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INSTITUTE

Commissions of Inquiry Act 1995 (Tas) and the *Evidence Act 2001* (Tas) s 194K

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In forming the views contained in this Research Paper, the TLRI sought and took into account perspectives from people with relevant expertise, including Mr Michael O'Farrell SC and Ms Maree Norton SC, and the Department of Justice. The TLRI thanks them for their insights and feedback.

An electronic copy of this Research Paper is available at the TLRI website.

An electronic copy may also be obtained by:

Email: law.reform@utas.edu.au

Phone: (03) 6226 2069

Post: Tasmania Law Reform Institute

Private Bag 89 Hobart TAS 7001

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Executive Summary

Commissions of inquiry

Commissions of inquiry are a type of statutory public inquiry, and the term is generally used interchangeably with 'royal commission' in the Australian context. Public inquiries are temporary, independent bodies, appointed by executive government. Inquiries are a powerful type of statutory public inquiry with coercive information-gathering powers. As part of these inquiries, an extensive investigation is undertaken, leading to recommendations aimed at resolving the problem at hand. Consequently, commissions of inquiry are important to Tasmania and the community. However, commissions of inquiry are not criminal courts (and so individuals do not have the protections of a fair trial and the presumption of innocence). It is for this reason that caution should be exercised in conferring additional broad powers of investigation on a commission. The power of a commission is to make recommendations within the ambit of the terms of reference in the order setting up the commission. Importantly, given the scope of the powers of a commission of inquiry or a royal commission, there is a need to balance coercive powers with the protections of the rights of individuals. Caution is required in the application of a commission's coercive powers, to avoid compromising the civil liberties of individuals appearing before the commission. There are potentially devastating consequences for an individual if an adverse finding or finding of misconduct is made by a commission.

There has been a long history of royal commissions in Tasmania. However, in recent times, royal commissions and commissions of inquiry have been very rare. The modern legislative structure of commissions of inquiry began with the introduction of coercive powers into the *Evidence Act 1910* (Tas) ('*Evidence Act*') to support the Royal Commission into an Attempt to Bribe a Member of the House of Assembly and other Matters ('Carter Royal Commission') established in 1990. Following this, the Law Reform Commissioner of Tasmania considered a reference on an appropriate legislative framework for commissions of inquiry or royal commissions. This led to the enactment of the *Commissions of Inquiry Act 1995* (Tas) ('*Commissions of Inquiry Act*') and there have been only two subsequent commissions of inquiry (commenced over 20 years apart):

- in 2000, the Commission of Inquiry into the Death of Joseph Gilewicz ('Gilewicz Commission of Inquiry'); and
- in 2021, the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Child Abuse Commission of Inquiry').

In its reflections on the operation of the *Commissions of Inquiry Act*, the Child Abuse Commission of Inquiry commented on reforms to the legislative framework that may assist future inquiries and the Tasmanian community. These reforms related to the Commissions of Inquiry Act and the *Evidence Act* s 194K. In this regard, it is important to clarify that this Research Paper is not an extension of the Child Abuse Commission of Inquiry and does not consider or revisit the views expressed or the recommendations made by that Commission, other than where it made comment on the operation of the *Commissions of Inquiry Act* and the *Evidence Act* s 194K. This Research Paper is concerned with reviewing the broader statutory framework in which all commission of inquiry are conducted, for the benefit of future inquiries.

In expressing its views and making recommendations in this Research Paper, the TLRI has considered the historical development of relevant provisions in Tasmania, including the comments made by the Child Abuse Commission of Inquiry in relation to the legislative structure, as well as approaches taken in other jurisdictions, including in other reviews. The TLRI has also considered feedback it received in the development of this Paper.

Proposed reforms to the Commissions of Inquiry Act 1995 (Tas)

Addressing the Terms of Reference, the TLRI makes recommendations in this Research Paper for reform of the *Commissions of Inquiry Act* in the following areas:

Procedural fairness (see Part 4 and Recommendations 1 and 2)

The notion of 'procedural fairness' means acting fairly in administrative decision-making, and the principles of procedural fairness apply to commissions of inquiry. Particularly relevant in the context of allegations of misconduct at a commission of inquiry, the fair hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests. The principles are encapsulated in the requirements of ss 18 and 19 of the *Commissions of Inquiry Act*.

