

FROM FACT FINDING TO TRUTH-TELLING: AN ANALYSIS OF THE CHANGING FUNCTIONS OF COMMONWEALTH ROYAL COMMISSIONS

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Royal commissions are a tool for the executive government to inquire into matters of public importance. A new type of royal commission has emerged at the federal level as a result of the Royal Commission into Institutional Responses to Child Sexual Abuse – the truth-telling inquiry. Several more royal commissions have been established with an explicit truth-telling function. Recent legislative changes to the Royal Commissions Act 1902 (Cth) allowed for private sessions, cementing a truth-telling function in the legislative framework. The function of a truth-telling royal commission is to aid people who have suffered damage or injury in a process of reconciliation or restorative justice. In this article, I analyse the historical development of the powers and functions of Commonwealth royal commissions in statute and at common law in light of a truth-telling function. If this trend continues, truth-telling royal commissions may develop into an important symbol of reconciliation and justice.

I INTRODUCTION

Royal commissions have been used for hundreds of years as a tool of inquiry by the executive government. In Australia at a federal level, the Governor-General establishes royal commissions on the advice of the government via the Federal Executive Council. Historically, royal commissions have been set up for two main reasons: to inquire into a complex area of policy and provide advice to solve those complex problems; and to investigate a particular incident or event in order to establish facts and assign responsibility for wrongdoing.¹ However, more recently, a third type of royal commission has begun to emerge at the federal level – the truth-telling inquiry. The focus of this inquiry is not so much providing advice on an issue of policy or assigning responsibility for an incident, but to provide a process for people to share their experiences with the inquiry members in a process of national reconciliation.

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1 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (Report No 111, October 2009) 57.

The imputed success of the Royal Commission into Institutional Responses to Child Sexual Abuse ('Child Abuse Royal Commission') in raising public awareness about institutional child sexual abuse and promoting policy and legislative reform² marked the beginning of a truth-telling style royal commission. The terms of reference of the Royal Commission required it to, among other things, have regard to

the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs.³

The defining characteristic of truth-telling inquiries is that they value the experiences of those who have suffered abuse and allow them to engage in a cathartic healing process. Those who have experienced abuse typically have low levels of trust in public institutions through the inaction of government, so royal commissions are a way to re-engage and reconcile the disillusioned.⁴ In response to the need to facilitate these experiences, the *Royal Commissions Act 1902* (Cth) ('*Royal Commissions Act*') was amended to allow the Child Abuse Royal Commission to make use of private sessions.⁵

In this article, I will show how truth-telling is well-suited to the capabilities of royal commissions. The development of the functions and powers of royal commissions in Australia give them a valuable set of tools that can assist the truth-telling role. The prestige and perceived independence of the highest form of executive inquiry can help to restore public trust in government institutions and help to reconcile the past abuses with future actions. As this has so far been a federal trend, I have restricted my analysis to federal royal commissions. I also note that Australian royal commissions are different in nature to royal commissions in other Commonwealth countries, thus, this article is limited to Australian royal commissions. This restriction is not intended to understate the impact of other inquiries that have contributed to the development of the truth-telling function. The impact of these inquiries will also be examined in the context of how they have affected Commonwealth royal commissions.

In Part II, I trace the historical role of Commonwealth royal commissions and their evolution through the common law and statute. I analyse the powers and functions of royal commissions with reference to this historical backdrop. In Part III, I analyse the existing types of royal commissions: inquisitorial inquiries and policy advisory inquiries, drawing on the legal and historical strands from Part II. In Part IV, I introduce the truth-telling function, comparing it to the other two functions and demonstrating how the evolution of the functions of the royal commission have led it to take on this new form. Finally, I conclude with some observations of what the truth-telling function might look like in the future.

2 Katie Wright, Shurlee Swain and Kathleen McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1, 7.

3 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013) 3.

4 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 1, 29 ('*Child Abuse Royal Commission*').

5 *Royal Commissions Act 1902* (Cth) pt 4.

II THE HISTORICAL ROLE OF ROYAL COMMISSIONS

Royal commissions and other types of public inquiries have long been used by the Crown to inquire into matters of public importance. In the United Kingdom, the use of royal commissions has been traced back to William the Conqueror in the 11th century, where royal commissioners were sent to compile land title information for inclusion in the Domesday Book.⁶ The flexible and adaptative nature of a royal commission, with its various wide ranging powers, has meant that it has remained popular amongst governments to inquire into issues that existing committees or civil service departments lacked the expertise or resources to undertake. Similarly, George Gilligan has observed that the use of royal commissions during the Tudor and Stuart era ‘reflected attempts by the Crown to centralise power under the royal prerogative’.⁷

Australia adopted the use of royal commissions as a method of inquiry relatively early: the colony of Victoria passed legislation to allow for royal commissions with coercive powers following the Eureka Stockade in 1854.⁸ The Commonwealth Parliament enacted the *Royal Commissions Act* as one of its first pieces of legislation after Federation. Leonard Hallett argues the early uptake can be attributed to the eagerness of colonial Governors to impose military-like mechanisms and that commissions of inquiry evolved from those military courts.⁹ Since Federation, 139 Commonwealth royal commissions have been established.¹⁰ The enduring popularity of royal commissions in Australia has cemented its role as a powerful method of inquiry for governments.

A Royal Prerogative

As a tool of the executive government, royal commissions form part of the royal prerogative and the ability of the executive to set up such inquiries is recognised at common law. In Australia, it has been argued that the power of inquiry is a necessary function of the executive in order to inform itself of things necessary to carry out its functions. In *Huddart, Parker & Co Pty Ltd v Moorehead*, O’Connor J discussed the necessity of such methods of inquiry for the proper discharge of the executive function:

There are cases also in which official inquiries as a preparation for executive action may involve the necessity of exercising *quasi*-judicial functions – cases in which it is expedient to hand over to executive officers the ascertainment of facts upon which executive action is to be taken, such, for instances, as misconduct in an officer,

6 Hugh M Clokie and J William Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford University Press, 1st ed, 1937) 28.

7 George Gilligan, ‘Royal Commissions of Inquiry’ (2002) 35(3) *Australian and New Zealand Journal of Criminology* 289, 290.

8 Australian Law Reform Commission (n 1) 52.

9 Leonard A Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Law Book Co, 1982) 19.

10 ‘Royal Commissions and Commissions of Inquiry’, *Parliament of Australia* (Web Page, 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions>.

military or civil, the nature and foundation of claims against the Commonwealth, the value of property and the amount of compensation to be paid where the Government has exercised its right of expropriation. The finding of the relevant facts in such cases by some such method is essential to the ripening of matters for executive action.¹¹

The ability to inquire into matters for the purpose of administration and informing the executive is therefore ‘an essential part of the equipment of all executive authority’.¹² This power was wide ranging: Dixon J in *McGuinness v Attorney-General (Vic)* observed that Sir Harrison Moore had concluded ‘at common law there was no limitation upon the executive power of inquiry even though the matter inquired of were of a private nature or some matter of offence or right capable of being brought to adjudication’.¹³

However, even with an apparently unlimited power to inquire into a wide variety of subject matters, the common law power to hold inquiries is not without limits. The inquiry must be held for a proper purpose of government, which is what distinguishes an inquiry by an ordinary person from an inquiry established under royal prerogative. In *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation*, Brennan J wrote:

A commission to inquire and report cannot be issued in exercise of the prerogative or of the statutory power merely to satisfy an idle curiosity: what distinguishes a prerogative commission from an inquiry which any person is at liberty to make is that it is an inquiry on behalf of the executive government for a purpose of government.¹⁴

Accordingly, purposes which lie outside a purpose of government may not serve as the basis for a royal commission.

Truth-telling is arguably a purpose of government. As will be discussed further in this article, an essential component to truth-telling is institutional acknowledgement and support by government, which is aimed at reconciliation between segments of the population. Seeking the truth of past atrocities, particularly those atrocities with government sanction or involvement, falls within this definition of inquiry.

The common law power to hold inquiries does not extend to coercive powers, such as the power to compel attendance of witnesses, require the production of documents, or issue of warrants.¹⁵ Consistent with the doctrine of separation of powers, it is necessary that each branch have some powers of investigation to carry out their functions: the executive government, as discussed above; the legislature reviews legislation in the form of committees; and the judiciary to be able to adjudicate conflicts and to administer justice. For an inquiry to have the same powers as a court exceeds the bounds of the prerogative.

Similarly, a royal commission may not interfere with or usurp the operations of the courts or the judicial branch of government.¹⁶ Thus, any interference with

11 (1909) 8 CLR 330, 377–8 (emphasis in original).

12 Ibid (O’Connor J).

13 (1940) 63 CLR 73, 101.

14 (1982) 152 CLR 25, 156.

15 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83 (Latham CJ), 99 (Dixon J).

16 *Clough v Leahy* (1904) 2 CLR 139, 154 (Griffith CJ).

the administration of justice could be contempt of court and is unlawful.¹⁷ A commission appointed to, for example, inquire into the guilt of a person might supersede the ordinary course of justice, without affording to that person the rights and protections associated with an ordinary judicial proceeding.¹⁸ The powers of inquiry under the royal prerogative cannot interfere with the due course of the administration of justice.¹⁹

It might be the case that these two powers are not required for a truth-telling royal commission. The purpose of a truth-telling commission is aimed at transitive or restorative justice, and very often, such as in the South African Truth and Reconciliation Commission, perpetrators of crimes and abuses that give evidence before the commission may be granted amnesty from prosecution and civil suits. This reconciliatory approach does not require any legal coercion, but simply the institutional legitimacy of a governmental inquiry established by law. However, the lack of any coercive powers may itself undermine the institutional legitimacy of a commission, as it could be viewed as lacking any substance.

