.

Recommendation number 4

The Act provide that a claim of privilege against self-incrimination is not a reasonable excuse for failing to comply with the requirement of a Royal Commission, except where relevant proceedings are on foot, that is, compliance with the Commission's requirement might tend to incriminate the witness in relation to proceedings for an offence or for the imposition of a penalty, that have been commenced but not fully disposed of.

Recommendation number 5

In tandem with abrogation of the privilege against self-incrimination there be a provision to the effect that statements and disclosures made to a Royal Commission by a person are not admissible against that person in criminal or civil proceedings, or other proceedings for the imposition of a penalty ('use immunity'), except in proceedings for an offence against the Act or proceedings brought against the person arising out of the person's conduct before the Commission. It should be made clear that the use immunity is not to apply to a document or a thing that was or could have been obtained independently of production to the

Commission, or which was in existence prior to any request for its production by the Commission.

Recommendation number 6

The Act provide that a claim of legal professional privilege is not a reasonable excuse for failing to comply with a requirement of a Royal Commission.

Recommendation number 7

In tandem with abrogation of legal professional privilege there be a provision to the effect that statements made or documents produced by a person to a Royal Commission which are legally professionally privileged are not admissible against that person in other proceedings.

Recommendation number 8

The Act provide that a claim of public interest immunity is not a reasonable excuse for declining to comply with a requirement of a Royal Commission.

Recommendation number 9

All levels of inquiry be given the power to refer any question of law arising in an inquiry to the Supreme Court for decision.

CHAPTER 4: PROHIBITING PUBLICATION AND OTHERWISE RESTRICTING ACCESS

Term of Reference 4: Powers in relation to the making of orders for non-publication of certain materials provided in Commissions including:

a) the application of such provisions and status of such orders following the end of Commissions; and
b) whether it is necessary to establish a formal regime to provide for the management of such materials (such as access and storage) following the end of Commissions, including whether a Court should make any necessary orders. Particular regard should be had to the operation of the Freedom of Information Act 1991 and the State Records Act 1997; and
c) the creation of special arrangements, powers or restrictions for inquiries involving matters such as terrorist incidents, criminal intelligence, sensitive material or any other matter in which it may be appropriate to restrict access to information or evidence and:
    i) whether relevant evidence can be sealed by Commissions (rather than by a Court);
    ii) if so, consideration of the appropriate procedure for sealing such documents;
    iii) the status of such orders following the end of Commissions; and
    iv) whether it is necessary to establish a formal regime to provide for management of any sealed materials following the end of Commissions, including whether a Court should make any necessary orders.

Non-publication orders

The South Australian Act empowers a Royal Commission to forbid publication of 'specified evidence, or any account or report of specified evidence' absolutely or conditionally: s 16A(1)(b). The same section provides that it is an offence to contravene such an order. The Royal Commission may vary or revoke its orders: s 16A(2), but presumably only until the time when its report is delivered. However, in my opinion, such orders survive the Royal Commission which made them. There is no explicit reference to documents in the formula used, which is based on wording found in Part 8 of the *Evidence Act 1929* (SA) dealing with publication of evidence. The State Care Act has an identical provision: s 9(2). It is relevant to note that courts have powers additional to those found in the Evidence Act, where public access to a document is to be denied; for example s 131 of the *Supreme Court Act 1931* (SA).

Provisions in the other Australian Acts are broadly similar, although the powers given in the Commonwealth Act (s 6D(3)), the Victorian Act (s 26(1)) and the New South Wales Act (s 12B) allow the prohibiting order to extend to 'information'. This is plainly desirable.

Sealing Orders

None of the Acts mentioned contains a provision empowering a Royal Commission to seal evidence given before it, or information provided to it, in cases of peculiar sensitivity, or any case at all. However, the Commonwealth enacted a series of provisions to apply specifically to the Royal Commission into Institutional Responses to Child Sexual Abuse, enabling the Commission to receive unsworn statements and materials in private sessions: Part 4 of the Commonwealth Act. These were rendered inadmissible in evidence in any proceedings. Disclosure is an offence and access only becomes available 99 years after the record was made.

Management of and access to records

None of the South Australian Act, the State Care Act, or the New South Wales Act provides for the management of the records of a Royal Commission after it ceases to exist. In South Australia, the *State Records Act 1997* (SA) provides a regime for receiving and dealing with 'records' and 'official records' of an 'agency'. 'Agency' is variously defined in s 3(1) of the State Records Act, but a Royal Commission would appear to answer one description in s 3, namely:

> 3(1)(e) an incorporated or unincorporated body—
>
> (i) established for a public purpose by or under an Act; or
> (ii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown.

An agency may deliver its records into the custody of State Records: s 18(1). An agency must deliver its official records into that custody when it ceases to require access to the records for 'current administrative purposes': s 19(1)(a). That obligation would arise once a Royal Commission delivers its report. The agency is obliged to advise the Manager of State Records if disclosure of the records or part thereof is restricted: s 20. That is so, presumably, because provision to a third party by the Manager of material subject to, for example, a non-publication order under s 16A of the *Royal Commissions Act*, would give rise to an offence.

Section 26 deals with access to official records in the custody of State Records. In consultation with the Manager, a Royal Commission could determine conditions excluding or restricting access to the records: s 26(1). Such consultation would necessarily take place (at the latest) at the time of delivery. The Manager would be obliged to decide applications for access in accordance with such a determination: s 26(4). While s 26 appears to envisage that a determination might be varied at a later time after fresh consultation with the agency, that could not occur where the agency has ceased to exist.

The *Freedom of Information Act 1991* (SA) has no application to the records of Royal Commissions. The right of access given by that Act is to the documents of an 'agency': s 12. Where documents held by an agency are delivered into the custody of State Records, the documents are, for the purposes of the FOI Act, taken to continue in the possession of the

agency by which they were formerly held: s 7 FOI Act. In s 4 of the Act, 'agency' is defined to include an unincorporated body 'established or continued in existence for a public purpose' by or under an Act, but *not* to include an exempt agency: s 4(1) FOI Act. Schedule 2 of the FOI Act provides a list of exempt agencies which includes 'all Royal Commissions'.

In my view it is appropriate that the status of Royal Commissions as exempt agencies stand.

The Victorian Act provides for transfer of records to the Department of Premier and Cabinet, and thence to the Public Records Office, where they are to be held on the same basis as obtained while they were in the hands of the Royal Commission: s 124 Victorian Act. It is noteworthy that the *Freedom of Information Act 1982* (Vic) does not apply to documents in the possession of a Royal Commission or other inquiry, but only while the Royal Commission or other inquiry 'is in existence': s 125.

The Commonwealth provision is different. For current and future Royal Commissions, records are to go to the custody of the Secretary of the Attorney-General's Department and to stay there for 20 years: reg 10 *Royal Commissions Regulations 2019* (Cth). They are then to be transferred to the National Archives. Once there access may be granted in certain, strictly limited circumstances for purposes pertaining to law enforcement: reg 12.

Discussion

As mentioned, it is desirable that a Royal Commission have the power to forbid the publication, not only of specified evidence or accounts or reports of it, but also the information sitting behind that evidence. That might consist of statements or documents of any nature, or electronically recorded material, photographs or film.

While a Royal Commission exists it seems unlikely a member of the public could secure access to such materials. But it is important that a Royal Commission has the ability to ensure protection of such information after it has ceased to exist. If a Royal Commission is to be empowered to receive evidence which would usually be protected by the privilege against self-incrimination, or legal professional privilege, or public interest immunity – as recommended in this Review – then it is desirable that its powers to protect that information from publication or public access be markedly expanded. In some, perhaps many incidences, sensitive evidence of this type would be taken *in camera.* This suggests that the Royal Commission's powers should go beyond the ability to forbid publication of such materials and should also extend to the sealing of them.

One of the shortcomings of the provision giving the power of forbidding publication is that, while during its life a Royal Commission may vary or revoke its order, once the Commission's work has concluded, a parallel power does not vest elsewhere. The need for continuation of such orders may well diminish with the effluxion of time. Persons protected by orders might not any longer require that protection. The interests of historical analysis might loom larger. Particularly if Royal Commissions are to be given the power of sealing material, it seems appropriate that a mechanism be put in place by a way of a check and balance, enabling a review of any restrictive orders, to be carried out by the Supreme Court.

Such a system could only work if there were a register of non-publication orders made under s 16A, and also a register containing, in appropriately general terms, a description of the nature of the material subject to a sealing order and the reason for it. I envisage that the registers would travel with the official records. The registers should be available for viewing by a member of the public having an apparently genuine interest in the subject matter. I see no difficulty with State Records continuing to house the records and deal with applications for access to them. The review by the Supreme Court should occur on application either of the Manager of State Records, or of an interested member of the public.

Given the far reaching nature of a sealing order, I have considered whether, prior to lodgement of the records, the Supreme Court should be asked to examine materials to be sealed to ensure there is justification for the order or orders. In the end I do not recommend that course. The obligation to disclose in general terms the reasons underlying a sealing order will likely make it tolerably clear why the order is made and whether a later review would be worthwhile.