The TLRI recognises the importance of acknowledging a commission's obligation to provide procedural fairness to any person whose interests may be affected. This is undisputed, and fundamental to the operation of a commission of inquiry. The TLRI also recognises that in a smaller jurisdiction, like Tasmania, the potential for a finding of misconduct, or an adverse finding, to damage an individual's reputation (both professional and personal) is particularly acute. It is also not the function of a commission of inquiry to hold individuals to account (as a criminal court may, for example). However, it is possible that public expectations of the role of a commission in relation to individual responsibility may be blurred by the truth-telling focus of more recent inquiries. A commission does not have powers to enforce its findings and cannot make a determination that a person has committed a crime. Importantly, however, an adverse finding may permit an inference that an individual has, for example, committed a criminal offence, and such a finding is made without a fair trial. Fair trials reduce the risk that innocent people are found guilty, and they achieve this through the application of fundamental principles, such as the presumption of innocence, the criminal standard of proof (beyond reasonable doubt), rules of evidence and so on. Consequently, a careful balancing of the powers of an inquiry and the interests of an individual is required. In examining the operation of the *Commissions of Inquiry Act* ss 18 and 19 in the context of the Commission of Inquiry into Child Sexual Abuse and the approach in other jurisdictions, it is the view of the TLRI that greater flexibility is required in the application of the principles of procedural fairness. However, the TLRI does not consider that the legislation should be changed to make it 'less onerous' for a commission to make a finding of misconduct or an adverse finding.

Instead, the TLRI's view is that the current provisions governing commissions of inquiry in Tasmania are out of step with the approaches taken elsewhere, are unduly complex, and impede the capacity of a commission. Prescriptive provisions about the content of procedural fairness are undesirable. It is fundamental that the rules should be applied flexibly against the setting of the legislation and according to the particular circumstances, including the subject matter of the inquiry. In making recommendations related to procedural fairness, the TLRI is not seeking to weaken protections for individuals, and remains of the view that robust protections are required to ensure individuals are afforded procedural fairness.

It is the TLRI's view that the continuation of s 18 (findings of misconduct) in its current form, with overly prescriptive and impractical requirements, is undesirable for the operation of any future commissions of inquiry. No other jurisdiction in Australia or overseas adopts the current approach in Tasmania of separate and distinct misconduct and adverse findings processes. Accordingly, the TLRI's view is that the definition of 'misconduct' in s 3, s 18 and s 20(2) of the *Commissions of Inquiry Act* be repealed.

The TLRI considers that s 19 of the *Commissions of Inquiry Act*, in relation to adverse findings, requires amendment. It is overly prescriptive in its requirements for procedural fairness and does not provide for flexibility. Accordingly, the TLRI's view is that the *Commissions of Inquiry Act* s 19 should be amended to:

- remove the requirement for a specified period of notice and instead specify that the rules of procedural fairness apply; and
- state that if a commission proposes to make a finding that is adverse to any person, the commission must ensure that the person is aware of the matters on which the proposed finding is based, and that the person has had an appropriate opportunity to respond to those matters.

Client legal privilege and other privilege (see Part 5 and Recommendations 3–6)

A number of privileges exist at common law (and in legislation), including the privilege against self-incrimination (protecting individuals from giving incriminating evidence against themselves, including the fundamental right to remain silent) and client legal privilege (also known as legal professional privilege). Legal professional privilege is a fundamental aspect of the justice system that protects individual rights and interests and serves broader public interests. This privilege is a recognised exemption from the requirement to disclose certain information. A commission's powers to require information may be subject to claims of privilege. However, as investigatory body, it has been recognised that a commission is not necessarily bound by the same restrictions that apply to judicial proceedings.