B The Royal Commissions Act 1902 (Cth)

Soon after Federation, the *Royal Commissions Act* was passed to support the establishment of royal commissions. The executive power to establish such commissions of inquiry is supplemented by the *Royal Commissions Act*. Section 1A of the Act reads:

Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor-General, to make or authorise any inquiry, or to issue any commission to make any inquiry, it is hereby enacted and declared that the Governor-General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons, as he or she thinks fit, requiring or authorising him or her or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.²⁰

Although not explicitly extinguishing the power of the executive to hold their own commissions of inquiry, it allows the executive use of a statutory framework. In addition, it confers additional powers on royal commissions, most notably coercive powers. Apart from the first royal commission,²¹ each subsequent Commonwealth royal commission has been established under the *Royal Commissions Act*.

The *Royal Commissions Act* confers on royal commissions a wide range of coercive powers, including the power to:

17 Ibid 161 (Griffith CJ).

18 *Hammond v Commonwealth* (1982) 152 CLR 188, 198 (Gibbs CJ).

19 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 85 (Latham CJ).

20 *Royal Commissions Act 1902* (Cth) s 1A.

21 The Royal Commission Appointed to Inquire into and Report Upon the Arrangements Made for the Transport of Troops Returning from Service in South Africa in the S.S. 'Drayton Grange', which was established prior to the passage of the *Royal Commissions Act 1902* (Cth).

- Issue summonses to witnesses to give evidence;²²
- Require witnesses to produce documents;²³
- Require witnesses to give evidence under oath;²⁴
- Apply for a search warrant;²⁵ and
- Issue an arrest warrant for a witness failing to attend a hearing in response to a summons.²⁶

In addition, the *Royal Commissions Act* creates several new criminal offences for refusing to appear or answer questions when appearing before a royal commission.²⁷ It also specifically abrogates several rights and privileges, such as legal professional privilege²⁸ and the right against self-incrimination.²⁹ These powers are ostensibly given to royal commissions to aid in their investigations, particularly in investigating matters which relate to potential criminal misconduct or other forms of impropriety. As these powers are coercive in nature and abrogate rights normally granted in a judicial criminal proceeding, it is particularly important that the establishment of a royal commission not interfere with the proper administration of justice.

Importantly, the *Royal Commissions Act* also explicitly states that statements made by witnesses in the course of giving evidence to the commission are inadmissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, State, or Territory.³⁰ This provision is important as it ensures that witnesses are not prejudiced in any judicial proceeding by the abrogation of the right against self-incrimination and legal professional privilege, while also ensuring that royal commissions are equipped to properly investigate a matter. However, it remains unclear whether such evidence can be used in administrative matters.³¹

In *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd*, the Privy Council held that the *Royal Commissions Act*, which purported to confer upon royal commissions coercive powers such as the power to compel answers to questions and to order the production of documents, was outside the legislative competence of the Commonwealth Parliament and therefore void.³² However, in subsequent decisions of the High Court, this decision has been interpreted to restrict the

22 *Royal Commissions Act 1902* (Cth) s 2(1)(a).

23 *Ibid* ss 2(2), 2(3A), 2(5).

24 *Ibid* s 2(3).

25 *Ibid* s 4.

26 *Ibid* s 6B.

27 *Ibid* ss 3, 6, 6FA.

28 *Ibid* ss 6AA, 6AB.

29 *Ibid* s 6A. See also *Sorby v Commonwealth* (1983) 152 CLR 281.

30 *Royal Commissions Act 1902* (Cth) s 6DD.

31 See, eg, *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630. Although section 6DD of the *Royal Commissions Act* does not preclude the use of evidence to the disadvantage of the witness in an administrative matter, it was argued that this was prohibited by section 6M, which prohibits causing disadvantage to a person on account of that person having appeared as a witness before or given evidence to a Royal Commission. The High Court rejected this argument: at 648 [59].

32 (1913) 17 CLR 644, 656 (Viscount Haldane LC for the Court).

coercive powers to operate only with respect to subject matters which are within the legislative competence of the Commonwealth.³³

The Royal Commissions Amendment (Private Sessions) Bill 2019 was introduced into the House of Representatives on 25 July 2019. The Bill received assent on 13 September 2019. The effect of the Bill is to give the power to hold private sessions to any royal commission prescribed in subsequent regulations, expanding the operation of private sessions from just the Child Abuse Royal Commission to allow any royal commission prescribed by regulation to use it.³⁴ The protections for private sessions include making it an offence to disclose information given at a private session without consent except for the purposes of the royal commission. This Bill was ostensibly introduced to allow for greater use of private sessions, following calls for it to be expanded to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission'). Truth-telling royal commissions will likely expand in use in the future as a result.

Royal commissions in Australia, then, are equipped with an extensive range of powers to be able to inquire into matters of significant public importance. The powers arising from common law developments and the legislative framework point to the purpose of a commission of inquiry: to investigate and report on matters of significant public interest and complexity. There are, however, limitations on the powers of royal commissions. They must be set up for a proper governmental purpose (although there has not been much judicial consideration of what a proper purpose is), restricted to subject matters within the legislative competence of the Commonwealth Parliament, and cannot interfere with the administration of justice.

C Characteristics of Royal Commissions

To better analyse the purposes and types of royal commission, it is useful to define the characteristics of a royal commission that differentiate them from other types of inquiry. Analysing the defining features will help to characterise the types of issues that are the subject of royal commissions. In summary, the relevant intrinsic legal features include:

- Prestige;
- Independence and impartiality; and
- Coercive powers.

These features would aid a royal commission in its truth-telling function.

Firstly, royal commissions are associated with a high level of prestige. Royal commissions are appointed by the Governor-General or state Governors through letters patent, representing the Crown. They perhaps have the highest profile of any type of executive inquiry and are reserved only for the most important public issues of the day.³⁵ As such, governments often establish royal commissions to

33 *Lockwood v Commonwealth* (1954) 90 CLR 177, 183–4 (Fullagar J).

34 *Royal Commissions Amendment (Private Sessions) Act 2019* (Cth) sch 1, inserting *Royal Commissions Act 1902* (Cth) s 6OAB.

35 Scott Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them?' (2006) 65(3) *Australian Journal of Public Administration* 28, 34 ('Royal Commissions in Australia').

signal to the community that they are taking an issue seriously.³⁶ Thus, royal commissions can have a legitimising effect on the public, as an inquiry may validate a community's interest in the subject matter as well as the government's response to that issue. The legitimising feature lays the groundwork for the recent development of the truth-telling function of royal commissions. The converse is also true: governments should be wary of appointing too many royal commissions to avoid tarnishing its prestigious reputation. The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union faced this problem, as there was difficulty finding a suitable commissioner due to the perceived political motivations of the Commission.³⁷ More recently, the Royal Commission into Trade Union Governance and Corruption ('Trade Royal Commission') was criticised as being a purely political exercise on the part of the Coalition Government, with the impartiality of Commissioner Dyson Heydon being questioned after he accepted an invitation to speak at a Liberal Party fundraiser while still a Commissioner.³⁸

A related concept to prestige is the symbolic importance of a royal commission and its resonance with the public. Many politicians and members of the public routinely call for the establishment of a royal commission into specific matters, without necessarily considering the particular legal powers of a royal commission and whether they are particularly suited to the proposed issue. To illustrate, in the latter half of 2020, there were calls for royal commissions into veteran suicides,³⁹ the Robodebt scheme,⁴⁰ media organisations owned by Rupert Murdoch,⁴¹ the dairy industry,⁴² and universities.⁴³ This phenomenon demonstrates the symbolic importance of the royal commission as a tool for exposing alleged corruption or maladministration and the high regard that Australians hold for royal commissions.

Secondly, royal commissions are perceived as independent and impartial to the government of the day.⁴⁴ As a result of its association with the Crown, it is often seen as more independent than other kinds of executive inquiry.⁴⁵ To maintain

36 Frank Burton and Pat Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State* (Routledge and Kegan Paul, 1979) 34.

37 Prasser, 'Royal Commissions in Australia' (n 35) 34.

38 Anthony Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *University of New South Wales Law Journal* 1336, 1357.

39 'Mother of Dead Veteran Joins Labor, Jacqui Lambie in Call for Royal Commission into Military Suicides', *ABC News* (online, 1 December 2020) <<https://www.abc.net.au/news/2020-12-01/mother-of-veteran-rejects-royal-commissioner-into-suicides/12938520>>.

40 Darren O'Donovan, 'The "Problem" Is Not "Fixed". Why We Need a Royal Commission into Robodebt', *The Conversation* (online, 23 June 2020) <<https://theconversation.com/the-problem-is-not-fixed-why-we-need-a-royal-commission-into-robodebt-141273>>.

41 Amanda Meade, 'Kevin Rudd Petition Seeking Royal Commission into Murdoch Media Nears 500,000 Signatures', *The Guardian* (online, 3 November 2020) <<https://www.theguardian.com/media/2020/nov/03/kevin-rudd-petition-seeking-royal-commission-into-murdoch-media-nears-500000-signatures>>.

42 Bryce Eishold, 'Dairy Groups Call for Royal Commission to Improve Transparency', *The Canberra Times* (online, 21 September 2020) <<https://www.canberratimes.com.au/story/6933493/dairy-groups-want-royal-commission/?cs=14264>>.