Moving aside for a moment from Royal Commissions, it may be that the giving of evidence in, for example, criminal trials touching on national security or criminal intelligence will have led to the creation of a regime to regulate publication, whether in a redacted form or by way of summary, or not at all. Such problems as might arise probably occur more commonly outside the Royal Commission arena. If there is a need for, or already in place, legislation to regulate the publication of particularly sensitive evidence given in courts, it might be more expedient to allow Royal Commissions to utilise the same provisions, rather than attempt a sophisticated system within the confines of the *Royal Commissions Act*.

Recommendation number 10

Royal Commissions (and the second tier inquiry) continue to be exempted from the ambit of the *Freedom of Information Act*.

Recommendation number 11

The powers given in s 16A be extended to enable a non-publication order in relation to any ‘information’ in any form in the possession of a Royal Commission (or the second tier inquiry) and it be made explicit that an order survives the completion of the Commission which made it.

Recommendation number 12

Royal Commissions (and the second tier inquiry) be given the power to seal evidence, information or materials where they are particularly sensitive, for example (dealing only with a Royal Commission) where the evidence given was subject to a claim of legal professional privilege, or given despite the privilege against self-incrimination, or is material with respect to which there was or might have been a claim for public interest immunity.

Recommendation number 13

The duty to deliver its official records to State Records within a certain period after the Royal Commission has delivered its report be imposed in the *Royal Commissions Act* and apply also to the second tier inquiry.

Recommendation number 14

A duty be imposed upon a Royal Commission (and the second tier inquiry) to deliver with its official records:

(a) a register containing details of all suppression orders made by the Commission, with a description of the general nature of the suppressed material, together with brief reasons for the order;
(b) a register containing details of all sealing orders made by the Commission, with a description of the general nature of the sealed material, together with brief reasons for the order.

Recommendation number 15

A right to review a non-publication order or a sealing order, after a Royal Commission or second tier inquiry has delivered its report, be provided in the Act, allowing application either by the Manager of State Records, or a member of the public with an apparently genuine reason for making the application, to the Supreme Court of South Australia on the basis that:

(a) the reason for the order no longer applies; or
(b) the material has been published elsewhere; or
(c) the person or body whose interests were sought to be protected by the order consents to its revocation; or
(d) the public interest in exposure of the material now outweighs the reasons for the original order.

The Supreme Court be given power to vary or revoke any order of a Commission forbidding publication of, or sealing, material.

CHAPTER 5: EXTRATERRITORIAL REACH

Term of reference 5: Whether Commissions' powers should have extraterritorial application and, if so, the scope and extent of those powers.

Coercive powers are conferred by legislation rather than by letters patent appointing Royal Commissions. It follows that 'the coercive powers of Commissions are constrained by the legislative powers of the Parliament that confers them'.[21]

Under s 118 of the *Commonwealth of Australia Constitution Act*, full faith and credit is to be given to the laws, public Acts, and the judicial proceedings of every state. The *Service and Execution of Process Act 1992* (Cth) permits service out of South Australia of compulsory process. Therefore, in the generality of instances, a combination of the coercive powers given to a Royal Commission in s 10 of the South Australian Act, together with leave granted by the Supreme Court of South Australia, will oblige a person in receipt of such a summons to attend before the Royal Commission, be sworn, answer questions, produce documents, and surrender documents for inspection and retention.

However, there will be particular cases where doubt attends the Royal Commission's ability to use its coercive powers in relation to witnesses from outside the jurisdiction. The states do not have power to legislate so to affect or limit the prerogatives, property or revenues of the Commonwealth Crown,[22] therefore state legislation which has such an effect will be invalid. Note, however, there is a distinction between legislation which merely regulates activities carried out by a Commonwealth agency in exercising its functions – which is not invalid – and legislation which discriminates against the Commonwealth, or impacts adversely on the privileges or immunity enjoyed by the Commonwealth.[23]

In late February 2020, there was discussion in the national newspapers of the federal proposal to establish a Royal Commission to examine the 'Black Summer' bushfire season. There was a suggestion that the Labor government states, Victoria and Queensland, might not co-operate. It was said that such an eventuality could threaten the integrity of the Royal Commission. University of Sydney constitutional law expert, Professor Anne Twomey, was quoted as saying:

> A Royal Commission – unlike a court – is an executive body and there has always been a reluctance within a federation to compel officials of a government from one jurisdiction to appear before those of another.[24]

This is a manifestation of what is called the doctrine of intergovernmental immunity. It raised its head closer to home quite recently.

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[21] Donaghue (n 4) at [2.2].
[22] *Commonwealth v Cigamatic* (1962) 108 CLR 372.
[23] *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.
[24] David Ross, 'Inquiry Feasible only if the States Play Ball', *The Australian* (Adelaide, 21 February 2020) 1, 6.

During the currency of the South Australian Murray-Darling Basin Royal Commission established on 23 January 2018, the Commission issued a number of summonses to various officers of the Murray-Darling Basin Authority (MDBA) and to the Secretary of the Commonwealth Department of Agriculture and Water Resources. The MDBA is a body corporate established under the *Water Act 2007* (Cth). The Commonwealth of Australia and the MDBA issued proceedings in the High Court in its original jurisdiction seeking declaratory and injunctive relief against enforcement of the summonses. The Commonwealth was to argue, first, that provisions authorising the issue and enforcement of such summonses and imposition of penalty for non-compliance (under s 11(1) of the *Royal Commissions Act*) would involve an exercise of judicial power, so offending Chapter III of the Constitution. Further, it foreshadowed the argument that the Commonwealth was impliedly immune from the operation of state laws which purported to have the effect of modifying or restricting the exercise of the executive power of the Commonwealth – including as exercised by the MDBA – or which substantially interfered with or curtailed the operations of the executive government of the Commonwealth.

It is noteworthy that, in resisting the application, the State of South Australia was to concede that s 11(1) does not apply to the Commonwealth, a person being sued on behalf of the Commonwealth, or a resident of another State, as those terms are used in s 75 of the Constitution, that section giving original jurisdiction in such matters to the High Court. However, it was to further argue, in essence, that the MDBA is an intergovernmental authority, not subject to general ministerial direction or control, and not a Commonwealth department or executive agency; and that the recipients of the summonses were not employed on behalf of the Commonwealth. Section 11(3) of the South Australian Act, while not binding the 'polity of the Commonwealth', bound members, servants, and agents of the Commonwealth and of the MDBA. The State of South Australia denied that the South Australian Act modified or restricted the powers, privileges or immunities of the Commonwealth Crown, or its executive capacities, or interfered with the operations of the Commonwealth or – having regard as well to s 128 of the *Service and Execution of Process Act* – abrogated any privilege or immunity claimable by the executive government of Commonwealth or the MDBA.

In the event, the High Court was not called upon to resolve this dispute as the summonses were withdrawn by consent. However, there are good grounds to believe that the Commonwealth challenge would not have succeeded. In correspondence with the Honourable the Attorney-General dated 11 May 2018 the Commission, Mr Bret Walker SC, made this observation:

> I have taken the view consistently from the inception of the Royal Commission that the combined effect of the *Royal Commissions Act* and the *Commonwealth Service and Execution of Process Act* permits and gives force to the compulsion of evidence from persons out of South Australia, and within the Commonwealth, for the purposes of this Royal Commission.

The Commissioner went on to say:

> …so called clarifying legislation to amend the *Royal Commissions Act* has been and still is regarded by me as a matter of more abundant caution, not sought by me and certainly not considered necessary by me.

Further, in his final report, Commissioner Walker made a number of what he called 'tentative observations' about the issue. They included:

> Fifth, the Commonwealth position does seem to entail the drastic consequence of reading down or even invalidating its own legislation – s 6 of the *Service and Execution of Process Act 1992* (Cth), which purports to bind the Crown in all its capacities, to provisions including Division 4 of Part 4 that authorised this Commission's summonses to be served on the MDBA in Canberra. That would be a regrettable regression in nationbuilding.[25]

The clarifying legislation of which Mr Walker spoke in his correspondence with the Honourable Attorney-General would appear to be no more than legislation which would clearly express the South Australian Parliament's intent that the *Royal Commission Act* was to have extraterritorial effect. A bill to effect such an amendment was in fact introduced in the House of Assembly on 20 June 2018, namely the *Royal Commissions (Extraterritorial Application) Amendment Bill 2018, No. 21 of 2018*. It contained what was to be a new section 3A, providing as follows:

> **3A—Application of the Act**
>
> This Act applies outside of South Australia to the full extent of the extraterritorial legislative power of the Parliament.

Section 4 of the Victorian Act includes a provision to similar effect:

> **4—Act binds the Crown**
>
> This Act binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

There is a presumption that an Act of a Parliament is not intended to bind an executive government of another polity in the absence of a clear intention: *ACCC v Baxter Health Care* (2007) 233 CLR 1 at [27] - [28]; *Bropho v Western Australia* (1990) 171 CLR 1 at [16] - [17]. To the extent that this presumption still carries weight it would be prudent to include in the *Royal Commissions Act* a section along the lines of the proposed s 3A set out above. However, as is plain from Mr Walker's own statements, his view was that the summonses were validly issued.

