

To: **Commissioner Les McCrimmon, Australian Law Reform Commission (ALRC)**

Re: **Royal Commissions Inquiry**

In assisting ALRC's thinking, Civil Liberties Australia (**CLA**) focuses on:

- overviewing the role of investigating administration/governance in Australian society, and
- a system that would be more useful to Australian society in 2025 or 2050.

In addressing the key elements of this inquiry, CLA is mindful of the major issues surrounding commissions, inquiries and the like which were identified at ALRC's public consultations:

- the current predominance of lawyers in a process representing ordinary Australians; and
- the influence the media has on investigatory bodies (commissions, inquiries and the like).

### **Overview:**

There is a mis-match and a discontinuum in Australia between administration and governance of society, and ways of investigating whether anyone has breached society's written (or, at the time, unwritten) rules.

Any investigative body acts as a representative of individual members of the community, and of the community in total. This is so whether the 'body' is one person, or a panel. No individual or group should have a disproportionate influence on such important elements as commissions and inquiries to the extent that they - the individuals or groups - sway the way these bodies operate.

Undoubtedly, commissions and inquiries now operate far too litigiously and adversarially because of the dominance of lawyers; equally, the way commissions and inquiries operate is dynamically influenced by media reporting and promotion. People at ALRC consultations throughout Australia were overwhelmingly of these views, apparently.

### **Principles: fundamentals for the future**

Whatever the body, it acts for the people. The body's inquiries must be public, and its findings must be publicly disclosed...to the people.

Currently, in all cases – coronial inquests through inquiries to royal commissions – outcomes are patchy because there is no requirement on the commissioning authority to act on the findings or recommendations, or to report on why there will be no action.

For the people to have confidence in the system, the process must be public, the findings must be publicised and the recommendations acted on (or good reasons for not doing so explained in full).

## **Inquests:**

At the ‘bottom’ end of Australian society’s process for self-administration, there are inquests held by coroners. These generally inquire into the cause(s) of death, make a determination and often recommendations surrounding issues raised and/or identified during the inquiry process.

## **Inquiries:**

The middle level of societal administration involves inquiries. Generally, these are convened at state\* or federal level by the relevant government.

*\* for the purpose of this paper, ‘state’ includes ‘territory’*

## **Royal commissions:**

At the ‘upper’ level, when an issue involves many (or particularly horrific or inexplicable) deaths, major cost or detriment to community/nation, or issues of complex and competing philosophical contention, royal commissions are called by state or the federal governments.

## **Structure:**

There is a mis-match between how normal investigating bodies operate, and how Australia operates administratively. The nation has three levels of administration:

- local government
- state government
- federal government

Therefore, a system that reflects ‘the people’ would appear to be better structured if it operated at three ‘levels’.

## **Lawyer-based review:**

At all levels, the investigation processes are lawyer-founded and generally run by and ‘assisted’ by lawyers. Investigation is by police officers at lower levels of complexity, assisted by lawyers and professional/technical experts as complexity increases.

Being a lawyer is not a precursor qualification for election to the various governing levels of governing (though lawyers are, of course, very well represented – disproportionately to percentage of population). However, lawyers over-dominate the investigatory administration/governance systems.

When reviewing society’s investigation processes and mechanisms completely, as the ALRC has invited CLA to do, a number of things seem crystal clear:

- function should follow administrative level and form (or vice versa) wherever possible for ease of administration and closeness to problem/source of solution;
- there should be a progression of complexity (and time/cost), from local community up to nation;
- as complexity rises, so the experience level of those involved in decision-making should rise;
- members of society other than lawyers should be (at least equally with lawyers) involved in societal areas of concern or issues that are not strictly legally-based;
- where any individual or group is the subject of the investigation, that individual's trade/profession (including lawyers or police officers) or common group should not be involved in any of the investigatory or decision making/taking processes; and
- the experience of being involved in such important societal processes is a national asset, which should be valued, encouraged and built on over time; and
- the most crucial element of the investigations at any level should be - as representative(s) of the public – reporting to the public in full as the default, with any non-complete reporting being the exception; and
- the commissioning body should act completely and wholly on the decisions/findings (or the commissioning body should report, and justify, in thorough detail why it is not so doing).

