ARTICLE

When Should Royal Commissions Be Appointed?

The task for government is to always appear to be appointing a royal commission as if it really wants to rather than because it is being forced to by public opinion. Dr Scott Prasser

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INTRODUCTION

Recent calls for a royal commission into the Federal Department of Immigration and the appointment during April of royal commissions in Queensland and South Australia have again highlighted this interesting institutional phenomenon and suggest that royal commissions remain an important institution in Australia performing a role other bodies are apparently unable to fulfil. Because appointing a royal commission is sometimes a risky undertaking for the government concerned (see Tiffen 1999) this article explores why and in what circumstances governments appoint such bodies.

Of course, there are many demands for royal commissions and governments often do not readily oblige by appointing such bodies. The Victorian Government chose in 2003 to upgrade the State Ombudsman's office to investigate the police issues rather than establish a royal commission. The Howard Government has resisted appointing royal commissions into the Cornelia Rau imprisonment affair. Indeed, the Howard Government has only established three royal commissions. By contrast its Labor predecessor appointed twelve royal commissions, the Fraser Coalition Government seven and the Whitlam Labor Government eight royal commissions.

While since the mid 1970s royal commission numbers increased at both federal and state levels compared to earlier periods post World War Two, this enthusiasm has appeared to abate. As highlighted, there is some hesitancy by all governments to initiate royal commissions so that their overall numbers during the past decade have declined.

Thus, the recent appointment of several royal commissions deserves some attention. In New South Wales there has been a royal commission into major train accident and other areas. In April, the Queensland Government, after trying a range of other alternatives, finally succumbed to public and political pressure and appointed a royal commission to investigate allegations of medical malpractice in regional hospitals. This is one of Queensland's few stand-alone royal commissions since the National Party government established the Fitzgerald inquiry into police corruption in 1987. In South Australia, the Rann Government has just announced a royal commission to review the legal processes involving a prominent lawyer.

So when do governments appoint royal commissions over other forms of public inquiry?

WHAT ARE ROYAL COMMISSIONS?

Royal commissions are special advisory and investigatory bodies found in Westminster democracies. Originally appointed or commissioned in Britain by the monarch to investigate a particular issue or problem, they are in Australia

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formally established by *letters patent* issued by the governor or governor-general on the advice of the government.

Like other forms of public inquiry such as committees, taskforces and the like, royal commissions are temporary, *ad hoc* bodies with members drawn from outside of government that use open processes of investigation and publicly release their reports and most of the collected evidence. Royal commissions and other public inquiries should not be confused with inquiries conducted by parliamentary committees, consultants, internal public servant committees, backbench committees or permanent advisory bodies.

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Importantly, what really distinguishes Australian royal commissions from most other forms of public inquiry and their counterparts in the United Kingdom is their establishment under specific legislation. In Australia nationally, this is the *Royal Commissions Act 1902*. Similar legislation exists in each state. Such legislation confers on Australian royal commissions coercive powers to collect and procure information, make witnesses attend hearings and give evidence, even if self-incriminating. By contrast, royal commissions in the United Kingdom are not statutory based and do not have the same coercive investigatory powers. The British equivalent is the tribunal of inquiry established under the *Tribunals of Inquiry Act (Evidence) Act 1921*. There have been twenty eight such inquiries established in the United Kingdom since 1921 (Lindell 2002).

Importantly, royal commissions are not 'judicial inquiries' despite often being chaired by present or past judges or other senior legal professionals and adopting many of the outward trappings and adversarial processes of courts. Royal commissions are creatures of executive government, and unlike tribunals of inquiry in the United Kingdom, are only established by executive government, not by parliament.

There is no requirement for a royal commission to be chaired by a judge or legal professional although some state legislation (e.g. Queensland) provides for certain advantages for an inquiry that does (Campbell 1984). There has been some debate as to whether judges should serve on royal commissions as this may be seen as blurring the separation of powers between the executive and the judiciary (Fraser 1986).

Overall, royal commissions are seen to have status because of their coercive and statutory backed powers of investigation, apparent appointment by the Crown rather than elected officials, their often senior judicial and legal professional memberships and their open processes. This explains the frequent demand for royal commission over other forms of inquiry.

TYPES OF ROYAL COMMISSIONS

Royal commissions come in two major forms—the inquisitorial royal commission and the policy advisory commission, although there is necessarily some overlap between the two.

Inquisitorial royal commissions investigate allegations of corruption or seek to find the cause of a particular catastrophic event such as an accident. Their primary tasks are to assemble, check and verify facts, hear and cross-examine witnesses, and to allocate responsibility for a particular act or incident. Inquisitorial inquiries are highly dependent on evidence collected first hand from witnesses through hearings and cross-examinations and in some cases, research. Such inquiries are more likely to be royal commissions because of the coercive powers of investigation needed in some instances to collect evidence and call witnesses.