To make these points is not to deny the validity of the doctrine of intergovernmental immunities. In *Spence v Queensland* [2019] 93 ALJR 643, Kiefel CJ, Bell, Gageler and Keane JJ said at [100] that the doctrine of intergovernmental immunities expounded in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 is a structural implication built on the proposition articulated by Starke J in that case, that: 'neither federal nor state governments may destroy the other nor curtail in any substantial manner the exercise of its powers or obviously interfere with one another's operations'. Their Honours described the necessary analysis in a given case as a 'practical inquiry'.

For present purposes it is enough to say that, short of enacting a section like the proposed s 3A or the Victorian Act's s 4, the South Australian Parliament can do no more to

[25] *Murray-Darling Basin Royal Commission Report* (Report, January 2019) 40.

ensure extraterritorial reach. The limitations on its reach are located in constitutional matters, either expressly or by implication.

Recommendation number 16

The Act contain a provision to the effect of the proposed s 3A in the amending Bill, No. 21 of 2018, viz:

> This Act applies outside South Australia to the full extent of the extraterritorial legislative power of the Parliament.

CHAPTER 6: ALTERNATIVE FORMS OF INQUIRY

Term of reference 6: Whether there is any need to create an alternative form or forms of executive inquiry to provide greater flexibility, less formality and greater cost-effectiveness than a Royal Commission (including the arrangements and powers that should apply to any such alternative forms of inquiry).

Background

By way of context, it may be noted that inquiries by executive government may take a number of forms. They may be statutory or non-statutory.

Of the statutory variety, there are *ad hoc* inquiries such as those presently under consideration. These may or may not have coercive powers. Then there are permanent bodies, such as created by the *Ombudsman's Act 1972* (SA) or the *Independent Commissioner Against Corruption Act 2012* (SA).

Non-statutory inquiries include taskforces, departmental and ministerial inquiries. A recent example in the federal sphere was the inquiry ordered by the Prime Minister to be carried out by his Departmental Secretary, Mr Gaetjens, into what became known as the Sports Rorts Saga, involving the former Minister for Sports, Ms Bridget McKenzie. Such an inquiry is carried out in private, and is low cost, flexible and presumably efficient.

Returning to statutory, non-permanent inquiries, a Royal Commission is at the highest end of the spectrum. Its hallmarks are that, once established, it is entirely independent of the Executive. In most cases all its evidence is taken in public and so it is open and accessible. It has coercive powers of varying degree, depending on the model. Indeed, the use of this type of inquiry is often an indicator that the voluntary co-operation of witnesses is in doubt. It also has important protections given both to the Commissioner(s) and to Commission officers and witnesses.

The subject matter of a Royal Commission is usually a matter of 'vital public importance', and, in the view of the Salmon Commission,[26] the machinery of a Royal Commission should only ever be used for such matters. The advantages of a Royal Commission inquiry include the following:

- the status of Royal Commission will likely encourage those with knowledge of the subject matter to come forward;
- it will be seen by the public to be an independent search for the truth;
- those involved in the subject matter will have an opportunity in public hearings to explain their actions;
- the findings and recommendations are likely to carry weight;

[26] *Royal Commission on Tribunals of Inquiry: Evidence and Papers* (Report, UK, November 1966) 16.

- the public will have confidence in the results; and
- the results will usually put an end to the public controversy.

Moving away from that degree of formality, a statutory inquiry that is not a Royal Commission, but which can call evidence, may also have advantages. Depending on its structure it may be more flexible, easier to get up and running and less expensive. There may be fewer expectations that hearings will occur in public and, of itself, this may significantly reduce its costs. It may be less time consuming. There will be less scope for reputational damage. Such an inquiry would still be bound by the rules of procedural fairness, but compliance with them would likely not present the potential problems which arise in a public setting. If there is no abrogation of the various privileges enjoyed by witnesses in civil proceedings, then there may not be a need for legal representation of participants, and, even if parties are represented, the role played by those representatives might be quite limited.

Discussion

The benefits of a legislative framework in one South Australian Act, which provides for a hierarchy of inquiries, are manifest. This would allow for a clear expression of the respective coercive powers and protections at each level. The correlation would be less clear if separate Acts were to contain the different species of inquiry, as occurs in New South Wales. A clear juxtaposition, of itself, would inform public debate and assist in selecting the appropriate vehicle for any particular inquiry under consideration. The public would more readily understand where any particular inquiry stood in the broader scheme. Self-evidently, having the machinery in place, ready to utilise, would be efficient in terms of time at the point when the Executive is considering whether to establish an inquiry and its nature and terms of reference.

Including both or all levels of inquiry in one statute would also have the advantages of:

- standardising such matters as recordkeeping;
- making clear what bodies or officers were not to be the subject of inquiry;
- standardising the powers of each body to restrict publication of information relating to its investigation;
- setting out what other Acts of Parliament were not to apply to inquiries established under the Act, for example the *Freedom of Information Act 1991* (SA);
- avoiding fragmentation of any regulations made.

Introducing one new Act to encompass Royal Commissions and inquiries of lesser status would have the advantage of enabling a complete redrafting of the *Royal Commissions Act*, leaving behind the ‘antiquated’ drafting referred to by Doyle CJ in *McGee’s Case* and utilising the clear modern language we have come to expect of the South Australian Parliamentary Counsel.

The question remains how many tiers should the new Act contain. As mentioned, the third tier inquiry in the Victorian Act, the Formal Review, has no coercive powers. Unlike the provisions in the Victorian Act governing Royal Commissions and Boards of Inquiry, a Formal Review is not empowered to require a person to give evidence on oath. Such a review is established by the Premier (or another Minister with the Premier's approval) as opposed to, in the case of a Royal Commission, letters patent issued by the Governor, and in the case of a Board of Inquiry, an appointment by the Governor in Council, published in the Government Gazette. The Victorian Act provides for the conversion of a Formal Review into either a Board of Inquiry or Royal Commission by use of the applicable method of appointment.

There are a number of aspects of a Formal Review which require a statutory base. A member of a Formal Review and indeed its staff, are given the same protections as members of a Board of Inquiry or a Royal Commission and witnesses and legal representatives also enjoy parallel protections. Like Royal Commissions and Boards of Inquiry, a Formal Review may refer to the Supreme Court a question of law arising in an inquiry. Various offences, such as hindering a Formal Review and knowingly misleading it, are created.

The equivalent legislation in New Zealand, the *Inquiries Act 2013* (NZ) takes a broadly similar approach. The Act applies to three tiers of inquiry namely:

- Royal Commissions established under the authority of letters patent;
- public inquiries established by the Governor-General by Orders in Council; and
- government inquiries established by one or more Ministers.

As can be seen from the descriptors, only Royal Commissions and public inquiries are primarily public inquiries. However, a government inquiry may also hold public hearings if it so chooses. The Act deals with the establishment and membership of inquiries, the duties, including the obligation to report, procedures (which include wide discretion as to how to proceed), powers and protections. Notably, with respect to all three tiers, the powers to summons witnesses and to obtain information are the same: ss 20 and 23. Like the two types of public inquiry, the government inquiry can require a witness to give evidence to it on oath. Witnesses at all levels have the same privileges and immunities as they would have in a court: ss 27(1) and 29(2).

The New Zealand Act provides for contempt proceedings to be initiated in the High Court – equivalent to Australian Supreme Courts – by the Solicitor-General. Again, this provision applies to all three types of inquiry.

Experience in New Zealand has shown that all three species of inquiry have been utilised since the Act was passed. The clarity provided by the Act demonstrates the utility of setting out in one statute provisions dealing with the establishment, duties, powers and protections of inquiries, as well as matters related to record keeping. That is not to say that the powers of each level of inquiry need correspond as they do in the New Zealand model.

Conclusion

In my view there is a strong argument for a new 'Inquiries Act' utilising at least a two-tiered public inquiry structure, with the Royal Commission having an enhanced set of powers in relation to witnesses, superior to those of the second tier public inquiry. The Royal Commission should have all its current powers (except the power to enter land and to punish for contempt) but, in addition, as earlier recommended, the privilege against self-incrimination and legal professional privilege should be abrogated, and the right to claim public interest immunity should be overridden. To protect witnesses who would otherwise claim either of the privileges mentioned, or public interest immunity, there should be a section like the current s 16 (answers not admissible elsewhere) but expanded to cover answers, information, documents or other things given or produced under compulsion. Section 40 of the Victorian Act provides an example of such a provision.

The second tier should, in my view, have the powers which the Royal Commission currently has (except the power to enter land and to punish for contempt), that is, preserving the two privileges and public interest immunity. I have considered whether a second tier inquiry should have the additional powers set out above, if declared to have them, along the lines of the New South Wales Act. That is ultimately a matter of policy. A clear differentiation of powers makes more sense in terms of structure, but the New South Wales Parliament has plainly seen value in the flexibility of a Royal Commissioner and a Special Commissioner having the additional powers provided in the Act, provided the instrument of appointment declares them to be available.