In an attempt to build the skeleton of a system which reflects the above, CLA proposes that, from coronial matters to royal commissions, there be a continuum.

### **Nature of the levels**

Currently, coronial processes are the worst-funded, least-resourced enclaves of the societal system of administration and governance. Typically, inquests of any complexity take two years to finalise; they are conducted by legally-trained people at magistrate level helped by a harried, usually under-manned staff assisted by police who may consider themselves divorced from mainstream police activity. Coroners and coronial inquests often occupy tucked-away enclaves, and most of what occurs is outside the ken of the public.

At the other end of the scale, royal commissions are one-offs, usually funded without limit, able to call on the best available legal and investigative brains, housed in prime rented premises, and subject to daily media coverage for their length of about 6-9 months, on average. Inquiries occupy a place between, but usually towards the costly end of the scale, to a similar timeframe.

'Big issue' matters – the subjects of inquiries and commissions – are where state and federal governments concentrate, usually aided by a media-driven focus.

The reality is that most of what affects Australians – the people – in a day-to-day sense is played out in coroners' courts (and in the council chambers) of suburbs, towns and cities throughout the nation. Yet the areas that most influence people's daily lives are subject to very limited funding, relatively poorer administrative and legal assistance, much less media scrutiny and virtually no comparative analysis and action to learn major and national lessons from individual, isolated events occurring sometimes thousands of kilometres apart.

Just simply at the coronial level, there is need for major reform throughout Australia in how we – the people – benefit from sparks of insight and wisdom dimmed to extinction by distance and a state or territory border across which such fires of the imagination cannot leap.

*(We appreciate that Local Government and State administration/governance is beyond the ALRC’s formal brief in this inquiry, but the issue of how the entire system of Australia’s societal investigations is pertinent to ensuring that the ‘top’ level is appropriate and correctly pitched for the function it should perform. For example, the High Court of Australia could not function without a system of magistrates and district, federal and supreme court judges below it acting as they do).*