43 Judith Sloan, 'Our Universities Would Fail Any Basic Ethics Test', *The Australian* (online, 1 September 2020) <<https://www.theaustralian.com.au/commentary/our-universities-would-fail-any-basic-ethics-test/news-story/fda781a1eebd8ce796a975d8fb91f682>>.

44 Australian Law Reform Commission (n 1) 54–5.

45 Prasser (n 35) 31.

this independence, governments often appoint commissioners from outside the executive government. Typically, this has led to the appointment of many judges and former judges.⁴⁶ The judges' legal experience, their own reputation for impartiality, and the fact that royal commissions have quasi-judicial coercive powers of investigation contribute to this perception.⁴⁷ On the other hand, an excessively legalistic investigation may obscure the underlying issues and result in a missed opportunity to fully address other perspectives.⁴⁸

Consequently, royal commissions can be used by governments to investigate matters of impropriety, corruption, or maladministration. As discussed earlier in this article, the impartiality of royal commissions may be an antidote to eroded public trust in institutions. A recent example of royal commissions in which independence was a key feature is the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme. This inquiry was set up to investigate allegations of corruption in the UN Oil-for-Food Programme, but touched on matters of government administration, with then-Prime Minister John Howard being called as a witness.⁴⁹

On the other hand, the perception of impartiality of a royal commission is diminished if there exists perceived conflicts of interests or biases. For example, Commissioners Barbara Bennett and John Ryan from the most recent royal commission, the Disability Royal Commission, have faced pressure to step down due to perceived conflicts of interest.⁵⁰ It is notable that both Commissioners were former public servants and members of the executive branch of government: Commissioner Bennett is a former deputy secretary at the Department of Social Services, and Commissioner Ryan is a former New South Wales ('NSW') shadow minister for disabilities and a former employee of the NSW Department of Families and Communities.

46 J D Holmes, 'Royal Commissions' (1955) 29(4) *Australian Law Journal* 253, 266. See also Sir Murray McInerney and Garrie J Moloney, 'The Case Against' in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals: Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration* (Australian Institute of Judicial Administration, 1986) 52.

47 Kenneth C Wheare, *Government by Committee: An Essay on the British Constitution* (Clarendon Press, 1955) 85. However, there are downsides to judicial appointments. For example, despite the reputation for judicial independence and impartiality, appointing a judge will not necessarily depoliticise an inherently controversial issue, and appointing a judge in these circumstances may even tarnish the independence of the judiciary: Jack Beatson, 'Should Judges Conduct Public Inquiries?' (2005) 121 *Law Quarterly Review* 221, 235–6. In other contexts, the uses of judges in arbitral conferences has been criticised for the use of adversarial and overly formal procedures that might increase costs and complexity and stifle the flexibility of inquiries such as royal commissions: Bruno Zeller, 'Judicialization of the Arbitral Process' (2019) 4 *Perth International Law Journal* 111, 112, 114.

48 See, eg, Elena Marchetti, 'Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody' (2005) 5 *Macquarie Law Journal* 103, 118 ('Critical Reflections').

49 John Howard, 'Press Conference Phillip Street, Sydney', (Transcript, 10 April 2006) <<https://pmtranscripts.pmc.gov.au/release/transcript-22227>>.

50 See, eg, Andrew Tillett, 'Call for Royal Commission Appointees to Step Down', *Australian Financial Review* (online, 5 April 2019) <<https://www.afr.com/news/politics/national/disability-royal-commission-to-be-most-expensive-ever-20190405-p51b27>>; Rosemary Bolger, 'Call for Public Servants to Step Down from Royal Commission Over Conflict of Interest', *SBS News* (online, 8 April 2019) <<https://www.sbs.com.au/news/call-for-public-servants-to-step-down-from-royal-commission-over-conflict-of-interest>>.

Thirdly, as discussed in previous sections, royal commissions have substantial coercive powers conferred by legislation, including abrogation of some legal privileges, giving them powers far beyond any other type of executive inquiry. This makes royal commissions well suited to inquiring into matters which require independent investigation, such as efficiently identifying problems and allocating responsibility. Coercive powers are useful to compel stakeholders to comply with a commission's inquiries in order for it to adequately carry out its duties. As coercive powers can only be conferred by them, they are 'constrained by the legislative power of the Parliament that confers them'.⁵¹

Governments may justify the appointment of a royal commission in circumstances where existing institutions, such as regulatory bodies or law enforcement, have failed to hold people or corporations to account and public confidence is being eroded. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Banking Royal Commission') is an excellent example of this. The Royal Commission was called following a series of scandals in the financial services sector and the failure of the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority to adequately regulate the sector in the eyes of the public.⁵² The coercive powers of the Royal Commission forced banks and other corporations to reveal the extent of their misconduct.

To some extent, there will always be the possibility of bias and prejudgement in a royal commission because 'commissions necessarily have suspicions before they utilise their coercive powers'.⁵³ Royal commissions are typically appointed to investigate a particular issue, so there must have been some reason to appoint a commission to look into that issue through its terms of reference. While the terms can be amended, the royal commissioners guide the inquiry on the basis of those terms. There is nothing objectionable to this element of suspicion as long as it does not cross over to prejudgement of the issue at hand.⁵⁴

The defining characteristics of royal commissions – prestige, independence, and coercive powers – make them suitable for use in a variety of circumstances, depending on what is needed by the subject matter. In addition, royal commissions have a symbolic importance to the public that elevates and legitimises royal commissions over other types of inquiries. It makes them well suited as a tool for inquiring into matters of public importance. Based on these features, it is easy to

51 Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (LexisNexis Butterworths, 2001) 31.

52 See, eg, Joanna Mather, 'Superannuation Regulators ASIC, APRA Unable to Deter Bad Behaviour', *Australian Financial Review* (online, 26 August 2018) <<https://www.afr.com/personal-finance/superannuation-and-smsfs/regulators-unable-to-achieve-specific-or-general-deterrence-20180825-h14i0j>>; Lucy Sweeney and Louise Yaxley, 'Malcolm Turnbull Backflips on Banking Royal Commission After Big Four Call for Inquiry to Restore Public Faith', *ABC News* (online, 30 November 2017) <<https://www.abc.net.au/news/2017-11-30/banking-royal-commission-announced-by-pm-after-big-four-letter/9209926>>; Adele Ferguson, Ben Butler and Ruth Williams, 'Scrutinising ASIC: Is It a Watchdog or a Dog with No Teeth?', *The Sydney Morning Herald* (online, 23 November 2013) <<https://www.smh.com.au/business/scrutinising-asic-is-it-a-watchdog-or-a-dog-with-no-teeth-20131122-2y1s0.html>>.

53 Donaghue (n 51) 147.

54 *Carruthers v Connolly* [1988] 1 Qd R 339, 372 (Thomas J).

understand why royal commissions have been appointed to inquire into matters of high controversy and during times of low public confidence in institutions.

D Why Do Governments Establish Royal Commissions?

To understand the functions of royal commissions, it is important to investigate why governments use them as tools of inquiry. Although they may face public pressure to establish royal commissions, there is no requirement to do so. By definition, the choice to establish a royal commission must be a conscious decision by the executive. The wider purpose of a royal commission is to ‘inquire into and report on’ an issue of public significance that is referred to them by the government. This is the cornerstone of their terms of reference: every Commonwealth royal commission established since Federation has the words ‘inquire into’ and ‘report on’ in its terms of reference. However, royal commissions may often serve secondary functions ancillary to the primary function which may motivate governments to establish royal commissions.

Royal commissions as a tool of public inquiry appear to go in and out of fashion, and for different reasons. Between 1910 and 1929, 54 royal commissions were established on a wide variety of topics, whereas only 12 were appointed between 1940 and 1972 – mostly inquisitorial inquiries aimed at investigating impropriety.⁵⁵ Thirteen royal commissions, mostly policy advisory in nature, were appointed by Whitlam’s Labour Government between 1972 and 1975, compared to Fraser’s Coalition Government’s eight in as many years.⁵⁶ More recently, the Rudd-Gillard Labor Government appointed just one royal commission between 2007 to 2013, compared to seven royal commissions set up by the Abbott-Turnbull-Morrison Coalition Government between 2013 to 2020.⁵⁷ Accordingly, royal commissions have been used by different governments for different purposes.

There are many differing opinions as to the main reasons why governments set up royal commissions.⁵⁸ An analysis of these opinions demonstrates that royal commissions can be set up for different purposes and are not all intended to respond to the same type of problem. Instead, they are a flexible tool, able to adapt to the situations in which they are utilised. Scott Prasser categorises these opinions into four main theories:

- The rational or instrumental theory;
- The popular theory;
- The pragmatic theory; and
- The institutional theory.⁵⁹

The rational or instrumental theory posits that governments appoint royal commissions ‘to assist in rational decision making’ in order to solve complex

55 Prasser, ‘Royal Commissions in Australia’ (n 35) 28–29.

56 Ibid 29.

57 ‘Royal Commissions and Commissions of Inquiry’, *Parliament of Australia* (Web Page, 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions>.