I also consider there would be advantage in incorporating into the new Act a third tier of inquiry modelled on New Zealand's 'government inquiry'. Having available a clear structure for such a third tier inquiry would not detract from any other, less formal options currently available to Ministers. But potentially having a much reduced expectation of public hearings (if any) this might be a suitable vehicle for some quite confined topics in need of investigation. The benefit of a third tier resides in the framework provided by the statute – setting out matters of process including the requirement of procedural fairness – but also in the important protections given to all participants. I have considered whether this third tier inquiry should have the power to take evidence. In the end, I have thought it unnecessary. Most such inquiries will be of a less formal nature, and a person heading it will not necessarily be familiar with the process of taking evidence. Additionally, it is likely that the range of subject matter will give rise to witnesses either being willing to co-operate, or being constrained by other considerations to co-operate. If the type of inquiry calls for the taking of evidence, then a second tier inquiry can be selected.

Although the Victorian Act allows for the conversion of a Formal Review into a Commission of Inquiry, that would appear to entail difficulty where the Formal Review was in receipt of contentious information which was not on oath. On the other hand, if the area of conflict were anticipated, that difficulty might be avoided. On balance, I do not see advantage in providing, in the new Act, for a conversion of a Government Inquiry into a Commission of Inquiry.

Recommendation number 17

The *Royal Commissions Act* be replaced by a new Act, the 'Inquiries Act', providing for three tiers of inquiry as follows:

(a) Royal Commission, established by the Governor issuing a commission by letters patent under the Public Seal to a person or persons to inquire into and report on the terms of reference specified in the letters patent;
(b) Commission of Inquiry, established by the Governor in Council, by Order in Council appointing a person or persons to constitute a Commission of Inquiry to inquire into and report on the terms of reference specified in the order;
(c) Government Inquiry, established by the Premier (or a Minister with the Premier's approval) by instrument appointing a person or persons to constitute a Government Inquiry to inquire into and report on the terms of reference specified in the instrument.

Recommendation number 18

The powers of the Royal Commission be expanded by:

(a) changes to the current powers as recommended in this Review, including:
(b) abrogation of:
    (i) the privilege against self-incrimination (except where relevant proceedings are on foot);
    (ii) legal professional privilege;
    (iii) public interest immunity; and
    (iv) the operation of statutory secrecy (unless the relevant statute expressly binds a Royal Commission).

Recommendation number 19

The powers of a Commission of Inquiry be limited to the current powers of a Royal Commission, as varied by changes recommended in this Review, but without any abrogation of the privileges against self-incrimination, legal professional privilege, public interest immunity or the operation of statutory secrecy.

Recommendation number 20

The powers and procedures of a Government Inquiry be based upon those provisions of the Victorian *Inquiries Act* which apply to a Formal Review, namely ss 99–106, the hallmarks of which are that there are no coercive powers, or the power to take evidence.

CHAPTER 7: PRIVATIVE CLAUSES

Term of reference 7: To what extent are the Acts and decisions of a South Australian Royal Commission liable to review or restraint having regard to Kirk v Industrial Court (NSW) (2010) 239 CLR 531, Kaldas v Barbour (2017) 326 FLR 122, and s 9 Royal Commissions Act 1917 (SA).

In addressing this term I propose to start with some general propositions which emerge from *Forge v ASIC* (2006) 228 CLR 45, *Craig v South Australia* (1995) 184 CLR 163, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CR 476 and *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531.

Legislation which purports to deprive a State Supreme Court of its authority to grant relief against jurisdictional error committed by an inferior court or tribunal, or the Executive, is beyond the power of a State Parliament.

That is because Chapter III of the Constitution requires that there be a body fitting the description of the Supreme Court of a State: s 73.

The State cannot alter the constitution or character of a Supreme Court such as it existed at federation, that is, it cannot alter the defining characteristics of a Supreme Court.

At federation the Supreme Courts of the States held a supervisory jurisdiction enabling enforcement of the limits on the exercise of state executive and judicial power by persons and bodies other than the Supreme Courts: *Kirk* [580].

That jurisdiction – to grant relief against jurisdictional error – was exercised by the Supreme Courts through grant of the prerogative writs: prohibition, certiorari, mandamus and habeas corpus.

It was and remains the mechanism for determining and enforcing the limits upon the exercise of state judicial and executive power.

It remains a defining feature of the State Supreme Courts.

The distinction between jurisdictional error and non-jurisdictional error marks the relevant limit on state legislative power: *Kirk* [581].

After *Plaintiff S157* and *Kirk,* some commentators expressed the view that privative or ouster clauses, which sought to deny relief for jurisdictional error, would be read, in the future, so narrowly as to undermine them completely.[27]

[27] Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law', in Groves and Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 347.

The originating proceedings in *Kirk* occurred in the Industrial Court of New South Wales, where the claimants were convicted for offences against the *Occupational Health and Safety Act 1983* (NSW). The High Court held that the errors identified in the trial were jurisdictional errors and required the grant of relief in the nature of certiorari to quash the convictions and sentences. The errors were in the construction of s 15 of the Act and the failure to comply with the rules of evidence, viz permitting an accused person to give evidence for the prosecution.

The Court intervened despite s 179 of the Act which provided that a decision of the Industrial Court is final and may not be appealed against, reviewed, quashed or called into question by any Court or Tribunal (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise).

Kaldas v. Barbour[28] concerned a report published by the New South Wales Ombudsman which made various findings about the former Assistant Police Commissioner, Mr Kaldas. A privative clause in s 35A(1) of the *Ombudsman Act 1974* (NSW) provided (in part) that:

> the Ombudsman shall not… be liable, whether on the ground of want of jurisdiction or any other ground, to any civil or criminal proceedings in respect of any Act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

Kaldas sought in the Supreme Court declaratory and injunctive relief against the defendants. A single Judge referred questions of law to the Full Court for its consideration, including the validity of s 35A.

The Court found, distinguishing *Kirk*, that the clause was valid. The decision turned on the nature of the relief sought and on the fact that *Kirk's Case* involved findings of guilt in a court, whereas this was concerned with a report by the Ombudsman. The relief sought – declarations, and injunctive orders which were said to flow from the declarations – was held by Bathurst CJ to be outside the relief available by means of the prerogative writs. Further, His Honour held that, in its nature, an Ombudsman's report did not affect the rights of any person; nor was it a necessary pre-condition to a decision which could affect such rights: [160]. Therefore, certiorari would not have been available in any event. Nor would prohibition, as the report had already been published.

Basten JA (with whom MacFarlane JA agreed) was content to rest his decision on the nature of the relief sought: that the power to make a bare declaration of right in the exercise of a Supreme Court's supervisory jurisdiction (that is, one that is not consequential on the grant of other relief) was not available to the Supreme Court at the time of federation, and that the prerogative writs did not, in 1901, provide a basis for reviewing decisions of statutory authorities which did not affect legal rights or interests. That being the case, the privative clause was not invalid; its enactment did not exceed the power of the New South Wales Parliament, as constrained by Chapter III of the Constitution.

[28] (2017) 326 FLR 122.

While the facts in *Kirk* and *Kaldas* were strikingly different, it is clear that the High Court will have more to say on the ambit on *Kirk* and on the classification of jurisdictional error. As far as my researches go, the critical reasoning in *Kaldas* has not been discussed in other Full Courts.

The privative clause in the South Australian Act provides as follows:

> **9—Acts and proceedings of commission not liable to be reviewed or restrained**
>
> No decision, determination, certificate, or other act or proceeding of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, *certiorari*, or otherwise howsoever.

There does not appear to be any comparable privative clause in the Royal Commissions and Inquiries Acts of other jurisdictions. Having regard to the High Court decisions in *Plaintiff S157* and *Kirk,* and notwithstanding *Kaldas*, there would seem to be limited, if any utility, in allowing s 9 to stand.

It is interesting to note that in *McGee's Case* the South Australian Full Court was prepared to entertain an application for a declaration as to whether s 11 of the Act abrogated the privilege against self-incrimination. The Court first dealt with the issue of whether s 9 precluded the Court from making any order. No party argued that it did. Indeed, only the Solicitor-General addressed the issue. Doyle CJ, with whom Perry and Sulan JJ agreed, referred (at [105]) to *Plaintiff S157* and to the inherent contradiction between the conferral of a statutory power that is subject to a limit and the removal of the power of the Court to decide that the limit had been exceeded.

It was just as well that the Court found that it did have jurisdiction to determine the question. Because the Royal Commissioner had expressed the view that the privilege against self-incrimination was abrogated, and the Court found to the contrary. Had the Commissioner proceeded on the basis of his opinion then, either, if refusing to answer, the witness would have rendered himself liable to being imprisoned for contempt, or, if answering, the integrity of the Commission's report might have been called into question.

The case neatly illustrates that subjecting a Royal Commission's processes, including its conclusions of law, to review can be advantageous to a Commission. There is the potential to provide authoritative guidance during the course of the Commission's hearings. It can be accepted that the provision of a mechanism for referring questions of law to the Full Court, if then available, would have provided a suitable vehicle for determination of the issue in *McGee's Case*. I have already recommended such a step. However, looking further ahead, and bearing in mind that a Court will be restricted to considering whether a Royal Commission is or is about to fall into jurisdictional error, in my opinion it would be of benefit that judicial review were available. In my experience, Full Courts are quick to respond to applications coming from parties before a Royal Commission to prevent perceived breaches of the rule of law. In those circumstances, any interruption to the progress of the Commission would not likely be significant.