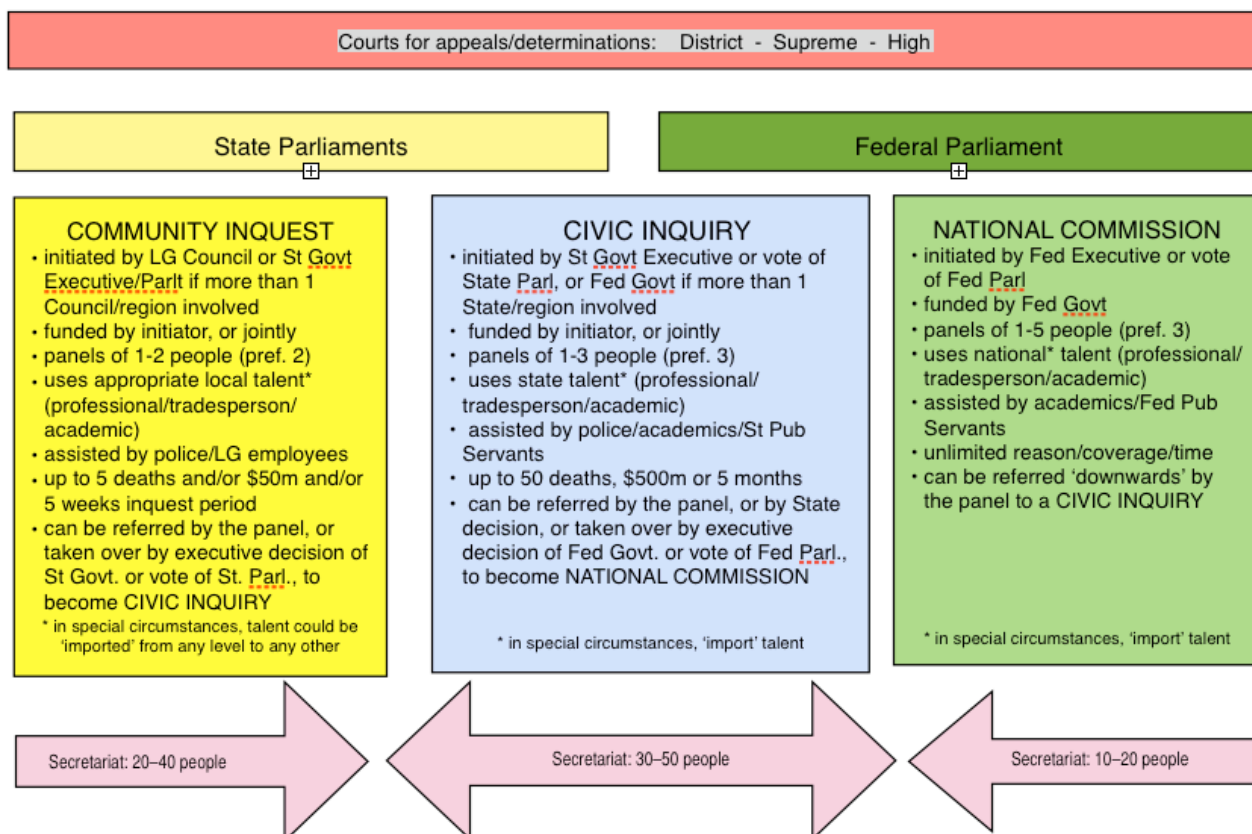
CLA sees the ideal system as having three levels, integrated and forming a continuum and whole:

## Community Inquest - Civic Inquiry - National Commission

Over them would be the sovereignty of parliaments: the State Parliament able to take action within its jurisdiction for any other separate or different investigation it wished, and the Australian Parliament likewise. Appropriate courts would provide appeal mechanisms at the appropriate level.

We envisage a system of using talented lawyers and non-lawyers as both staff to the three levels of investigative bodies, and as the ‘panellists’ or ‘board members’ sitting in judgement. Quite quickly, a level of experience and special expertise would build up.

To explain the concepts, and how the various elements would interact, a diagram is useful (note, in the diagram, and in the description following, we scope the bare elements only - we would be happy to work on fleshing out more detail should our base ideas meet with favour):



The secretariats would be drawn initially from existing staff in areas such as coroners courts and state and federal attorney-general's departments who deal with relevant matters now.

Some additional staff may be needed in an initial phase; additional and temporary staff may be needed when there is heavy workload at two or more levels simultaneously.

It is envisaged that permanent, experienced staff would move 'up' the hierarchy, with temporary or part-time staff filling in from the lower levels up.

### **Competition between public/private sectors**

The three levels of investigating bodies could work for the private sector, and might – as well – develop additional expertise in mediation/arbitration, to compete as government-based authorities or semi-government authorities with private sector providers.

Private sector mediators/arbitrators could also compete for positions on the various investigatory bodies, or tender for particular investigations.

### **Community Inquiries:**

A community inquest could be initiated by a Local Government Council, or by the State Government. Whoever initiates the inquest, pays.

It would consider local issues involving usually one only local area or up to, say, three. Notionally, a limit on the extent of issues to be decided would be set: say up to 5 deaths and/or \$50m at issue. Also, a time limit of, say, 5 weeks would be imposed on the length of community inquiries.

Hearings would be before panels of normally 2-3 people. If 2 or more, at least one would not be a lawyer, and at least one would be of different gender. If 2 or more, one would be from a profession and/or one a trade and/or academe (or one with an occupation, and one not working full or part-time).

Initially, a panel of 1 to sit on 'coronial' issues could be adopted until a cut-off date of, say, 2020 or 2025.