58 Australian Law Reform Commission (n 1) 56–7.

59 Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 69.

policy problems.⁶⁰ In this view, royal commissions are valued for their independent advice, which is seen to be apolitical and therefore perhaps more useful for policy development. Walls elaborates, arguing the reason governments set up royal commissions is to provide ‘a cold blooded, impartial survey followed by an equitable solution to the problem submitted to it, a solution without concern as to its implications or on whose toes it may figuratively step’.⁶¹

The underlying assumption is that royal commissions employ experts in order to provide sound research and analysis, which is to be the basis for policy development. It relies on the perceived independence of royal commissions from the government. Alternatively, they are an impartial investigator, being able to use its coercive powers to find facts and allocate responsibility. Thus, even though a royal commission may not provide any additional information or insight into a problem, the perceived impartiality of the commission gives weight to a proposal that may be otherwise politicised if proposed by government of its own accord.⁶²

On the other hand, the popular theory presents a more cynical view of a government’s motives, arguing royal commissions are appointed solely for their political expediency. Instead of a legitimate exercise in policy analysis or investigation, royal commissions ‘are used as a delaying tactic; ... [are] an inadequate substitute for decision making; and ... were in practice ineffectual or irrelevant’.⁶³ The function of making impartial policy recommendations merely ‘enables[s] governments to do what they want to do anyway ... clothing it in the legitimacy’ provided by the prestige and processes of royal commissions.⁶⁴

On this perspective, royal commissions are therefore appointed in reaction to a controversial issue that has attracted the public’s attention to give the illusion that something is being done until the public eye is drawn by something else.⁶⁵ The assumption under this view is that the lack of trust in government institutions can be remedied by outsourcing the inquiry to a trusted institution. Of course, the downside is that too many royal commissions established for politically expedient reasons can itself undermine the public’s trust in the expertise and impartiality of royal commissions.

The pragmatic view of why governments appoint royal commissions sits somewhere in between the previous two theories. In many cases, royal commissions are not set up purely for rational policy making or political expediency. Governments sometimes do require additional information in order to inform decision-making, particularly in policy areas in which they may not have expertise or to capture new and emerging fields.⁶⁶ There may also be political benefits, such as signalling a

60 Ibid.

61 CES Walls, ‘Royal Commissions: Their Influence on Public Policy’ (1969) 12(3) *Canadian Public Administration* 365, 365.

62 See generally Gerald Rhodes, *Committees of Inquiry* (Allen and Unwin, 1975).

63 Martin Bulmer, ‘Increasing the Effectiveness of Royal Commissions: A Comment’ (1983) 61(4) *Public Administration* 436, 436.

64 Martin Bulmer, *The Uses of Social Research: Social Investigation in Public Policy Making* (Allen and Unwin, 1982) 99.

65 HF Gosnell, ‘British Royal Commissions of Inquiry’ (1934) 49(1) *Political Science Quarterly* 84, 110.

66 Prasser, *Royal Commissions and Public Inquiries in Australia* (n 59) 90.

government's interest in an area or a commitment to explore certain issues. Even overtly political inquiries which focus on the conduct or failings of political figures may be appointed because of a 'belief that in times of public crisis they can act as a catalyst for addressing larger, systemic issues underlying the crisis'.⁶⁷ Thus, royal commissions can contribute to government accountability as well as serving political purposes.

The institutional view of royal commissions argues there are particular advantages that royal commissions have over other types of inquiry. As discussed previously, those unique features are prestige, independence, and coercive powers. These features are particularly suited to inquire into matters of significant controversy. By appointing a royal commission, a government can demonstrate it is taking a matter seriously and is willing to accept the results of the inquiry, even if they are unfavourable to the government.

Other institutional reasons may be that the existing resources of the government are not sufficient to hold investigations or engage in in-depth policy analysis. The civil service may be too busy or insufficiently resourced.⁶⁸ In particular, public service departments may lack the expertise and therefore require that some of the work is outsourced to experts, for example, in royal commissions. The resourcing and expertise problems are overcome by establishing a separate body that is able to utilise expert advice to inquire into an issue.

The independence of public servants may also be called into question, as the public service may be seen to be too politicised. Justice Woodward, the Chair of the Aboriginal Land Rights Commission appointed by Gough Whitlam, wrote:

There is little public confidence in the ability of bureaucrats to deal properly with the issues involved. Although in fact the much-maligned inter-departmental committee will often do a workmanlike job and produce sensible recommendations, the very fact that it operates behind closed doors, and the necessary compromises or trade-offs may not be publicly explained, reduces confidence in the result.⁶⁹

The prestige and perceived independence of royal commissions, combined with the facts that their inquiries are very often public, and their final reports are made available through tabling in Parliament, can resolve the lack of public confidence in existing institutions. Particularly, when dealing with allegations of corruption or impropriety, trust in public institutions can be extremely low. Lord Justice Salmon, Chair of the British Royal Commission on Tribunals of Inquiry argues that in these instances:

the public naturally distrusts any investigation carried out behind closed doors ... [u]nless these inquiries are held in public they are unlikely to achieve their purpose ... that of restoring the confidence of the public in the integrity of our public life.⁷⁰

67 Janet Ransley, 'Public Inquiries into Political Wrongdoing' in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential* (Connor Court Publishing, 2014) 55, 57.

68 Patrick Weller, 'Royal Commissions and the Government System in Australia' in Patrick Weller (ed), *Royal Commissions and the Making of Public Policy* (Macmillan Education, 1994) 259.

69 Edward Woodward, 'Land Rights and Land Use: A View from the Sidelines' (1985) 59 *Australian Law Journal* 413, 424-5.

70 *Royal Commission on Tribunals of Inquiry 1966: Report of the Commission under the Chairmanship of the Rt Hon Lord Justice Salmon* (Report, November 1966) 38.

Royal commissions, as independent bodies equipped with coercive powers, are therefore tasked with restoring public confidence in government institutions.

It is the lack of trust in institutions that motivates a trend in recent royal commissions to take on another function – that of reconciliation, healing, and truth-telling. For example, the marginalised sections of the population may be concerned that their issues and problems are not being adequately addressed by the government, and therefore demand that an impartial arbiter listen to their stories. These people have typically encountered governments, public service departments and a legal system that have previously failed to adequately support their needs. Royal commissions can serve this function to help mend the distrust of public institutions caused by their previous disappointments of government inaction and can provide a sense of catharsis through the truth-telling process.

III TYPES OF ROYAL COMMISSIONS

In analysing the history, unique characteristics, and motives of royal commissions, it is possible to categorise the type of royal commission according to its function. In some cases, royal commissions may be appointed to gather information or consult with experts in order to come up with a novel solution to a complex policy problem or reforms to legislation. In other cases, they may be established to investigate incidents such as allegations of maladministration or a natural disaster to allocate responsibility and establish facts in dispute.

Royal commissions have typically been categorised based on the former two categories: inquisitorial inquiries, aimed at ascertaining the facts of an incident; and policy advisory inquiries, aimed at gathering evidence for policy development.⁷¹ There are also royal commissions that are equal parts inquisitorial and advisory – the HIH Royal Commission was tasked with allocating responsibility for the unexpected collapse of HIH Insurance (including allegations of corruption and incompetence) as well as making broader policy recommendations in matters such as corporate governance, financial reporting and assurance, regulation of insurance, and taxation.⁷²

Of course, these categories are not discrete; policy advisory inquiries might inquire into a complex policy area motivated by a particular incident of wrongdoing.⁷³ Similarly, inquisitorial inquiries might consider the broader policy and systemic issues that have resulted in the incident that is the focus of the inquiry. As there is no difference between the two types of royal commission in statute or at common law, they each have the same powers of inquiry. The method in which

71 See Hallett (n 9) 12. Hallett uses the terms ‘investigatory’ and ‘inquisitorial’ to distinguish the two categories. The Canadian Law Reform Commission uses ‘advisory’ and ‘investigatory’: Law Reform Commission of Canada, ‘Administrative Law: Commissions of Inquiry’ (Working Paper No 17, 1977) 23. The Australian Law Reform Commission uses ‘policy inquiries’ and ‘investigatory inquiries’: Australian Law Reform Commission (n 1) 57.

72 *HIH Royal Commission* (Report, April 2003) vol 1, 1xv–1xxiv.

73 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry* (Report No 73, 2005) 19 [2.15].

the royal commission conducts its inquiries may differ depending on the subject matter it is investigating. It is this flexibility that makes royal commissions well-suited to these types of executive inquiry.

More recently, a third function has arisen from royal commissions in practice and from the expectations placed on them by the public. In royal commissions such as the Child Abuse Royal Commission, a major function has been to allow people who have suffered abuse to share their experiences with the Royal Commissioners in a process of restorative justice. Private sessions were made available to all members of the public who wished to speak to the Commissioners, and the Commission held over 8,000 private sessions in total.⁷⁴ As such, they were not treated as ordinary witnesses to an inquiry, but rather were treated with validation and respect in order to generate a positive cathartic response for the witness. The focus on restorative justice was just as important as the investigative or evidence-gathering component of the Commission's role. The positive response to the truth-telling function of the Child Abuse Royal Commission has led to similar calls for this function to be adopted by the Royal Commission into Aged Care Quality and Safety ('Aged Care Royal Commission') and the Disability Royal Commission.

A Inquisitorial Inquiries

Inquisitorial inquiries include all royal commissions that have been set up to inquire into specific incidents. They may include investigating allegations of corruption, suggestions of impropriety, suspicions of maladministration, or to find the cause of a disaster or catastrophic event. The typical roles of this type of inquiry are to question witnesses – using their coercive powers if necessary – establish and verify facts, and allocate responsibility.