Recommendation number 21

No privative clause, either in the form of s 9 of the current Act or any other form, be included in the new Act.

CHAPTER 8: PROSECUTION OF OFFENCES

Term of reference 8: How offences in relation to Commissions should be prosecuted.

Background

The South Australian Act empowers the Royal Commissioner (or if there is more than one, the Chairman) to commit to gaol, for not more than three months, or to fine, a person who neglects to attend in answer to a summons, insults or defames the Commission, or misbehaves before or interrupts the Commission or, being a witness, refuses to attend, or to be sworn, or answer, or prevaricates in answering, or refuses to produce documents as required by summons: s 11. The Commission may issue a warrant requiring the arrest and imprisonment of the person: s 11(2) and (3). Such actions are described as offences: s 11(4). Under s 4 of the *Acts Interpretation Act 1915* (SA) 'person' includes a body corporate. Although the Act does not use the word contempt, I shall refer to these offences, for convenience, as the contempt offences.

The Act also provides the offence of contravening a non-publication order made by the Royal Commission and failing to comply with a direction that a person absent himself from Commission proceedings: s 16A. The maximum penalty is given as $200 or imprisonment for six months. The Act does not stipulate how or by whom the latter offences are to be prosecuted. Presumably the Director of Public Prosecutions would be asked to prosecute.

Discussion – Offences

Dealing with the contempt offences, there are several difficulties with these provisions. For a start, they invest the Royal Commission with the role of informant, prosecutor and Judge. For a body in which it is vital that public confidence be maintained, this is unedifying. The public would expect that what has the appearance of an exercise of judicial power would be exercised by the courts. It may also violate article 14 of the International Covenant on Civil and Political Rights.

As to the offences prescribed by s 16A, it would be appropriate to specify how they (and any other offences) were to be prosecuted.

In my view a new and better approach to what I have called the contempt offences is to create a number of offences to represent each of them, and some additional ones. The New Zealand Inquiries Act provides a model. I reproduce s 29(1) of that Act.

29—Offences

(1) Every person commits an offence who intentionally—
- (a) fails to attend the inquiry in accordance with the notice of summons;
- (b) refuses to be sworn or to affirm and give evidence;
- (c) fails to produce any document or thing required by order of the inquiry;
- (d) destroys evidence or obstructs or hinders any person authorised to examine, copy, or make a representation of a document or thing required by order of an inquiry;
- (e) fails to comply with a procedural order or direction of an inquiry, including an order *made* under section 15(1); [section 15(1) deals with orders prohibiting publication]
- (f) disrupts the proceedings of an inquiry;
- (g) prevents a witness from giving evidence or threatens or seeks to influence a witness before an inquiry;
- (h) provides false or misleading information to an inquiry;
- (i) threatens or intimidates an inquiry, a member of an inquiry, or an officer of an inquiry.

An alternative, in respect of those activities which are obstructionist – failing to attend, refusing to be sworn, refusing to answer – is to empower the Royal Commission to apply to a court for enforcement of its notices or directions. The advantage of this course is that it will more likely persuade the witness to co-operate, thereby assisting the work of the Commission, as opposed to simply leading to a conviction. If the witness still refuses to comply, then the court is in a position to enforce its own orders, or the infringement can be prosecuted. For not dissimilar reasons it would be advisable to give the Royal Commission the express power to expel from a hearing a person who disrupts it. This is a different power from that given in s 16A of the South Australian Act. Use of such a power may well restore order and obviate the need for a prosecution. The Victorian Act provides such a provision: s 25. It should be made clear that reasonable force may be used.

Whether such offences are prosecuted or referred to a court, it would be advisable to specify that costs may be awarded against any parties. The New South Wales Act has such a provision: s 24, as does the Commonwealth Act: s 15.

It is noteworthy that the penalties provided for perhaps the most serious of the offences under consideration, that of giving false or misleading information to an inquiry, vary widely. For example the New South Wales Act provides a maximum penalty of 5 years imprisonment: s 21. The Victorian equivalent is a mere 12 months: s 50. Perhaps the New South Wales penalty is designed to bear some relativity to the New South Wales offence of perjury, which occurs in the context of any judicial proceedings and which carries a maximum penalty of 10 years imprisonment: *Crimes Act 1900* (NSW) s 327. (The equivalent South Australian provision carries a maximum penalty of 7 years imprisonment: *Criminal Law Consolidation Act 1935* (SA) s 242). Whether all varieties of infringement should be placed within one section of the Act and covered by one maximum penalty, as in the New Zealand Act, is really a question of policy.

Turning to the way in which offences should be prosecuted, I note that s 10 of the Commonwealth Act provides as follows:

10—Institution of proceedings in respect of other offences

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

In my view, it is helpful to nominate the Attorney-General or the Director of Public Prosecutions as the initiator. Unless in any particular case the Director of Public Prosecutions considered that the infringement was trivial and fell outside the prosecutorial guidelines, it is difficult to see a situation where the Director would not take carriage of the matter.

Whether the offences provided should be dealt with in a court of summary jurisdiction or in a superior court is again a matter of policy. On the one hand they would be potentially serious offences in the nature of contempt. On the other hand, the maximum penalty would probably enable their being dealt with in the Magistrates Court.

Discussion – Contempt

I consider it desirable to retain a power in the Royal Commission to deal with contempt. Conduct which answers that description might also render a person liable for prosecution for an offence. It should be clear that this is not a bar to contempt proceedings, but a person should not be liable to both. Beyond any overlap, there may be further conduct which would be contemptuous, although not within the array of offences mentioned above.

However, the Royal Commission should not retain power to itself penalise for contempt. Rather, the Royal Commission should be entitled to apply to the Supreme Court so that the Court may deal with the matter. The Royal Commission should be required to provide a certificate setting out the grounds of the application and the evidence in support. Such a certificate would be *prima facie* evidence of the assertions within it. The *Independent Commissioner Against Corruption Act 2012* (SA), Schedule 2, clauses 13-14 provides a model. There is utility in replicating that system, although the infringing conduct would be defined differently. The New South Wales Act provides in like manner: s18B.

Recommendation number 22

Royal Commissions and Commissions of Inquiry be given explicit power to eject from a hearing a person who disrupts it, and to use reasonable force in so doing.

Recommendation number 23

A series of offences dealing with failing to comply with a requirement of a Royal Commission or Commission of Inquiry be created along the lines of s 29 of the New Zealand Act.

Recommendation number 24

Royal Commissions and Commissions of Inquiry be given power to refer conduct of a person in relation to the inquiry to the Director of Public Prosecutions or the Attorney-General for prosecution.

Recommendation number 25

If the offences referred to in Recommendation 23 are to be summary offences then there be provision for costs to be awarded against the unsuccessful party.

Recommendation number 26

The power to punish for contempt of a Royal Commission be removed from the Royal Commissioner to the Supreme Court.

Recommendation number 27

A Commissioner be entitled to apply to the Supreme Court so that it may deal with a charge of contempt and be required to provide a certificate setting out the grounds of the application and the evidence in support, which certificate would be *prima facie* evidence of the assertions within it.

Recommendation number 28

The new Act provide that if the impugned conduct would constitute both an offence and a contempt, the person is not liable to be punished twice for that conduct

CHAPTER 9: PREVIOUS RECOMMENDATIONS

Term of reference 9: Suggestions for legislative changes proposed or raised by Royal Commissions previously constituted under the Act.

In an attempt to locate suggestions for legislative change raised by Royal Commissions previously constituted under the South Australian *Royal Commissions Act*, reports of the following Royal Commissions were examined:

(1) the Royal Commission into the State Bank of South Australia (Samuel Jacobs QC, replaced by John Mansfield QC, 1991 – 93);
(2) the Hindmarsh Island Royal Commission (Iris Stevens, 1995);
(3) the Commission of Inquiry into Children in State Care (E. P. Mullighan QC, 2004 – 08);
(4) the Commission of Inquiry into Children on the APY Lands (E. P. Mullighan QC, 2004 – 08);
(5) the Kapunda Road Royal Commission (Greg James QC, 2005);
(6) the Royal Commission – Report of Independent Education Inquiry (Bruce Debelle QC, 2012 – 13);
(7) the Child Protection Systems Royal Commission (Margaret Nyland, 2014 – 16);
(8) the Nuclear Fuel Cycle Royal Commission (Rear Admiral Kevin Scarce, 2015 – 16); and
(9) the Murray-Darling Basin Royal Commission (Bret Walker SC, 2018 – 19).

Where electronic copies were available, in addition to skim reading, searches were made for trigger words such as 'recommendations', 'amendments', and 'Royal Commissions Act'. Where only hard copies were available, relevant chapters were briefly examined.

Of the nine abovementioned reports, none explicitly raised suggestions for legislative change to the South Australian Act. Three of the reports (the State Bank, Kapunda Road, and Murray-Darling Basin reports) referred to proceedings brought as a result of, or against the relevant Royal Commissions. These reports discussed the application of certain sections of the Act without explicitly recommending reform.