Any assistance required by the panels would be provided by local police and/or Local Government employees and/or local academics, as well as the Community Inquest secretariat.

At any time during a hearing, the sitting panel could refer the matter to a Civic Inquiry (the next stage up in the investigative process).

Equally, the State Government executive (or a vote of State Parliament) could decide to take over the issue and escalate it to a Civic Inquiry, thus taking over management of the process, being responsible for the costs, and constituting a new panel which may or may not include some or all of the members of the original panel.

## **Civic Inquiry**

As outlined in the diagram, the broad operating principles of the civic inquiry would be in line with those of a community inquest, but a step up in dimension. For example, the matters covered could include, say, up to 50 deaths, \$500m at issue, or be expected to last no longer than 5 months.

It could be assisted by police, academics or State Public Servants, or the officers of any of the three secretariats.

A civic inquiry could be initiated by one state or a number of states together. It could be referred upwards into a National Commission (see later) by the panel, or be taken over and made into a National Commission by a decision of the State (Executive or Parliamentary vote), or by a Federal Executive or Australian Parliament vote. Whoever decides, pays. The sitting panel may or may not comprise part or all of the National Commission panel.

A civic inquiry could also downgrade the issue into a Community Inquest by panel decision.

## **National Commission**

A National Commission could be initiated by the Federal Executive or a vote of the Australian Parliament.

It would cover issues without limit as to reason or scope or funds.

The panel could downgrade the issue to a Civil Inquiry.

## **Method of operation**

All bodies – inquest, inquiry, commission – would operate to a standard set of ‘rules’ governing evidence, protection of witnesses, reporting requirements, etc. These would be the rules that come out of the current ALRC inquiry process.

## **Advantages:**

The proposed scheme would:

- frame rules for establishing, holding, and reporting on societal investigations;
- provide a growing/developing national resource for investigation at all levels;
- broaden decision-making on import societal issues beyond just lawyers;
- educate and make aware a much wider cross section of the community;
- create skilled and transferable secretariat groups, able to operate where/when needed;
- encourage a career path for people in this important line of work;
- enable the selection of the right body to do the appropriate work;
- create flexibility to move and change the size/scope of the process, once under way;
- apportion costs where appropriate;

**Recommendation:**

CLA believes a proposal similar to the above should be included in the ALRC's report for consideration by COAG and SCAG, the forums of the Prime Minister/Premiers and of the Attorneys-General, with a view to developing an implementable scheme by 2012.

**Media:**

The media is itself a problem when it comes to investigatory bodies. CLA strongly believes in the need for openness, and in the media's right to report everything that occurs in public in inquests, inquiries and commissions.

However, the media has no licence to, and no place to, turn the gathering of news and the showing/reporting of it into a circus. Most people will recall seeing, on TV or in newspaper photos, the circus-like scenes of jostling by a media pack when witnesses approach a commission or inquiry building. The 'news' becomes the jostling and the media gauntlet, rather than what occurs inside the building or the substance of the evidence and findings.

CLA proposes a compromise solution (subject to further discussion with media outlets as to which is the 'reporting day'):

- media – including online media – can attend all open sessions, and are entitled to a reasonable space allocation within the building where the investigation is being held;
- media – including online media – are not permitted to film/photograph arrivals/departures to/from inquests, inquiries and commissions;
- all media are entitled to report on one day only (Sunday, subject to further discussion with media outlets) on the week's events in the inquest, inquiry or commission;
- reporting must be balanced as to the evidence heard during the week, and previously; and
- the media – including online media – are subject to refusal of permission to continue to cover the individual inquest, inquiry or commission; and
- the media – including online media – are subject to the payment of fines for acting in breach of the inquest, inquiry, commission laws/regulations.