Typically, inquisitorial inquiries expose flaws in the legal system. In many of the recent royal commissions set up to expose wrongdoing, there are already existing laws to deal with them. For example, child sexual abuse is itself a crime, while many of the findings of misconduct in the finance industry could be prosecuted under existing laws. The failure of authorities to believe survivors of child sexual abuse and the lack of investigatory powers by regulatory bodies were a major contributing factor to why governments set up the Child Abuse Royal Commission and the Banking Royal Commission.⁷⁵ Coercive powers, such as the abrogation of legal privileges, assist royal commissions to overcome the flaws in existing institutions. While evidence collected in royal commissions is not admissible in any civil or criminal proceeding, it can provide the basis for a further investigation and royal commissions may refer matters to law enforcement.⁷⁶

Similarly, many commissions were set up to inquire into allegations of political misconduct. A royal commission may be able to pierce the often-opaque political decision-making processes better than existing processes of investigation due to

74 *Child Abuse Royal Commission* (n 4) vol 1, 26.

75 *Child Abuse Royal Commission* (n 4) vol 1, 2–3; See generally *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 1–5.

76 *Royal Commissions Act 1902* (Cth) s 6P. The Royal Commission into Institutional Responses to Child Sexual Abuse made 2,252 referrals to police: *Child Abuse Royal Commission* (n 4) vol 1, 25.

their powers, independence, and prestige. Royal commissions benefit from the perception of independence from the subject they are inquiring into.⁷⁷

On the other hand, inquisitorial commissions may be susceptible to political considerations. For example, the Federal Coalition Government in 2014 appointed the Royal Commission into the Home Insulation Program ('Insulation Royal Commission') to inquire into deaths caused by a program established by the previous Labor Government. In a response to summons issued by the Royal Commission, the Commonwealth produced Cabinet documents of the previous government, which are ordinarily protected by public interest immunity.⁷⁸ The decision to release a previous government's Cabinet records was criticised as a political decision made simply to embarrass the previous government.⁷⁹ However, there may have been legitimate reasons for a royal commission to view Cabinet documents, if the purpose is to investigate political misconduct by Cabinet Ministers.

One interesting phenomenon is that each state and territory has an integrity commission with similar powers to a royal commission. The integrity commission is typically charged with investigating corruption within government bodies within the jurisdiction. For example, in NSW, the Independent Commission Against Corruption ('ICAC') is given coercive powers similar to that of a royal commission (eg, the power to compel witnesses⁸⁰ and hold public inquiries⁸¹). The Inspector of ICAC, an independent statutory officer who is to hold ICAC to account, is explicitly given the powers of a royal commissioner in the conduct of its inquiries.⁸² At the Second Reading speech of the Independent Commission Against Corruption Bill 1988 (NSW), then-Treasurer Nick Greiner said that ICAC 'will effectively have the coercive powers of a Royal commission'.⁸³ Effectively, integrity commissions like ICAC are standing royal commissions.⁸⁴ The effect of standing inquisitorial royal commissions may mean that states and territories are less likely to establish inquisitorial royal commissions for the purposes of investigating corruption in government, although more research would need to be done to confirm this. In contrast, at the time of writing, there is currently no integrity commission at the Commonwealth level.⁸⁵ It

77 Ransley (n 67) 69.

78 *Royal Commission into the Home Insulation Program* (Report, August 2014) 8–11.

79 See, eg, Gabrielle Appleby, 'Cabinet Confidentiality: Privilege, Accountability and Public Interest', *The Conversation* (online, 4 March 2014) <<https://theconversation.com/cabinet-confidentiality-privilege-accountability-and-public-interest-23905>>.

80 *Independent Commission Against Corruption Act 1988* (NSW) ss 30, 35.

81 *Ibid* s 31.

82 *Ibid* s 57D(2), noting that the reference to royal commissioner is to a royal commissioner appointed under NSW legislation (*Royal Commission Act 1923* (NSW)).

83 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 675, 677.

84 Indeed, the ICAC website describes it as such: 'The ICAC Act', *Independent Commission Against Corruption* (Web Page, 2019) <<https://www.icac.nsw.gov.au/about-the-nsw-icac/legislation/the-icac-act>>.

85 Although, the Morrison Coalition Government has committed to establishing one. In a 2020 press release, then-Attorney-General Christian Porter said the proposed Commonwealth Integrity Commission 'will have greater investigatory powers than a Royal Commission': Attorney-General, 'Release of Commonwealth Integrity Commission Consultation Draft' (Media Release, 2 November 2020) <<http://pandora.nla.gov.au/pan/179573/20201105-0000/www.attorneygeneral.gov.au/media/media-releases/release-commonwealth-integrity-commission-consultation-draft-2-november-2020.html>>.

remains to be seen whether the number of inquisitorial-type royal commissions will decrease if a Commonwealth Integrity Commission is established.

B Policy Advisory Inquiries

Policy advisory inquiries include royal commissions that were established to provide advice to governments on policy matters and to provide solutions to policy problems. The roles involved include informing and making suggestions to resolve complex issues. The characteristics of royal commissions that would assist in this task include independent analysis, impartial assessment of potential solutions, and making recommendations to government.

Banks categorises the value of policy advisory inquiries into three main purposes:

- To vindicate, legitimise, or substantiate a policy course already being followed by the government;
- To determine how a preferred policy direction should be framed, designed, or implemented; and
- To help establish what a new policy direction should be in a particular area, either by reviewing and evaluating existing policies or by inquiring into a new, complex issue in which there are no existing policies.⁸⁶

Policy advisory royal commissions can be useful in consulting widely with the public and stakeholders to canvass policy options independently of government. This allows the government to remain separate from recommendations that may be politically controversial or alternatively give weight to a government's own proposed policy. The downside for governments is if royal commissions make recommendations that do not align with the government's policy directions – the characteristics that make royal commissions attractive, such as independence, expertise, and the profile to consult widely, may result in governments being pressured to accept the findings of the royal commission and make it difficult for governments to avoid adopting those recommendations.

The proliferation of specialised, independent policy advisory bodies may have decreased the frequency at which policy advisory royal commissions are established. These include the Productivity Commission, the Australian Law Reform Commission, the Australian Institute of Family Studies and the Australian Institute of Aboriginal and Torres Strait Islander Studies. The Productivity Commission, for example, investigates matters referred to it by the Minister⁸⁷ as well as undertaking research on its own initiative,⁸⁸ mostly relating to microeconomic policy and regulation. Although these bodies undertake research and make policy recommendations in a wide range of areas as opposed to the specificity of a royal commission, there is overlap between their roles. Indeed, Ronald Sackville, writing extra-curially, observes that it is often the case that royal commissions

86 Gary Banks, 'Making Public Policy in the Public Interest – The Role of Public Inquiries' in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential* (Connor Court, 2014) 112, 113–14.

87 *Productivity Commission Act 1998* (Cth) ss 6(a), 11.

88 *Ibid* s 6(e).

recommend the creation of a permanent body as a means of continuing the work of the commission.⁸⁹ The fact that policy advisory bodies are less costly and more efficient than royal commissions due to their nature as standing agencies without the high-profile of a commission may mean that governments prefer policy advisory bodies to commissions.⁹⁰

IV TRUTH-TELLING INQUIRIES

A third type of inquiry has recently emerged in Australia, following an international trend, and it remains to be seen whether it will catch on as an enduring category of royal commissions. The function of a truth-telling royal commission is to aid people who have suffered damage or injury in a process of reconciliation through an investigation of the events that caused the damage. Typically, it might involve victims of abuse sharing their stories, people involved or who were affected, and perhaps even testimonies from the alleged perpetrators. The focus here is moral or restorative justice, not economic damages or criminal restitution, aimed at restoring dignity and addressing the loss of human rights and cultural identity.⁹¹

They may result in matters being referred to authorities for further investigation. However, the most significant aspect is that it is not a judicial process. Instead, it is focussed on ensuring that victims are listened to and restoring trust in the public institutions that have historically betrayed them. A careful balance needs to be struck between restoring dignity to victims and administering justice to the perpetrators.⁹² After the evidence is heard, a report may be written summarising the evidence and proposing recommendations for moving forward, such as redress or restitution. Consequently, truth-telling inquiries should not focus solely on forgiveness of past wrongs but also on shared strategies for ‘moving forward together’.⁹³

While this article is arguing that truth-telling royal commissions are a distinct category of royal commissions, this does not mean they are an entirely novel or discrete innovation. Instead, there are distinct overlaps between the categories. A truth-telling commission might, for example, take on the character of an inquisitorial inquiry by focussing on past wrong-doings and allocating responsibility, or, like a policy advisory commission, identify policy failures and make policy recommendations. What distinguishes truth-telling inquiries from other inquiries is a focus on restorative justice and giving victims a voice.⁹⁴ Truth-

89 Ronald Sackville, ‘Law Reform Agencies and Royal Commissions: Toiling in the Same Field?’ [2005] *Federal Judicial Scholarship* 10: 1–12, 6.

90 Ibid 8–9.

91 Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (WW Norton & Co, 2000) 318.

92 In the context of international tribunals: Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998) 23.

93 Andrew Rigby, *Justice and Reconciliation: After the Violence* (Lynne Rienner, 2001) 12.

94 Anne-Marie McAlinden and Bronwyn Naylor, ‘Reforming Public Inquiries as “Procedural Justice” for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice’ (2016) 38(3) *Sydney Law*

telling inquires use the existing, flexible royal commission framework currently in place to achieve this goal.

A The Development of Truth-Telling Inquiries Internationally and in Australia

In Australian discourse, the idea of a truth-telling commission is heard most often in connection with the restorative justice or reconciliation processes for Indigenous Australians.⁹⁵ It is a trend reflected internationally, typically as part of a wider reconciliation process between the indigenous peoples and the settlers or government of a country.⁹⁶ The idea behind it is to come to terms with past injustices and provide a way to redress the wrongs of the past.