At pages 13–14 of the first report of the State Bank Royal Commission, the Commissioner discussed a challenge made by the Australian Broadcast Corporation in the Supreme Court to a non-publication order issued by the Commission under s 16A of the Act.[29] Matheson J dismissed the summons on the ground that s 9 of the Act ousted the Court's jurisdiction, but also found that the summons, in any event, should be dismissed on its merits.

At pages 10–11 of the Kapunda Road Royal Commission report, the Commissioner discussed the proceedings (*McGee's Case*) brought before the Full Court of the Supreme

[29] *Australian Broadcasting Corporation v Royal Commissioner* (1991) 56 SASR 274.

Court by Mr McGee seeking a declaration that the Act did not abrogate the privilege against self-incrimination. The Full Court granted the declaration.

At pages 38–41 of the Murray-Darling Basin Royal Commission report, the Commissioner drew attention to the proceedings that were commenced (but withdrawn) in the High Court in relation to summonses issued by the Commissioner to officers of the MDBA and their extraterritorial effect.

Recommendations have already been made in relation to the privilege against self-incrimination and extraterritoriality.

More limited reading of interstate Royal Commission reports has revealed one example of some criticism of the Victorian legislation. It has been referred to already. It is the 2009 Victorian Bushfires Royal Commission. In Chapter 5, Volume 3 of the report, the Commission recommended (against the background of similar recommendations made by Mr Lex Lasry QC in the report of the Royal Commission into the Victorian Ambulance Service) that:

> the State consider the development of legislation for the conduct of inquiries in Victoria – in particular, the conduct of Royal Commissions.

Ms Val Gostencnik, a solicitor for the Bushfires Royal Commission conveniently quoted from the report of the earlier inquiry:

> Mr Lex Lasry QC … argued that during the course of his commission it became clear that the legislative framework for royal commissions in Victoria were inadequate. He said the framework was not comprehensive "for the efficient conduct of Commissions of Inquiry" and that the deficiencies "may have the effect of increasing the time and cost of Royal Commissions, as every Commissioner must make his or her own rulings on a range of procedural and administrative aspects that could otherwise be embodied in legislation". Further, the framework gave rise to "a degree of uncertainty as to how Commissions should operate from the point of view of those appearing before them"—to which I would add those working within them or assisting them.

Although it must be borne in mind that until 2014 Victoria did not have a dedicated Act dealing with inquiries, the observations made are of general application.

The need for clarity in the legislation, particularly regarding the powers of a Royal Commission, was a strong theme of the Australian Law Reform Commission report of 2009. It is hoped that the recommendations made in the current review will go a long way in achieving that clarity.

CHAPTER 10: CONSEQUENTIAL AMENDMENTS

Term of reference 10: Whether your recommendations give rise to any consequential amendments to other Acts in which an inquiry may exercise the powers of a Royal Commission, including the Remuneration Act 1990, the Ombudsman Act 1972 and the Independent Commissioner Against Corruption Act 2012.

There are several South Australian Acts that purport to confer the powers of a Royal Commission as provided in the *Royal Commissions Act* upon various investigative or arbitrative bodies by directly importing those powers.

The *Ombudsman Act 1972* (SA) provides as follows:

> **19—Ombudsman to have powers of a Royal Commission**
>
> For the purposes of an investigation the Ombudsman has the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act applies as if—
>
> (a) the Ombudsman were a commission as so defined; and
> (b) the subject matter of the investigation were set out in a commission of inquiry issued by the Governor under that Act.

The *Remuneration Act 1990* (SA) provides as follows:

> **11—Tribunal to have powers of a Royal Commission**
>
> (1) The Tribunal has the powers of a Royal Commission.
> (2) The provisions of the *Royal Commissions Act 1917* apply to and in relation to the Tribunal as if it were a Royal Commission.

The *South Australian Local Government Grants Commission Act 1992* (SA) provides as follows:

> **16—Inquiries and investigations**
>
> (1) In the exercise of its functions the Commission may hold such inquiries and make such investigations as it considers necessary.
> (2) For the purposes of an inquiry the Commission has and may exercise the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act will apply and have effect in all respects, as if—
> (a) the Commission were a commission as so defined; and
> (b) the subject matter of the inquiry were set out in a commission of inquiry issued by the Governor under his or her hand and the public seal of the State.

The *Police Act 1998* (SA) provides as follows:

74A—Special provisions relating to criminal intelligence

(1) The Commissioner must establish guidelines in relation to the assessment of information that is being considered for classification as criminal intelligence and the management of criminal intelligence.

….

(4) The Attorney-General must, before 1 July in each year (other than the calendar year in which this section comes into operation), appoint a retired judicial officer to conduct a review on—

(a) the effectiveness of the guidelines established under subsection (1); and

(b) the use of criminal intelligence,

during the period of 12 months preceding that 1 July.

(5) The Commissioner must ensure that a person appointed to conduct a review is provided with such information as he or she may require for the purpose of conducting the review.

(6) A person conducting a review has, in so doing, the powers of a commission of inquiry under the *Royal Commissions Act 1917* (and any obligations under an Act to maintain the confidentiality of information do not apply with respect to the provision of such information to the person conducting the review).

The *Judicial Conduct Commissioner Act 2015* (SA)

Section 24 of the Act deals with the powers of a judicial conduct panel appointed to inquire into the conduct of a judicial officer. It provides as follows:

24—Powers of panel

(1) For the purposes of an inquiry under this Part, a judicial conduct panel has the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act applies as if—

(a) the judicial conduct panel were a commission as so defined; and

(b) the subject matter of the inquiry was set out in a commission of inquiry issued by the Governor under that Act.

The *Freedom of Information Act 1991* (SA)

Section 39 of the Act provides for a person aggrieved by a determination under the Act to apply to a review authority for a review of it. Section 39(5) provides as follows:

39(5) In conducting a review under this section, the relevant review authority—

(a) may carry out an investigation into the subject matter of the application (and for the purposes of such an investigation may exercise the same investigative powers as are conferred on the Ombudsman by the *Ombudsman Act 1972* in relation to an investigation duly initiated under that Act, including the powers of a commission as defined in the *Royal Commissions Act 1917*).

The *Constitution Act 1934* (SA)

The Act makes provision for the constitution of the Electoral Districts Boundaries Commission, charged with the task of making an electoral redistribution every four years. Section 84 of the *Constitution Act* applies the relevant terms of the *Royal Commissions Act* to the Electoral Districts Boundaries Commission.

84—Application of Royal Commissions Act

The *Royal Commissions Act 1917* shall, so far as its provisions are applicable, apply to and in relation to the Commission, the secretary to the Commission, the members of the Commission and the proceedings of or conducted before the Commission as if—

(a) the Commission were a commission to whom a commission of inquiry had been issued by the Governor under his or her hand and the public seal of the State; and
(b) the Chairman of the Commission and each other member were the chairman and a member respectively of such a commission; and
(c) the secretary to the Commission were the secretary to such a commission.

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA)

This Act provides for the establishment of a Commissioner for Children and Young People. The Commissioner is empowered to make various inquiries, as set out in s 15. In doing so the Commissioner is given the powers of a Royal Commission.

15—Commissioner may inquire into matters affecting children and young people at systemic level

(1) The Commissioner may, in the Commissioner's absolute discretion, conduct an inquiry into—
  (a) the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people; and
  (b) any other matter declared by the regulations to fall within the ambit of this subsection.

16—Powers of a commissioner

(1) For the purposes of an inquiry under section 15, the Commissioner has the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act applies as if—
  (a) the Commissioner were a commission as so defined; and
  (b) the subject matter of the inquiry were set out in a commission of inquiry issued by the Governor under that Act.
(2) For the purposes of any other function under this Act, the Commissioner has such powers as may be necessary or expedient for the performance of that function.

The *Maralinga Tjarutja Land Rights Act 1984* (SA)

Section 21 deals with a situation where there has been an impasse between an applicant for permission to mine and the traditional owners, the Maralinga Tjarutja. Section 21 (14) provides that:

> 21(14) The arbitrator—
>
> (a) shall have the powers of a commission of inquiry under the Royal Commissions Act; and
> (b) ….

The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA)

Section 20 of the Act, drafted in a manner similar to s 21 of the Maralinga Tjarutja Land Rights Act, governs the arbitration of a dispute between an applicant and the traditional owners of the relevant land, the Anangu Pitjantjatjara Yankunytjatjara, arising as a consequence of an application for permission to mine on the land. Section 21(12) provides that:

> 21(12) The arbitrator—
>
> (a) shall have the powers of a commission of inquiry under the *Royal Commissions Act*; and
> (b) ….

The *Aboriginal Lands Trust Act 2013* (SA)

Section 53 of the Act provides for the application to the Trust for permission to carry out mining operations on Trust Land. Again utilising similar provisions, s 54(4) provides for the arbitration of a dispute arising as a consequence of an application to mine, and reads as follows:

> 54(4) The arbitrator—
>
> (a) must be—
> (i) a judge, or retired judge, of the High Court, the Federal Court of Australia, or the Supreme Court of a State or Territory of Australia; or
> (ii) a legal practitioner of at least 7 years standing; and
> (b) has the powers of a commission of inquiry under the *Royal Commissions Act 1917*; and
> (c) ….