In Tasmania, the privilege against self-incrimination is expressly abrogated, but the incriminating evidence given by a person before a commission is not admissible in subsequent legal proceedings, other than proceedings under the *Commissions of Inquiry Act*. This is known as a 'direct use immunity'. Taking into account the approach in other jurisdictions and the discussion in reviews, it is the TLRI's view that no reform is required to the *Commissions of Inquiry Act* in relation to the privilege against self-incrimination.

Legal professional privilege is not expressly abrogated under the *Commissions of Inquiry Act*. However, s 23A(1) of that Act provides that if a person refuses to prepare or produce a document or statement on the grounds that the information contained within that document or statement is protected by privilege, the commission may require the production of the document or statement to assess whether privilege applies. The TLRI considers that client legal privilege should continue to apply to commissions of inquiry established under the *Commissions of Inquiry Act*, as general principle. However, the TLRI's view is that there may be circumstances where the public interest in discovering the truth should prevail over the private interest of maintaining client legal privilege. Consequently, Parliament could consider passing specific legislation that will abrogate the privilege in exceptional circumstances where access to such material is relevant and necessary for the conduct of an inquiry.

Further, the TLRI considers that procedural issues in relation to making claims of client legal privilege need to be addressed. It is the TLRI's view that a statutory framework should be included in the *Commissions of Inquiry Act* to provide a clear process and set out the way in which claims of privilege can be made and determined. This statutory framework should provide for the following:

- An opportunity, in a practical sense, for a party to assert a claim of client legal privilege. This would mean that sufficient time must be given to a party to respond to a request from a commission of inquiry to produce documents and to determine whether privilege should be claimed for some documents and/or parts of some documents.
- An opportunity for a party to be heard in relation to the assertion of privilege.
- A clear mechanism by which claims of privilege are to be determined. At a minimum, this assessment must be made by person with appropriate legal qualifications and experience.

Closed hearings and restrictions on reporting (see Part 6 and Recommendations 7 and 8)

Under the *Commissions of Inquiry Act*, the general position is that the hearings of a commission are open to the public. However, it has become increasingly common for the more formal public hearings to be complemented with private sessions. Recent amendments to the *Commissions of Inquiry Act* allow for trauma-informed private sessions, paving the way for the addition of a 'truth-telling' function to public inquiries. In addition to private sessions, under the *Commissions of Inquiry Act* the interests of individuals can be protected by holding closed hearings or making an order restricting the publication of material.

In developing this Research Paper, the TLRI considered these provisions. Given the wide variety of procedures a commission of inquiry in Tasmania may adopt (depending on the subject matter of the inquiry, and its terms of reference) and practical factors relating to the number of notices that need to be given and the existence of a dedicated inquiry website, the TLRI considers that amendment to notice provisions is required. These amendments relate to closing hearings and restricting or prohibiting the publication of material. The TLRI's view is that the *Commissions of Inquiry Act* s 13(3) should be amended to change the requirement that notice of the intention to take or receive evidence at a hearing which is not open to the public be given at a previous public hearing. This provision should instead allow a commission to announce its intention to take or receive evidence at a closed hearing at a previous hearing which was open to the public, and/or on the commission of inquiry's website. Similarly, the *Commissions of Inquiry Act* s 14(2) should be amended to enable a commission to publish an order prohibiting or restricting the public reporting of a hearing, or the publishing of any evidence taken or received by it, on the commission of inquiry's website and/or at a hearing which is open to the public.

Other matters (see Part 8 and Recommendations 13 and 14)

The TLRI also considered issues relating to terminology used in the *Commissions of Inquiry Act* as part of its review. The TLRI agrees with the Child Abuse Commission of Inquiry that the terminology used in the *Commissions of Inquiry Act* is not consistent across the Act. The TLRI also agrees that there is scope to provide clarity to the Act by defining key terminology. Accordingly, the TLRI makes recommendations to provide for consistency and clarity.