Perhaps the most famous truth-telling commission was South Africa's Truth and Reconciliation Commission ('TRC') established to deal with an era of human rights abuses and apartheid.⁹⁷ The TRC is often cited as an example of reconciliation leading to a sense of nationhood – although full reconciliation may not be possible, it can be a defining moment in a nation's history to face up to past abuses.⁹⁸ The TRC was established under Nelson Mandela's transitional government in order to deal with the oppression that took place during the previous decades of apartheid and to promote national unity for the future.⁹⁹ Among other things, it held investigations and hearings in order to find the truth of human rights violations, give amnesty to perpetrators, and make recommendations with regards to reparations for victims.¹⁰⁰ The paradigm of transitional justice has helped to facilitate restorative justice in the form of a movement towards truth-telling inquiries. Restorative justice is often contrasted with retributive justice: Archbishop Desmond Tutu, a key player in the TRC, is quoted as saying that '[r]etributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew'.¹⁰¹ Accordingly, the process of restorative justice includes all stakeholders in the process, promoting dialogue and agreement.¹⁰² John Braithwaite identifies the core values of restorative justice

Review 277, 298.

95 See, eg, 'Uluru Statement from the Heart', *Uluru Statement* (Web Page) <<https://ulurustatement.org/the-statement>> : 'Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination' (emphasis in original).

96 There have been up to 24 truth commissions documented worldwide as of 2008: Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9(4) *Human Rights Review* 465, 466.

97 Elizabeth Stanley, 'Evaluating the Truth and Reconciliation Commission' (2001) 39(3) *Journal of Modern African Studies* 525, 525–7.

98 Aletta J Norval, 'Memory, Identity, and the (Im)possibility of Reconciliation: The Work of the Truth and Reconciliation Commission in South Africa' (1998) 5(2) *Constellations* 250, 258–9.

99 See *Promotion of National Unity and Reconciliation Act 1995* (South Africa).

100 Jennifer J Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49(3) *University of Toronto Law Journal* 355, 366–9.

101 Minow (n 92) 81.

102 John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice: A Review of Research* 1, 5–6.

as ‘healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology and making amends’.¹⁰³ Thus, the role of the TRC ‘was not punishment, but rather to provide an opportunity to achieve reconciliation through a process of truth-telling by all stakeholders’.¹⁰⁴

The approach of the TRC has been criticised for a number of failures. Firstly, one criticism is that the TRC failed to condemn or prosecute the evils of the apartheid regime, thus failing to ‘do justice’.¹⁰⁵ The lack of sanctions has been argued to contribute to a ‘climate of impunity’ on the part of perpetrators, alienating survivors who expect traditional criminal or retributive justice, and subsequently causing problems when those survivors must cooperate with perpetrators.¹⁰⁶ Secondly, the TRC has been criticised as it has failed to give victims adequate monetary compensation and reparation.¹⁰⁷ Despite the TRC having a mandate to make recommendations on reparations, the recommendations had no binding force, and the South African Parliament ultimately paid less reparation than the amount recommended by the TRC.¹⁰⁸

The strengths of the TRC approach are that it allowed survivors of apartheid to tell their stories and, through the process of truth-telling, lay the groundwork for future reconciliation. Specifically, the therapeutic potential of a truth commission through taking testimony and acknowledging past abuses were what attracted South African leaders to the truth-telling process.¹⁰⁹ The focus on individual trauma allowed the TRC to ‘depoliticiz[e] past injustices’ in order to legitimatise the transitional processes put in place.¹¹⁰ Involving the entire community in the truth-telling process is necessary for a real transition to occur, because it ‘by definition involves the creation or rebuilding of community, that is, the restoration of an inherently social equilibrium’.¹¹¹ Only by establishing the truth about past abuses can restorative justice be realised at the individual and community level. In some ways, the TRC was able to condemn the wrongdoing of perpetrators more effectively than traditional criminal justice processes.¹¹² This is because the TRC’s use of hearings and provision of amnesty to perpetrators enabled it to find out the truth and allocate responsibility at a systemic level, in a way that individual prosecutions could not, particularly given the legal difficulties in getting prosecutions.¹¹³ Of course, reality is not that simple. Elizabeth Stanley has noted that while there have been some

103 Ibid 6.

104 Kerry Clamp and Jonathan Doak, ‘More than Words: Restorative Justice Concepts in Transitional Justice Settings’ (2012) 12 *International Criminal Law Review* 339, 341–2.

105 Llewellyn and Howse (n 100) 369.

106 Stanley (n 97) 535–6.

107 Ibid 538.

108 Lucy Allais, ‘Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission’ (2011) 39(4) *Philosophy and Public Affairs* 331, 335.

109 Bronwyn Leebaw, ‘Legitimation or Judgment? South Africa’s Restorative Approach to Transitional Justice’ (2003) 36(1) *Polity* 23, 38.

110 Ibid 39.

111 Llewellyn and Howse (n 100) 380.

112 Allais (n 108) 357, 361.

113 For example, difficulties in gathering admissible evidence: *ibid* 356.

positive examples of reconciliation between victims and perpetrators as a result of the TRC's efforts, these efforts are often frustrated by political reticence.¹¹⁴

In Australia, several past inquiries have contributed to the growth of truth-telling commissions generally. The Royal Commission into Aboriginal Deaths in Custody ('RCADC') was appointed in 1987 in order to investigate the high number of Indigenous Australians who had died while in custody.¹¹⁵ Despite the ostensibly truth-telling purpose of the Royal Commission (to find out how and why particular individuals died and any underlying issues that may have had an effect on the deaths),¹¹⁶ the Royal Commission has been criticised for using an overly legalistic process and in fact 'continued the colonization of Indigenous people by its inability to understand and incorporate Indigenous views and values'.¹¹⁷ In an influential study examining the practices of the Royal Commission, Elena Marchetti interviewed 48 people who worked in and were involved in the Royal Commission.¹¹⁸ Based on these interviews, Marchetti identified five themes that served to hinder the process: social subordination of Indigenous staff as compared to non-Indigenous staff; a devaluation of Indigenous knowledge; ignorance of cultural practices and knowledge; a lack of support or counselling offered to Indigenous staff or to families of the deceased; and a lack of communication between Commissioners and the families of the deceased.¹¹⁹ Many of the Indigenous people interviewed felt that this meant that the Commission 'left them without any closure' and that there 'was no "healing process" implemented for Indigenous people to say "well this is what it was like for me ..."'.¹²⁰ Despite this, writing in 2005, Marchetti remarked that '[d]espite its many flaws ... the RCADC remains the most comprehensive investigation ever undertaken into the deep disadvantage experienced by Indigenous people as a result of colonisation'.¹²¹ The experience of the RCADC demonstrates the potential dangers of a royal commission undertaking a semi-truth-telling role without an adequate commitment to respecting the voices of the witnesses. Otherwise, the coercive and legalistic processes of a royal commission may contribute to the silencing of their voices.

B The Royal Commission into Institutional Responses to Child Sexual Abuse

In Australia, the modern impetus for truth-telling royal commissions was the positive response to the Child Abuse Royal Commission. For many participants appearing before the Royal Commission, it provided an opportunity to speak

114 Stanley (n 97) 542.

115 To access the report of the Royal Commission, see *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

116 Noting that originally, the investigation was to focus on the deaths, and the Letters Patent were amended later to include the underlying issues.

117 Elena Marchetti, 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33(3) *Journal of Law and Society* 451, 454.

118 Ibid.

119 Ibid 465–72.

120 Ibid 470.

121 Marchetti, 'Critical Reflections' (n 48) 125.

up and share their histories of abuse in a protected and supportive environment. The act of giving this evidence to an independent government body has cathartic significance and is a step towards healing from the abuses that victims of child sexual abuse suffered.

When it became clear that many victims wished to have the opportunity to tell the commissioners of their experience of sexual abuse, the Commonwealth Parliament passed an amendment to the *Royal Commissions Act* to allow for private sessions to be held by the Child Abuse Royal Commission.¹²² In the Explanatory Memorandum for the Royal Commissions Amendment Bill 2013 (Cth), there is a recognition that

it is important that persons affected by child sexual abuse and related matters in institutional contexts can share their experiences in appropriate ways recognising that many participants will be severely traumatised or will have special support needs. Private sessions would also allow Commissioners the opportunity to better understand the context and circumstances of child sexual abuse.¹²³

Although originally the power to hold private sessions could only be exercised by the Child Abuse Royal Commission, it marks a change in the function of royal commissions away from a public form of inquiry and towards a less public, less legalistic inquiry in which participants can privately share their experiences and receive some form of reconciliation.

It is also important to note that private sessions are not hearings of the royal commission¹²⁴ and that a person who appears at a private session is not a witness nor are they considered to be giving evidence.¹²⁵ This means that participants in private sessions were not required to take an oath or affirmation and, as the sessions were confidential, the allegations made in private sessions could not be tested according to ordinary procedures of the administration of justice. Consequently, while the private sessions provided valuable context to the Commissioners, evidence gathered could not form the basis of specific redress for the participants. Instead, the value of private sessions was to help restore the participants' trust in institutions that had failed them in the past.