Term of reference 10 mentions the *Independent Commissioner Against Corruption Act 2012*. Whilst the Commissioner may exercise powers similar to those of a Royal Commission (powers detailed in Schedule 2 of the ICAC Act), unlike the provisions identified above, the ICAC Act does not confer powers upon the Commissioner by direct reference to the *Royal Commissions Act*. The only references to Royal Commissions in the ICAC Act

arise as a consequence of a Royal Commission being considered a ‘law enforcement agency’ for the purposes of the ICAC Act.

Discussion

If the powers of a Royal Commission are to be enhanced in the manner recommended in this Review, then arguably each of the bodies, tribunals, commissions, reviewers or arbitrators mentioned in the excerpts of legislation reproduced above would also receive those enhanced powers. It is suggested that this would *not* be appropriate, certainly without some detailed consideration.

However, if each Act picked up only the powers of the recommended second tier inquiry (Commission of Inquiry), that would preserve the *status quo*.

Recommendation number 29

The *Ombudsman Act 1972* (SA), the *Remuneration Act 1990* (SA), the *South Australian Local Government Grants Commission Act 1992* (SA), the *Police Act 1998* (SA), the *Judicial Conduct Commissioner Act 2015* (SA), the *Freedom of Information Act 1991* (SA), the *Constitution Act 1934* (SA), the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), the *Maralinga Tjarutja Land Rights Act 1984* (SA), the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), and the *Aboriginal Lands Trust Act 2013* (SA) be amended so that the powers conferred or picked up are those of the second tier inquiry, rather than of the Royal Commission.

CHAPTER 11: OTHER IMPROVEMENTS

Term of reference 11: Recommendations regarding any other improvements to the Act.

Right of Representation

The South Australian Act allows for legal representation of 'a person giving evidence before the commission': s 13. The New South Wales and Victorian Acts go further and give some guidance as to the factors bearing on an exercise of the Commissioner's discretion to allow representation. Section 7 of the New South Wales Act provides as follows:

> **7—Right of appearance**
>
> (1) Any counsel or solicitor appointed by the Crown to assist the commission may appear at the inquiry.
>
> (2) Where it is shown to the satisfaction of the chairperson, or of the sole commissioner, as the case may be, that any person is substantially and directly interested in any subject-matter of the inquiry, or that the person's conduct in relation to any such matter has been challenged to the person's detriment, the chairperson or sole commissioner may authorise such person to appear at the inquiry, and may allow the person to be represented by counsel or solicitor.
>
> (3) Any counsel or solicitor so appointed and any person so authorised or the person's counsel or solicitor may with the leave of the chairperson or of the sole commissioner, as the case may be, examine or cross-examine any witness on any matter which the commissioner deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by the commissioner.

The Victorian Act provides as follows:

> **15—Participation in Royal Commission inquiries**
>
> (1) A Royal Commission may allow, to the extent and in the manner determined by the Royal Commission—
>
> (a) any person to appear or otherwise participate in an inquiry; and
>
> (b) any person to be legally represented in an inquiry.
>
> (2) In allowing a person to appear or participate in an inquiry, or to be legally represented, the Royal Commission may have regard to the following factors—
>
> (a) whether the person has any direct or special interest in the subject matter of the inquiry;
>
> (b) the likelihood that the Royal Commission may make an adverse finding against the person;
>
> (c) the ability of the person to assist the Royal Commission in the inquiry;
>
> (d) the age of the person;
>
> (e) any other matter the Royal Commission considers relevant.

In my view it is helpful to provide some guidance for a commission on when representation should be permitted, and as to granting permission to a person's representative to cross-examine witnesses. A provision along the lines of the New South Wales section would be appropriate.

Recommendation number 30

The new Act contain provisions dealing with the right of persons before a commission to be represented and as to their right to cross-examine witnesses.

Private Sessions

All legislation has provision for a commission to sit privately. The Commonwealth and Victorian Acts go further and allow for some hearings in private to be protected and not to amount to evidence. Part 4 of the Commonwealth Act was inserted to give extra powers in this regard to the Royal Commission into Institutional Responses to Child Sexual Abuse and to regulate the treatment of information provided in such hearings.

I have considered whether a new Act should contain such provisions. Inasmuch as that Royal Commissions, and indeed the inquiries conducted pursuant to the *State Care Act*, were quite different from the generality of subject matter of commissions and involved a counselling element, and are unlikely to be replicated, I have formed the view that it is unnecessary. If there is, in the future, an inquiry requiring such specific provisions, it will probably demand legislation of its own in any event.

Provision for counselling of participants

Inasmuch as commissions frequently deal with subject matter which involves trauma or other human suffering, I consider it appropriate that a provision be inserted into the new Act requiring the Commissioner to set aside funds for the counselling of witnesses, counsel, staff of the commission and the Commissioner, both during the life of the commission and for a period after delivery of the commission's report.

Recommendation number 31

The new Act contain a provision requiring the allocation of some part of a commission's budget for counselling of participants in the inquiry.

Persons and bodies not examinable

The Victorian Act provides a list of persons or bodies who may not be the subject of inquiry by a Royal Commission or Board of Inquiry: s 123.

The list includes the Auditor-General, the Ombudsman, IBAC, a Crown Prosecutor and a judicial officer. Whether such a list is provided is really a matter of policy. If it is, then the provision should make clear that the immunity is only provided where the witness sought by a commission to be examined held one of the listed positions *at the time* of the events subject to inquiry. Experience in Victoria has shown that such a limitation is necessary.

Recommendation number 32

Any list of persons or bodies not liable to be examined by a commission contain a temporal element, limiting the embargo to the period in which a prospective witness held a position not liable to be the subject of inquiry.

APPENDICES

APPENDIX A: POWERS UNDER OTHER LEGISLATION

POWERS	SA	VIC (FOR RCs ONLY)	NSW	COMMONWEALTH
Appoint assistants	7 – refer matter to expert	9 – as necessary	12(2) – as deems proper	–
Enter and inspect land	10(a) – as required	28 – apply to magistrate for search warrant	–	4 – apply to Judge
Summons witness	10(b) 11A – by magistrate	17(1)(b)	8 18C – for contempt	2(1)
Inspect documents	10(d)	22	12(1)	6F(1)(a)
Require production of documents at hearing	10(c)	17(1)(b) – and things	11(1)(c) – and things	2(2) – and things
Require production of documents and things in advance of hearing	10(c) – not explicit	17(1)(a) – by a specified time	–	2(3A) – as specified
Require information in specified form	–	–	–	2(3C) – or statement
Issue warrant for attendance/production	11(3) – by Chair 11A(1)(b) – by magistrate	On application to Supreme Court	15 and 16 – if special powers given, by Commissioner	6B – by Chair

Table continues overleaf.

POWERS	SA	VIC (FOR RCs ONLY)	NSW	COMMONWEALTH
Administer oath	10(e)	21	9(1)	2
Sit in private	6	12 – conduct as considered appropriate	12B(2)	6OB – if prescribed by reg; and then not a 'hearing': 60C
Control proceedings	11(1) – penalize unco-operative witnesses	25 – expel disruptive persons	18C (if special powers given) can refer to Supreme Court	3 & 6 – conduct can give rise to offences
Forbid publication	16A	26	12B(1)	6D(3)
Publish	5 – as seen fit	35 – must deliver report	12A – can relevantly communicate 14B – release of report	6P – may publish information to certain bodies
Punish contempt	11(1) – chairman may commit to gaol or impose fine	42-52 – various offences created	18B (if special powers are given) refer only	6O(1) – is an offence 6O(2) – if RC is a Judge, can punish contempt in face of Commission
Refer question of law	–	41 – to Supreme Court	–	–

Numbers are section numbers of the relevant Acts.

APPENDIX B: PROTECTIONS UNDER OTHER LEGISLATION

	SA	VIC (FOR RCS ONLY)	NSW	COMMONWEALTH
Commissioner	16B(1) – same as Supreme Court Judge	39 – same as Supreme Court Judge 38 – not compellable regarding RC	6 – same as Supreme Court Judge	7 – same as High Court Justice
Witness	16B(2) – same as witness in Supreme Court 16 – statements etc. inadmissible in other proceedings against the witness	39 – same as witness in Supreme Court 40 – answers etc. inadmissible in other proceedings against the witness	11(3) – same as witness in Supreme Court 17(2) – answers etc. inadmissible in other proceedings against the witness	7 – same as witness in High Court. 6DD – answers etc. inadmissible in other proceedings against the witness
Counsel	16B(3) – same as counsel in Supreme Court	39 – same as counsel in Supreme Court	–	7 – same as counsel in High Court

Numbers are section numbers of the relevant Acts.