***Proposed reforms to section 194K of the Evidence Act* (see Part 7 and Recommendations 9–12)**

Legislative provisions that prohibit the publication of information that identifies, or is likely to lead to the identification, of sexual assault complainants and victim-survivors represent an exception to the principle of open justice. Under the *Evidence Act* s 194K, the publication of information that is likely to identify the complainants in prescribed sexual offence proceedings is prohibited. These provisions arose out of a concern to provide protection to sexual assault complainants by ensuring anonymity and thereby encourage reporting of sexual offences. In this way, the provisions are designed to further the privacy interests of complainants by seeking to avoid further harm and distress. However, in the context of the Child Abuse Commission of Inquiry, difficulties arose in relation to the interaction of the *Evidence Act* s 194K and the desire of victim-survivors to contribute their experiences to the Inquiry.

The TLRI remains of the view that the policy basis for the provision (the protection of complainants of sexual assault) continues to be fundamentally important. It is also the view of the TLRI that a complainant (victim-survivor) should be able to consent to the release of identifying information, as a means of supporting the public interest and as an expression of autonomy. Accordingly, in addressing the concerns raised by the Child Abuse Commission of Inquiry, the TLRI continues to recognise the importance of victim-survivor anonymity as a general rule in sexual assault cases, and the policy basis for the existence of s 194K as a safeguard for complainants. The TLRI also recognises the need for complainants to be able to speak out publicly about their own experience, if they wish to do so. As a result, there is a need for a provision that allows for consent to be provided to the release of identifying information. The TLRI also considers that consent by one victim-survivor should not permit identification of another complainant who seeks to remain anonymous or otherwise impinge on their rights.

The Child Abuse Commission of Inquiry highlighted issues with the application of the provision in circumstances where a complainant had given consent to be identified but there was uncertainty in relation to identification of potential witnesses. This was due to the need for a court order to be obtained to allow for the identification of witnesses or intended witnesses. The experience of the Inquiry highlights the difficulties created by this provision. More broadly, media organisations have indicated that uncertainty in relation to the scope of s 194K has also created difficulties in respect to their reporting of crimes.

Accordingly, the TLRI makes recommendations relating to the unusual operation of s 194K in relation to witnesses (as discussed) while maintaining the important statutory protections afforded to complainants and victim-survivors of sexual crimes. The TLRI considers that s 194K of the *Evidence Act* should be amended:

- to remove the reference to 'any witness or intended witness'; and
- to include within the definition of 'identifying information', information about a witness or intended witness if this would allow for identification or likely identification of another complainant protected by s 194K.

Further, in relation to witnesses who are also victim-survivors, a legislative provision should be enacted to provide the court with a discretion to make an order that the identity of a witness who is also a victim-survivor of the accused is not to be publicly disclosed (a 'tendency witness'). The *Criminal Procedure Act 1986* (NSW) s 294D(4) provides a useful model.

The TLRI also suggests that consideration be given to the introduction of a broader statutory discretion to allow the court to make a non-publication or non-disclosure order where necessary to avoid causing undue distress or embarrassment to a party or a witness (not including an accused). Such an order should be available in any proceeding that involves, or relates to, a sexual offence or domestic violence offence, or to a child who is a witness in any legal proceeding. In this regard, it is noted that a commission of inquiry already has the power to close hearings and control the public reporting of hearings if the public interest in an open hearing or reporting is outweighed by other considerations, including issues of privacy.

In relation to the age of consent for publication of identifying information, the TLRI's view is that the *Evidence Act* s 194K should not be amended to provide a defence to the publication of information if the consent is given by a person under 18 years unless there is a court order to that effect.

Recommendations

Recommendation 1

The *Commissions of Inquiry Act 1995* (Tas) should be amended to repeal:

- the definition of 'misconduct' in s 3;
- section 18; and
- section 20(2).

Recommendation 2

The *Commissions of Inquiry Act 1995* (Tas) s 19(2A) should be amended to remove the requirement for a specified period of notice.