Many survivors of child sexual abuse who participated in the process spoke positively of the use of the Royal Commission as a method of reconciliation and truth-telling. For many participants, 'it was the first time in their life they had been heard by someone in a position of authority'.¹²⁶ One participant wrote eloquently how the private sessions improved their process of healing:

My journey to the Royal Commission was spent with mixed emotions of intrepidation ... as soon as I met the Commissioner her soft-spoken voice, her nurturing aura, gave me the strength to tell my story, which was the most horrific and harrowing experience. Today (the day after) I realise it was a very cathartic process. This has brought to the stage when the shadows are diminishing the daily nightmares are

122 *Royal Commissions Act 1902* (Cth) Pt 4.

123 Explanatory Memorandum, Royal Commissions Amendment Bill 2013 (Cth) 1.

124 *Royal Commissions Act 1902* (Cth) s 6OC(2).

125 *Ibid* s 6OC(1).

126 *Child Abuse Royal Commission* (n 4) vol 1, 29.

subsiding and the fork in the road has a lot more light. Thank you all that were with me this day ... and nurtured the process.¹²⁷

The private sessions also enabled survivors to undergo post-traumatic growth.¹²⁸ People who attended private sessions often described how it enabled them to survive and make meaning of their past experiences.¹²⁹ More importantly, they spoke of how it provided them hope for the future and an opportunity to share their suggestions for a national plan to move on from the trauma of the past and prevent child sexual abuse from ever occurring.¹³⁰ The private sessions are influenced by ideas of restorative justice to address historical child abuse as a tool for giving survivors a voice. The significance of the trauma- and victim-focussed private sessions is that ‘it was not simply gathering evidence from survivors but rather engaged in the moral project of “bearing witness”’.¹³¹ Instead, it allowed survivors the opportunity to address their experiences in a way which previous public inquiries and hearings have not been able to do or did not give sufficient opportunities to do.¹³² The truth-telling process of giving testimony generates a space in which to reframe their experiences of child abuse.¹³³ Private sessions therefore have an important cathartic value for survivors.

The private sessions are therefore aimed at marking a symbolic end to the treatment of victims of institutional child sexual abuse by people in authority. While it may be impossible to put to an end the evils of crimes such as child sexual abuse, it is possible to end the institutional betrayal that authorities have perpetuated by not hearing or believing victims. The benefit of this national truth-telling process is to move beyond the past failures of government authorities and to restore personal and public confidence in those institutions.

C Truth-Telling and the Powers of Royal Commissions

It is clear then that there are several characteristics of royal commissions that make them well suited to a truth-telling function. The prestige, independence and impartiality, and legislative powers help royal commissions fulfil the truth-telling function.

Perhaps the most important role of a truth-telling inquiry is that it is open to all people to participate who feel compelled to speak about the injuries they have faced, within budgetary and time constraints. Truth-telling commissions worldwide have been held into matters of national concern and importance and to come to terms with a national crisis or failure.¹³⁴ Commonwealth royal commissions, as

127 ‘Message to Australia’, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page) slide 18 <<https://www.childabuseroyalcommission.gov.au/message-australia>>.

128 Kathleen McPhillips et al, ‘Understanding Trauma as a System of Psycho-Social Harm: Contributions from the Australian Royal Commission into Child Sex Abuse’ (2020) 99 *Child Abuse & Neglect* 1, 8.

129 *Child Abuse Royal Commission* (n 4) vol 5, 94.

130 *Ibid* vol 5, 285.

131 McPhillips et al (n 128) 5.

132 Shurlee Swain, ‘Giving Voice to Narratives of Institutional Sex Abuse’ (2015) 41(2) *Australian Feminist Law Journal* 289, 292.

133 *Ibid* 302.

134 Minow (n 92) 23.

the highest and most prestigious form of commission in Australia, are able to give truth-telling commissions a sense of gravitas and national unity that other forms of inquiry may not.

This is aided by the perceived independence and impartiality of royal commissions. As they are a separate entity to the government, it allows them to keep political considerations at arm's length. The task of a truth-telling commission is to find out the truth impartially, and perceived biases can derail a commission very quickly.¹³⁵ Although royal commissions in the past have been accused of bias or subject to political pressure, in general, they maintain a level of independence from the government of the day.¹³⁶

Similarly, as the purpose of truth-telling is on reconciliation rather than retribution, the adversarial nature of the courts is ill suited to truth-telling.¹³⁷ Instead, the flexible nature of royal commissions can allow them to take a less adversarial approach. Private sessions were designed with trauma-informed principles in mind, particularly to engage survivors in a way that affirmed their experiences and to be 'flexible and responsive' to the diversity of needs and capabilities of survivors.¹³⁸ In addition, in-house counsellors were provided to support survivors before, after and during the private session.¹³⁹ Although private sessions are not currently available to all royal commissions, the experience of the Child Abuse Royal Commission has shown that they have worked well to facilitate the reconciliation of victims of child sexual abuse. Prior inquiries have been criticised for having too much of a 'technocratic focus on psychiatric discourse and expertise' rather than on the testimony and experience of survivors.¹⁴⁰ The private sessions were therefore a 'significant corrective' to the characterisation of trauma victims in previous inquiries.¹⁴¹ The use of private sessions, as opposed to public inquiries, has been described as a form of procedural justice.¹⁴² Public inquiries with a focus on inquisitorial or adversarial methods do not necessarily address the needs of victims or allow for a comprehensive truth-telling component.¹⁴³ A hybrid model of public and private inquiries, such as the Child Abuse Royal Commission, has 'cathartic benefits' and incorporates a more restorative response to survivors.¹⁴⁴

As a creature of the executive government, a royal commission also provides validation for the experiences of victims of past wrongs. Typically, vulnerable victims, such as victims of child abuse, disability abuse, or the treatment of Indigenous Australian prisoners, were mistreated or not supported by the

135 Priscilla B Hayner, 'Commissioning the Truth: Further Research Questions' (1996) 17(1) *Third World Quarterly* 19, 24–5.

136 Peter M Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (Lawbook Co, 1st ed, 2004) 734–44.

137 Joanna Quinn, 'Truth Commissions and Restorative Justice?' in Mark Charlton (ed), *Crosscurrents: International Relations* (Nelson College Indigenous, 4th ed, 2005) 402, 403.

138 *Child Abuse Royal Commission* (n 4) vol 5, 9.

139 *Ibid* vol 5, 34.

140 McPhillips et al (n 128) 3.

141 *Ibid* 2.

142 McAlinden and Naylor (n 94) 284–5, 292.

143 *Ibid* 292.

144 *Ibid* 298.

government. Disclosures of abuse can often be met with disbelief, ridicule, or dismissal.¹⁴⁵ The appointment of a royal commission goes some way to resolving this as it is a public recognition of past wrongs. As the purpose of a truth-telling commission is ostensibly to help people in the process of reconciliation, the validation that comes with an authoritative government body listening to their stories is an important aspect of restoring public trust in government institutions.¹⁴⁶

Although a truth-telling inquiry is aimed at validating the stories of survivors in a safe environment, there can be some use of a royal commission's coercive powers. This may involve inquiring into the perpetrator's side of the story to be able to establish facts. However, as coercive powers can often be adversarial and conflict-driven, it is unlikely to see much use in an exclusively truth-telling royal commission. However, it is often the case that truth-telling is not the exclusive purpose of a royal commission. The Child Abuse Royal Commission, for example, could have used its coercive powers to compel an unwilling witness from an institution under investigation to give evidence about the institution's practices and historical approaches to dealing with reports of child sexual abuse.

D The Future of Truth-Telling Royal Commissions

It is telling that two of the Royal Commissions established after the Child Abuse Royal Commission handed down its final report in December 2017 make explicit reference to a truth-telling type of role in their terms of reference. The terms of reference of the Aged Care Royal Commission authorises the Commissioners to, as they consider appropriate, take action arising out of their consideration:

The need to establish, as you see fit and having regard to the date by which you are required to submit your final report, appropriate arrangements for evidence and information to be shared with you by people about their experiences, including people receiving aged care services, their families, carers and others who provide care and support, recognising that some people will need special support to share their experiences.¹⁴⁷

The terms of reference of the Disability Royal Commission are even more explicit. They direct the Commissioners to have regard to, among other things:

[T]he specific experiences of violence against, and abuse, neglect and exploitation of, people with disability are multilayered and influenced by experiences associated with their age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability.¹⁴⁸

They also authorise the Commissioners to take action arising out of their consideration:

[T]he need to establish accessible and appropriate arrangements for people with disability, and their families, carers and others, to engage with your inquiry and to provide evidence to you, and share information with you, about their experiences.¹⁴⁹

145 *Child Abuse Royal Commission* (n 4) vol 5, 13.

146 *Ibid* vol 5, 33.

147 *Royal Commission into Aged Care Quality and Safety* (Letters Patent, 6 December 2018) 4.

148 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Letters Patent, 4 April 2019) 3.

149 *Ibid*.

Thus, the terms of references make explicit mention of the experience of vulnerable people in the community, particularly the experience of minority groups. Truth-telling inquiries, as discussed in previous sections, have the aim of reconciling groups of people who have suffered damage in the past. These two Royal Commissions recognise the historic harm done to these people and provide a forum to address those issues. However, as the terms of reference leave it up to the discretion of the Commissioners to initiate a truth-telling role, it remains to be seen whether they will utilise this aspect of their function. It is clear that they contemplate a truth-telling function in order to facilitate a nation-wide reconciliation or restorative justice process.