APPENDIX C: LIST OF PERSONS CONSULTED

Mr A.R. Bishop QC, Senior Counsel Assisting, Royal Commission of Inquiry in respect to the case of Edward Charles Splatt (SA)

Hon. Justice Christopher Bleby, former Solicitor-General for South Australia

Hon. Jennifer Coate AO, Royal Commissioner, Royal Commission into Institutional Responses to Child Sexual Abuse (Joint Commonwealth and States)

Hon. Paul Heath QC, Counsel Assisting in various inquiries (NZ)

Mr Chad Jacobi, Counsel Assisting, Nuclear Fuel Cycle Royal Commission (SA), Kapunda Road Royal Commission (SA) and Royal Commission into the Protection and Detention of Children in the Northern Territory (Don Dale Juvenile Detention Centre)

Hon. Narelle Johnson QC, Counsel Assisting, Royal Commission into the Abuse of Executive Power (WA)

Hon. Margaret McMurdo AC, Royal Commissioner, Royal Commission into the Management of Police Informers (Victoria)

Hon. Brian Martin AO QC, Senior Counsel Assisting, Royal Commission into Commercial Activities of Government and other Matters (WA)

Mr Simon Mount QC, Senior Counsel Assisting, Royal Commission into Sexual and Physical Assault in State and Church Care (NZ)

Ms Bonnie Russell, Solicitor, Nuclear Fuel Cycle Royal Commission (SA)

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APPENDIX E: ALL RECOMMENDATIONS

Recommendation number 1
The Royal Commission's power (and that of the second tier inquiry) to require production of books, papers, documents or records be supplemented by addition of the words: 'or other thing'.

Recommendation number 2
The power given to a Royal Commission in s 10(a) (and that of the second tier inquiry) to enter upon land be replaced by the power to apply to a magistrate for a search warrant.

Recommendation number 3
The Royal Commission (and the second tier inquiry) be empowered to require a person to provide information to the inquiry, in a form approved by the inquiry, including by statement verified by statutory declaration.

Recommendation number 4
The Act provide that a claim of privilege against self-incrimination is not a reasonable excuse for failing to comply with the requirement of a Royal Commission, except where relevant proceedings are on foot, that is, compliance with the Commission's requirement might tend to incriminate the witness in relation to proceedings for an offence or for the imposition of a penalty, which have been commenced but not fully disposed of.

Recommendation number 5
In tandem with abrogation of the privilege against self-incrimination there be a provision to the effect that statements and disclosures made to a Royal Commission by a person are not admissible against that person in criminal or civil proceedings, or other proceedings for the imposition of a penalty ('use immunity'), except in proceedings for an offence against the Act or proceedings brought against the person arising out of the person's conduct before the Commission. It should be made clear that the use immunity is not to apply to a document or a thing that was or could have been obtained independently of production to the Commission, or which was in existence prior to any request for its production by the Commission.

Recommendation number 6
The Act provide that a claim of legal professional privilege is not a reasonable excuse for failing to comply with a requirement of a Royal Commission.

Recommendation number 7
In tandem with abrogation of legal professional privilege there be a provision to the effect that statements made or documents produced by a person to a Royal Commission which are legally professionally privileged are not admissible against that person in other proceedings.

Recommendation number 8
The Act provide that a claim of public interest immunity is not a reasonable excuse for declining to comply with a requirement of a Royal Commission.

Recommendation number 9
All levels of inquiry be given the power to refer any question of law arising in an inquiry to the Supreme Court for decision.

Recommendation number 10
Royal Commissions (and the second tier inquiry) continue to be exempted from the ambit of the *Freedom of Information Act*.

Recommendation number 11
The powers given in s 16A be extended to enable a non-publication order in relation to any 'information' in any form in the possession of a Royal Commission (or the second tier inquiry) and it be made explicit that the order survives the completion of the Commission which made it.

Recommendation number 12
Royal Commissions (and the second tier inquiry) be given the power to seal evidence, information or materials where they are particularly sensitive, for example, dealing only with a Royal Commission, where the evidence given was subject to a claim of legal professional privilege, or given despite the privilege against self-incrimination, or is material with respect to which there was or might have been a claim for public interest immunity.

Recommendation number 13
The duty to deliver its official records to State Records within a certain period after the Royal Commission has delivered its report be imposed in the *Royal Commissions Act* and apply also to the second tier inquiry.

Recommendation number 14

A duty be imposed upon a Royal Commission (and the second tier inquiry) to deliver with its official records:

(a) a register containing details of all suppression orders made by the Commission, with a description of the general nature of the suppressed material, together with brief reasons for the order;
(b) a register containing details of all sealing orders made by the Commission, with a description of the general nature of the sealed material, together with brief reasons for the order.

Recommendation number 15

A right to review a non-publication order or a sealing order, after a Commission has delivered its report, be provided in the Act, allowing application either by the Manager of State Records, or a member of the public with an apparently genuine reason for making the application, to the Supreme Court of South Australia on the basis that:

(a) the reason for the order no longer applies; or
(b) the material has been published elsewhere; or
(c) the person or body whose interests were sought to be protected by the order consents to its revocation; or
(d) the public interest in exposure of the material now outweighs the reasons for the original order.

The Supreme Court be given power to vary or revoke any order of a Commission forbidding publication of, or sealing, material.

Recommendation number 16

The Act contain a provision to the effect of the proposed s 3A in the amending Bill, No. 21 of 2018, viz:

> This Act applies outside South Australia to the full extent of the extraterritorial legislative power of the Parliament.

Recommendation number 17

The *Royal Commissions Act* be replaced by a new Act, 'the Inquiries Act', providing for three tiers of inquiry as follows:

(a) Royal Commission, established by the Governor issuing a commission by letters patent under the Public Seal to a person or persons to inquire into and report on the terms of reference specified in the letters patent;
(b) Commission of Inquiry, established by the Governor in Council, by Order in Council appointing a person or persons to constitute a Commission of Inquiry to inquire into and report on the terms of reference specified in the order;
(c) Government Inquiry, established by the Premier (or a Minister with the Premier's approval) by instrument appointing a person or persons to constitute a

Government Inquiry to inquire into and report on the terms of reference specified in the instrument.

Recommendation number 18

The powers of the Royal Commission be expanded by:

(a) changes to the current powers as recommended in this Review, including:
(b) abrogation of:
    (i) the privilege against self-incrimination (except where relevant proceedings are on foot);
    (ii) legal professional privilege;
    (iii) public interest immunity; and
    (iv) the operation of statutory secrecy (unless the relevant statute expressly binds a Royal Commission)

Recommendation number 19

The powers of a Commission of Inquiry be limited to the current powers of a Royal Commission, as varied by changes recommended in this Review, but without any abrogation of the privileges against self-incrimination, legal professional privilege, public interest immunity or the operation of statutory secrecy.

Recommendation number 20

The powers and procedures of a Government Inquiry be based upon those provisions of the Victorian *Inquiries Act* which apply to a Formal Review, namely ss 99-106, the hallmarks of which are that there are no coercive powers, or the power to take evidence.

Recommendation number 21

No privative clause, either in the form of s 9 of the current Act or any other form, be included in the new Act.

Recommendation number 22

Royal Commissions and Commissions of Inquiry be given explicit power to eject from a hearing a person who disrupts it, and to use reasonable force in so doing.

Recommendation number 23

A series of offences dealing with failing to comply with a requirement of a Royal Commission or Commission of Inquiry be created along the lines of s 29 of the New Zealand Act.

Recommendation number 24
Royal Commissions and Commissions of Inquiry be given power to refer conduct of a person in relation to the inquiry to the Director of Public Prosecutions or the Attorney-General for prosecution.

Recommendation number 25
If the offences referred to in Recommendation 23 are to be summary offences then there be provision for costs to be awarded against the unsuccessful party.

Recommendation number 26
The power to punish for contempt of a Royal Commission be removed from the Royal Commissioner to the Supreme Court.

Recommendation number 27
A Commissioner be entitled to apply to the Supreme Court so that it may deal with the charge of contempt and be required to provide a certificate setting out the grounds of the application and the evidence in support, which certificate would be *prima facie* evidence of the assertions within it.

Recommendation number 28
The new Act provide that if the impugned conduct would constitute both an offence and a contempt, the person is not liable to be punished twice for that conduct.

Recommendation number 29
The *Ombudsman Act 1972* (SA), the *Remuneration Act 1990* (SA), the *South Australian Local Government Grants Commission Act 1992* (SA), the *Police Act 1998* (SA), the *Judicial Conduct Commissioner Act 2015* (SA), the *Freedom of Information Act 1991* (SA), the *Constitution Act 1934* (SA), the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), the *Maralinga Tjarutja Land Rights Act 1984* (SA), the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), and the *Aboriginal Lands Trust Act 2013* (SA) be amended so that the powers conferred or picked up are those of the second tier inquiry, rather than of the Royal Commission.

Recommendation number 30
The new Act contain provisions dealing with the right of persons before a commission to be represented and their right to cross-examine witnesses.

Recommendation number 31
The new Act contain a provision requiring the allocation of some part of a commission's budget for counselling of participants in the inquiry.

Recommendation number 32

Any list of persons or bodies not liable to be examined by a commission contain a temporal element, limiting the embargo to the period in which a prospective witness held a position not liable to be the subject of inquiry.