Instead, s 19(2A) should provide (as set out currently in s 19(2B)) that if a commission proposes to make a finding that is adverse to any person:

- the rules of procedural fairness apply in respect of that person and that finding;
- the commission must ensure that the person is aware of the matters on which the proposed finding is based; and
- the commission must ensure that the person has had an appropriate opportunity to respond on those matters.

Recommendation 3

The *Commissions of Inquiry Act 1995* (Tas) should <u>not</u> be amended in relation to the privilege against self-incrimination.

Recommendation 4

Client legal privilege should continue to apply to commissions of inquiry established under the *Commissions of Inquiry Act 1995* (Tas), unless Parliament has passed legislation that abrogates privilege for a particular commission of inquiry.

Recommendation 5

A statutory framework should be included in the *Commissions of Inquiry Act 1995* (Tas) to provide a clear process as to how claims of privilege can be made and determined. This statutory framework should provide for the following:

- An opportunity, in a practical sense, for a party to assert a claim of client legal privilege. This would mean that sufficient time must be given to a party to respond to a request from a commission of inquiry to produce documents and to determine whether privilege should be claimed for some documents and/or parts of some documents.
- An opportunity for a party to be heard in relation to the assertion of privilege.
- A clear mechanism by which claims of privilege are to be determined. At a minimum, this assessment must be made by person with appropriate legal qualifications and experience.

Recommendation 6

The *Commissions of Inquiry Act 1995* (Tas) should continue to provide that the production to or use by a commission of documents for which privilege is claimed, does not amount to a waiver of privilege for any other purposes.

Recommendation 7

The *Commissions of Inquiry Act 1995* (Tas) s 13(3) should be amended to allow a commission to announce its intention to take or receive evidence at a closed hearing at a previous hearing which was open to the public, and/or on the commission of inquiry's website.

Recommendation 8

The *Commissions of Inquiry Act 1995* (Tas) s 14(2) should be amended to enable a commission to publish an order prohibiting or restricting the public reporting of a hearing, or the publishing of any evidence taken or received by it, on the commission of inquiry's website and/or at a hearing which is open to the public.

Recommendation 9

The *Evidence Act 2001* (Tas) s 194K(1) should be amended to remove the reference to 'any witness or intended witness in those proceedings'.

Recommendation 10

The *Evidence Act 2001* (Tas) s 194K(9) should be amended to include within the definition of identifying information, information about a witness or intended witness if this would allow for identification or likely identification of another complainant protected by s 194K.

Recommendation 11

A legislative provision should be enacted to provide the court with a discretion to make an order that the identity of a witness who is also victim-survivor of the accused is not to be publicly disclosed. The *Criminal Procedure Act 1986* (NSW) s 294D(4) provides a useful model for such witnesses.

Recommendation 12

The *Evidence Act 2001* (Tas) s 194K should <u>not</u> be amended to provide a defence to the publication of information if consent is given by a person under 18 years without a court order to that effect.

Recommendation 13

To ensure consistency in the terminology used in the statutory framework, the following amendments should be made to the *Commissions of Inquiry Act 1995* (Tas):

- section 21 (Admissibility of evidence in other proceedings) should be amended to include the words 'or information' after the word 'evidence';
- section 22 (Notices to witnesses) should be amended to include the words 'or information' after 'evidence' in subsections (1)(a), (2), (4) and (5). Further, s 22(5) should be amended to say 'any information or evidence' as opposed to 'any information of explanation';
- section 23A (Privilege does not apply in certain circumstances) should be amended to refer to 'document or statement or thing';
- section 23B (Powers in relation to witnesses) should be amended to include the words 'or information' after the word 'evidence';

- section 26 (Self-incrimination) should be amended to refer to ‘document or statement or thing’;
- section 34 (Copies of documents) should be amended to ‘document or statement or thing’; and
- section 34A(3)(c) and 5(c) (Commission may communicate information) should be amended to refer to ‘document or statement or thing’.

Recommendation 14

The *Commissions of Inquiry Act 1995* (Tas) s 3 should be amended to define ‘document’ to include any book, register or other record of information, however compiled, recorded or stored.