### **Specific questions asked in the ALRC issues paper:**

**Q3, 1:** Judicial review should be available to an appropriate court: please see the CLA Model.

**Q5, 1-6:** CLA supports maximum openness. The government should be required to report, one month before any election, the recommendations/implementation from National Commissions held in the current and preceding parliamentary term, including noting those under way.

**Q 6, 1-9:** Maximum openness and reporting, including accounting for funds spent. Commissioners should be able to order cost payments as appropriate.

**Q7, 1-10:** All powers and restrictions normally in place in magistrate's courts should be available to all forms of investigatory body. Any relevant person should be able, with the agreement of the panel (ie, commissioner) to refer a fundamental question in dispute to an appropriate body for resolution, including to the appropriate court.

Answering the overall thrust of the questions, rather than the specific items, CLA believes that the rights of the individual should be given precedence, where possible. We comment that, since 11 September 2001, the rights of the individual have, in general in Australia and elsewhere, been subjugated to new-found and extended rights of the state in the name of the fear of terror. CLA believes that the ALRC is in a unique position to start to re-balance the justice pendulum back towards the centre. In fact, in this particular inquiry, the ALRC can give a clear lead and direction to those areas of the federal government, and to the state governments, where expediency is being allowed to overcome the traditional rule of law.

**Question 8-9:** applying statutory privileges not presently recognised by Royal Commissions.

The privileges, which are beyond the common law but are legislated for in judicial proceedings in the Evidence Act (both Commonwealth and the State and Territory), include: journalist's privilege, religious confessions privilege and exclusion of evidence of settlement (doctor's privilege is recognised in some States and the NT but is not in the Uniform Evidence Act).

These privileges are qualified, containing a balancing test whereby the court determines the applicability of the privilege by weighing the competing interests on a case by case basis. Presently, not all jurisdictions recognise these privileges.

However, in the event of the *Uniform Evidence Act* being adopted by those jurisdictions yet to do so, there would be a more persuasive argument for commissions and other inquiries to recognise these statutory privileges.

CLA advocates for the recognition of the statutory privileges found in the *Uniform Evidence Act* by commissions and other inquiries. Commissions have strong powers to adduce evidence; however, the correlative protections of civil liberties are recognised by the defence of reasonable excuse. Although commissions are not bound by the rules of evidence and are not judicial bodies, privileges apply as a substantive doctrine wherever the disclosure of information may be compelled. Furthermore, the *Royal Commissions Act* recognises the defence of reasonable excuse. CLA advocates that the statutory privileges found in the *Uniform Evidence Act* be recognised by commissions and other inquiries as providing grounds for the defence of reasonable excuse.

These privileges are not absolute; rather they are qualified. The balancing test provides a device whereby the competing public interests can be weighted. The inquiry should take into account the relevance and necessity of the sought information, whether all reasonable alternative means of obtaining the information have been exhausted before applying the balancing test and only compel disclosure where as an option of last resort.

Although CLA is wary of secret hearings, there may be situations, such as compelling disclosure by journalists, clerics (and other groups in exceptional circumstances), where *in camera* hearings and orders suppressing the publication of information may provide a means whereby the information may be adduced whilst protecting the liberty of individuals and their professional ethical obligations.

Statutory privileges provide a check and balance on the coercive powers of commissions and other inquiries. By protecting individual's liberties, these investigatory bodies enhance their credibility and mitigate the 'star chamber' argument.

### **Conclusion:**

We stress that, in our opinion, any system or structure put in place for Commissions should apply to other relevant bodies, as outlined in the CLA Model.

The ALRC, with this inquiry, has the chance to set in place the foundation stones for investigations of all types throughout Australian society. We urge the ALRC to recommend a system that is capable of being applied equally at community, civic and national levels.

**CLA** Civil Liberties Australia  
Box 7438 Fisher ACT Australia  
Email: [secretary@cla.asn.au](mailto:secretary@cla.asn.au)  
Web: [www.cla.asn.au](http://www.cla.asn.au)

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Lead author: Bill Rowlings; associate author: Rhys Michie*