Truth-telling royal commissions so far have relied on a statutory head of power to establish them under the *Royal Commissions Act*, in line with the ruling that restricts statutory conferral of coercive powers on Royal Commissions to matters within the legislative competence of the Commonwealth.¹⁵⁰ This is unlikely to change in the future. If an argument about nation-building and truth-telling is sustained as a function of the executive, an exclusively truth-telling royal commission might be supported by section 51(xxxix) of the *Constitution*, enabling the Parliament to legislate on matters incidental to the executive power. However, it is very unlikely that the High Court would favour such a disposition. The High Court has consistently stated that the subject matter of the commission must be within the legislative competence of the Commonwealth Parliament; trying to get around it through section 51(xxxix) seems contrary to that intention.¹⁵¹

On the other hand, truth-telling royal commissions may not need coercive and compulsive powers in order to function properly. The main benefits of royal commissions in truth-telling inquiries derive not from the coercive powers but rather the prestige and impartiality.¹⁵² A royal commission established under the common law and royal prerogative may be sufficient for a truth-telling inquiry, particularly as the subject matter is not tied to legislative powers but any proper purpose of government. However, it remains to be seen whether a royal commission without coercive powers would have the same impact as one with coercive powers, as the coercive powers of a commission are what sets a royal commission apart from other types of inquiries. Accordingly, a royal commission without coercive powers could be viewed as ‘toothless’ and undermine the prestige associated with the institution of a commission.

150 See Part II(B) above. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability relies on the external affairs power, section 51(xxix) of the *Commonwealth Constitution*, and Australia’s international obligations to people with disability. The Royal Commission into Aged Care Quality and Safety relies on a combination of sections 51(xxiii) and (xx), the pensions/benefits power and the corporations power respectively, as they relate to aged care services funding. The Royal Commission into Institutional Responses to Child Sexual Abuse also relies on the external affairs power, particularly Australia’s obligations under the United Nations Convention on the Rights of the Child.

151 *Lockwood v Commonwealth* (1954) 90 CLR 177, 182 (Fullagar J).

152 See Part IV(C) above.

E Potential Issues with Truth-Telling Royal Commissions

There are potentially several issues associated with truth-telling royal commissions. The time and cost of truth-telling royal commissions can be quite significant. The total estimated cost of the Child Abuse Royal Commission is \$342.3 million over five years.¹⁵³ Similarly, the two most recent royal commissions that have contemplated private sessions have a budget of \$527.9 million (Disability Royal Commission) and \$104.3 million (Aged Care Royal Commission).¹⁵⁴ Compare this to a non-truth-telling royal commission, the Banking Royal Commission, which had a total cost of approximately \$75 million, and the Royal Commission into the Detention and Protection of Children in the Northern Territory, which cost \$40 million.¹⁵⁵ The Trade Royal Commission cost \$46 million, while the Insulation Royal Commission had a budget of \$20 million.¹⁵⁶ Thus, truth-telling royal commissions can by their nature be much more expensive, raising questions as to whether they are cost-effective in achieving their outcomes as compared to, say, a standing entity like an integrity commission or a policy advisory body. However, the symbolic importance and prestige of a royal commission may give an edge over other types of inquiries despite the time and the cost.

Another issue is the potential negative effects on witnesses arising from the royal commission process itself, in particular, re-traumatisation if witnesses who are survivors are required to relive traumatic events. Royal commission staff may be well-meaning but the fact that there exists a power differential between the survivor and the staff creates the potential for re-traumatisation.¹⁵⁷ Staff may, for example, use insensitive procedures or parallel social dynamics that recall the survivor's experiences of trauma.¹⁵⁸ The risk of re-traumatisation can, however, be mitigated through awareness of the potential risks and providing a trauma-informed approach to witnesses.¹⁵⁹ The Child Abuse Royal Commission heavily relied on trauma research in order to avoid the potential harms,¹⁶⁰ resulting in 'fundamental changes in treatment of survivors' compared to previous inquiries.¹⁶¹ Mitigation techniques such as making counselling and support services available,

153 'Final Report Released', *Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page, 15 December 2017) <<https://www.childabuseroyalcommission.gov.au/media-releases/final-report-released>>.

154 Commonwealth of Australia, *Budget 2019–20: Budget Measures* (Budget Paper No 2, 2 April 2019) 54; Josh Frydenberg and Mathias Cormann, *Mid-Year Economic and Fiscal Outlook 2018–19* (Statement, December 2018) 11.

155 Question on Notice No SBE17-100, *2017–18 Supplementary Budget Estimates* (14 February 2018).

156 Elizabeth Colman and Sam Buckingham-Jones, 'Unions Inquiry Spent \$46m', *The Australian* (online, 19 December 2015) <<https://www.theaustralian.com.au/nation/trade-union-royal-commission-spent-46m/news-story/c9164eb55db46a4e072518eab418ddd9>>; Mark Ludlow, 'Pink Batts Royal Commission – the Facts', *Australian Financial Review* (online, 21 March 2014) <<https://www.afr.com/politics/federal/pink-batts-royal-commission-the-facts-20140321-ixc6i>>.

157 Denise E Elliott et al, 'Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women' (2005) 33(4) *Journal of Community Psychology* 461, 468.

158 *Ibid.*

159 McPhillips et al (n 128) 8.

160 *Ibid.*

161 Lisa Featherstone, "'Children in a Terrible State': Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42(2) *Journal of Australian Studies* 164, 176.

reconfiguring the layout of rooms of public and private sessions, and creating trauma-informed policies and procedures with regards to communications, all helped to minimise the risk of re-traumatisation.¹⁶²

A further risk is that there is no obligation for governments to implement the recommendations of a royal commission. This could potentially undermine the benefits of a truth-telling royal commission because it would contribute to scepticism or disillusionment by people who have trusted the royal commission as a way of getting closure, restitution or recognition for past wrongs. After a royal commission's final report is handed down, it effectively ceases to exist and there is no longer any institution to ensure that the recommendations are actually implemented.¹⁶³ Of course, individual former royal commissioners could monitor implementation in their private capacity as they may still retain some influence, but they would still lack the institutional legitimacy of the commission. However, former royal commissioners who are serving judges would obviously be unable to undertake this route.

There is an additional complexity where the recommendations are for reform of non-government entities, as non-government entities do not face the same political or electoral incentive for reform as governments. Thus, the implementation of the recommendations to the Child Abuse Royal Commission have been mixed; governments have implemented or are in the progress of implementing the recommendations, but many non-government institutions have not made such commitments to reform.¹⁶⁴

There are some strategies that royal commissions can utilise to minimise the risk that their recommendations are not implemented. The Child Abuse Royal Commission was able to build advocacy coalitions by building on public momentum and effectively using the media to maintain public awareness of the public hearings and pressure on institutions.¹⁶⁵ The public nature and high profile of a royal commission may go some way to pressuring governments to commit to implementation. The Child Abuse Royal Commission also benefitted from having a relatively long period of operation. By releasing an interim report with recommendations, the Royal Commission was able to hold review hearings with institutions to assess what measures had been taken to implement those recommendations since the initial hearing, if any.¹⁶⁶ This allowed the Royal Commission to effectively hold those institutions to account while it was still on foot.

162 McPhillips et al (n 128) 8.

163 Although the Royal Commission might recommend the establishment of a permanent body to continue its work if it considers it necessary: Sackville (n 89) 6.

164 Wright, Swain and McPhillips (n 2) 5.

165 Michael Mintrom, Deirdre O'Neill and Ruby O'Connor, 'Royal Commissions and Policy Influence' (2021) 80(1) *Australian Journal of Public Administration* 80, 91.

166 Ibid.

V CONCLUSION

Royal commissions have evolved from an instance of executive fact finding to a reconciliation model of inquiry. With its origins in the royal prerogative, royal commissions have become a powerful symbol of truth-telling and not simply a way for the executive government to equip itself with knowledge necessary for the performance of its duties. Truth-telling inquiries are motivated by ideas of restorative justice and are intended to address historic abuses by giving survivors a platform to tell their stories. The prestige and symbolic significance of a truth-telling royal commission provides an advantage over other types of inquiries in addressing these issues. Truth-telling royal commissions are then a valuable tool to improve public confidence and trust in institutions. It may be that in the future, truth-telling becomes vital to properly discharging the symbolic role of the executive.

VI POSTSCRIPT

Since this article was written and accepted for publication, the Commonwealth Government has announced the Royal Commission into Defence and Veteran Suicide. This Royal Commission was established on 8 July 2021.¹⁶⁷ The terms of reference of the Royal Commission into Defence and Veteran Suicide confirm the trend towards a truth-telling inquiry. In this case, the inquiry is into the experiences of defence members and veterans and the systematic failure of government to provide them with adequate support. The preamble recognises that ‘individual experiences will be a central contribution to your inquiry and these experiences can inform best-practice, strategies and reforms and can assist in prevention and healing’.¹⁶⁸ There is also explicit reference to ‘the need to establish accessible and appropriate trauma-informed arrangements’ for witnesses ‘to provide evidence to you, and share information with you, about their experiences’.¹⁶⁹ Accordingly, the Prime Minister’s media release notes that private sessions will be available.¹⁷⁰ The *Royal Commissions Regulations 2019* (Cth) have been updated to allow private sessions to occur.¹⁷¹

167 *Royal Commission into Defence and Veteran Suicide* (Letters Patent, 8 July 2021).

168 *Ibid* 1.

169 *Ibid* 5.

170 Scott Morrison, ‘Defence and Veteran’s Suicide’ (Media Release, 8 July 2021) <<https://www.pm.gov.au/media/defence-and-veterans-suicide>>.

171 *Royal Commissions Regulations 2019* (Cth) reg 7, inserted by *Royal Commissions Amendment (Defence and Veteran Suicide Private Sessions) Regulations 2021* (Cth).