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Policy advisory royal commissions have provided advice to government on a wide range of issues (e.g. television, industries, public sector reform, policy reviews, environment, contraception). Such royal commissions seek to inform, summarise and propose suggestions to government on possible solutions to policy problems. Rarely do such policy royal commissions need to invoke their powers of investigation, relying instead on their status, consultative processes and research to obtain the information needed. Experts in the field, rather than legal professionals, usually chair policy royal commissions. When in recent times a policy royal commission has been chaired by a legal professional, it is usually the case of using the royal commission form to match the status and expectations of the chair, rather than to meet real inquiry tasks or functions.

Historically, the majority of royal commissions appointed nationally have been policy advisory type inquiries, but more recently the inquisitorial type has dominated Commonwealth royal commissions.

CONSIDERATIONS IN GOVERNMENT APPOINTMENT OF ROYAL COMMISSIONS

With so many calls for royal commissions how do governments decide to what to do?

First, the issue under question needs to be a significant one. What determines this is public pressure, media attention and of course political judgement.

Second, governments are quick to appoint royal commissions into a single issue as it has less potential link to wider aspects of government administration. Hence, royal commissions are quickly appointed into accidents and matters concerning individual impropriety. The Howard Government was quick to appoint a royal commission into the HIH collapse precisely because its links to government were limited. The HIH collapse was all about private sector incompetence and personal greed rather than government administration. Issues that have the potential to highlight wide ranging systems failure in government will be resisted. This explains the Howard Government's reluctance to appoint royal commissions into Australian intelligence services and the Cornelia Rau affair. In such cases, governments may seek to deflect demands for the more external and powerful royal commission investigation by establishing a less public and formal inquiry like the Palmer Inquiry in relation to the Rau affair.

Third, governments must be sure that the complaints have a legitimate basis. Of course, this is often a point of great contention and part of the game is for a government to deny the problem, to suggest that its extent is exaggerated or to deny that there is any basis at all in the complaints. The Howard Government rejected demands for a royal commission into the provision of intelligence advice concerning Indonesia, because it did not accept there was a sound basis in the complaint.

A fourth consideration is whether an inquiry really needs the coercive powers of a royal commission to make witnesses give evidence, to access normally confidential and private information from both government and other sources, to adequately tackle the issue and if it is necessary to provide protection to witnesses giving evidence. One of the complaints about the Palmer Inquiry is that it lacks the powers to both collect evidence and to grant immunity to essential witnesses such as Queensland police officers who are consequently unwilling to participate in the inquiry—a point stressed by Premier Beattie (Beattie 2005).

A fifth area of concern given the powers of royal commissions to compel witnesses to attend and to ask for files and information, is for governments to assess just what could be the implications of this for its ongoing administration. Are there files that a government may not want revealed? Will ministers, as well as senior bureaucrats be asked to front the royal commission? Royal commissions' powers of investigation, unlike other forms of public inquiry whose requests for additional information can be denied, need to be taken very seriously.

Sixth, a government will appoint a royal commission when there is such public scepticism about official explanations and capabilities of existing government agencies that only the findings of a royal commission type inquiry can relieve such public anxiety and restore trust in government. Hence, royal commissions were appointed into police, corruption and government financial administration across several states during the 1980s. Royal commissions appointed into police corruption and government maladministration during the 1980s in Queensland, Victoria, South Australia and Western Australian had elements of this.

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Seventh, there are the costs of royal commissions. It was on grounds of costs that the Howard Government rejected an inquiry into child abuse. The Hawke Government's *Royal Commission into Aboriginal Death in Custody* cost nearly $30 million and was criticised by the then Coalition Opposition and some Aboriginal groups on these grounds. Governments have to weigh these matters in deciding to appoint a royal commission and assess whether the means really justifies the ends. The Rann Government has gone to great lengths in its recently established royal commission to limit costs.

Eighth, is the issue of timing. Royal commissions take considerable time. For governments, the key consideration is where they are in their electoral cycle. Governments prefer to have some distance between when they appoint a royal commission and when they may be facing the next election.

Last is the policy area under investigation. Once a royal commission is established little action can occur until the report is released. Thus, governments are loath to appoint a royal commission in an area they see as politically important and where they have plans for initiatives. Hence the Howard Government has rejected calls for a royal commission into industrial relations—a key plank in the fourth Howard Government policy agenda where it wants to take numerous initiatives (Andrews 2004). At the same time a government may want an excuse for not doing something. A royal commission may be the answer, but it is an expensive and potentially dangerous technique to use for this purpose.

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CONCLUSIONS—ROYAL COMMISSIONS: AN 'INSTITUTION OF LAST RESORT'

These then, are the issues governments may consider in appointing a royal commission. Because of their prestige, and greater sense of independence and powers than other non-statutory public inquiries, there needs to be careful consideration before establishing a royal commission.

Governments are increasingly aware of these issues, hence their reluctance in recent times to appoint royal commissions. In effect, royal commissions have become the institution of last resort. They are established when governments politically have nowhere else to go; when the issues warrant an investigation by a body with such coercive powers and prestige; when government itself or some parts of it are seen to be lacking credibility over an issue, and when government still has some control over the policy and political agenda. The task for government is to always appear to be appointing a royal commission as if it really wants to rather than because it is being forced to by public opinion.

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