Part 1

Introduction

1.1 Introduction

1.1.1 Part 1 briefly outlines the nature of commissions of inquiry and the relevance of the *Evidence Act 2001* (Tas) ('*Evidence Act*') s 194K. It sets out the background to this Tasmania Law Reform Institute (TLRI) Research Paper, the Terms of Reference, and the scope of this Paper.

1.2 Commissions of inquiry

1.2.1 Commissions of inquiry are a type of statutory public inquiry, and the term is used interchangeably with 'royal commission' in the Australian context.[1] Public inquiries are temporary, independent bodies, appointed by executive government.[2] The executive is the branch of government that is made up of the public service and government ministers. At the heart of executive government in Tasmania is the Premier and the Ministers responsible for each governmental department, known as the Cabinet. The Cabinet decides government policy, puts these policies into practice, and drafts and introduces most Bills into Parliament. Unlike non-statutory inquiries, once a commission of inquiry has been established (including terms of reference, the appointment of Commissioners, and direction as to a reporting date and budget), the conduct of the inquiry is not subject to any further ministerial direction or control. In the Tasmanian context, commissions of inquiry are rare, with only two being held since the enactment of the *Commissions of Inquiry Act 1995* (Tas) ('*Commissions of Inquiry Act*').

1.3 Background to this Research Paper and approach of the TLRI

1.3.1 As discussed further in Part 3, there have only been two commissions of inquiry held in Tasmania under the *Commissions of Inquiry Act*. Prior to the enactment of the *Commissions of Inquiry Act*, a Royal Commission was established in 1990 to investigate events relating to an attempt to bribe a Member of Parliament following the 1989 state election. Following this inquiry, the Law Reform Commissioner of Tasmania reviewed the powers given to a royal commission under the *Evidence Act* and made recommendations for a new Act in 1993. Following this report, the *Commissions of Inquiry Act* was enacted, providing commissions of inquiry with enhanced powers. In 2000, the first Commission of Inquiry was established into the death of Joseph Gilewicz ('Gilewicz Commission of Inquiry'), and as part of this Inquiry, concerns were expressed about the scope of a commission's

[1] Tasmania Law Reform Institute (TLRI), *Report on the Commissions of Inquiry Act 1995* (Final Report 3, 2003) 5 ('*Report on the Commissions of Inquiry Act 1995*'). According to the Law Reform Commissioner, the term 'commission of inquiry' is the preferred term 'because it is more simple, and it operates to direct people's minds to the function of the body involved'. There is no practical difference between the two. The term 'royal commission' is simply a product of history, in that it was the Governor-General for the Commonwealth or the Governor of the State that would direct that a commission take place. The term 'royal' confers no extra powers on the commission: Law Reform Commissioner of Tasmania, *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (Report 70, 1993) 29–31 ('*Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*').

[2] Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Australia, 2nd ed, 2021) [2.11].

powers and the statutory procedures to be followed, creating practical issues for the commission in carrying out its investigation. In 2003, the TLRI released a Final Report, *Report on the Commissions of Inquiry Act 1995* (Tas), which made recommendations for reform aimed at addressing issues identified in the Gilewicz Commission of Inquiry. The subsequent reforms made to the *Commissions of Inquiry Act* are set out at [3.11].

1.3.2 In 2021, a Commission of Inquiry was established into the Tasmanian Government's responses to child sexual abuse in institutional settings ('Child Abuse Commission of Inquiry') and this was accompanied by reforms to various pieces of legislation to address issues that had been identified about the powers and procedures of a commission.[3] In 2023, the Child Abuse Commission of Inquiry released its final report, where it reflected on the operation of the *Commissions of Inquiry Act* and the *Evidence Act* and made comment on further reforms that may assist future inquiries and the Tasmanian community. The Child Abuse Commission of Inquiry encouraged the:

> Tasmanian Government to actively pursue the following potential framework for legislative reform:
>
> 1. Amend the Commissions of Inquiry Act 1995 to:
>
> (a) establish greater flexibility in the powers and privileges applying to different inquiries, including expressly abrogating legal professional privilege in relevant inquiries
>
> (b) repeal the definitions of 'adverse finding' and 'misconduct' (section 3) and sections 18, 19(2A) and (2B)
>
> (c) use consistent terminology and achieve drafting coherence across the various ways in which a commission of inquiry might obtain, manage and protect those who provide information
>
> (d) provide for more practical ways in which to make decisions about closing hearings and making prohibition or restricted publication orders.
>
> 2. Amend section 194K of the *Evidence Act 2001*, considering equivalent provisions in other Australian jurisdictions and the practical challenges identified in this report.[4]

1.3.3 This Research Paper considers the areas for reform identified by the Child Abuse Commission of Inquiry in its Final Report, as set out in the Terms of Reference.

1.3.4 It is noted, as discussed further in Part 2, that each Australian jurisdiction has its own statutory framework for the conduct of commissions of inquiry or royal commissions. Such commissions are not commonly held. Further, they have arisen from diverse circumstances and have examined a very wide range of topics.[5] In this context, it is perhaps not surprising that, over time, several jurisdictions have reconsidered the statutory powers of commissions. For example, at the Commonwealth level, the Australian Law Reform Commission (ALRC) (in its 2009 Report) observed that the '*Royal Commissions Act* has been amended 20 times since its enactment' with substantive amendments being made to address 'deficiencies in the legislation identified by particular Royal Commissions'.[6] The evolution of royal commissions in the different states and also at the Commonwealth level led to reforms (or proposed reforms) to legislation in other jurisdictions as well, reflecting the issues encountered by

[3] See Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children* (Report, August 2023) vol 2 ch 1 [2.3.1] ('*Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse*'); see this Research Paper [3.11.1]–[3.11.5].
[4] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23, 326.
[5] See Prasser (n 2).
[6] Australian Law Reform Commission ('ALRC'), *Making Inquiries: A New Statutory Framework* (Report 111, October 2009) [1.5] ('*Making Inquiries: A New Statutory Framework*').

the commissions that have been held. In this way, the legislative framework has evolved to reflect the often novel issues encountered in each inquiry process. This is also true for Tasmania, with commissions of inquiry being rare and held on diverse subject areas. Similarly, each commission has been accompanied by requests for additional or different powers by the Commissioner, contemporaneously with the inquiry, as well as part of a review of powers subsequent to the publication of the relevant report.

1.3.5 In this regard, it is important to be clear that this Research Paper is not an extension of the Child Abuse Commission of Inquiry and does not consider or revisit the views expressed, or the recommendations made, by that Commission, other than where it commented on the operation of the *Commissions of Inquiry Act* and the *Evidence Act* s 194K. In approaching this reference, it is also important to note that, while this Research Paper sets out the views of the Child Abuse Commission of Inquiry on these issues as expressed in its 2023 Report (as required by the Terms of Reference), the TLRI has independently considered the powers of a commission of inquiry and has formed its own views as to appropriate reforms. In expressing its views and making recommendations, the TLRI has addressed the terms of reference by 'considering the development of the law in Tasmania', including the views expressed previously by the TLRI and in prior commissions of inquiry, the comments in the Child Abuse Commission of Inquiry, the approaches in other jurisdictions, and the perspectives received from people with relevant expertise. In this way, this Research Paper aims to review the current powers of a commission of inquiry under the *Commissions of Inquiry Act* in light of this research process, for the benefit of future inquiries.

1.3.6 Further, in some instances, the particular issues encountered in inquiries or commissions in Tasmania and elsewhere, and subsequent legislative responses, have caused the TLRI to reconsider, and in some cases change, the views it expressed in its 2003 Report. In the future, this may occur again if the subject matter of a particular inquiry indicates the need for other legislative reform or (as happened in the Child Sexual Abuse Commission of Inquiry) inquiry-specific regulations.[7] This continual reform reflects the rarity of commissions of inquiry (and so the infrequency with which the legislation is used and tested) as well as the diversity of subject matter that commissions may address.

1.4 Terms of Reference

1.4.1 The Attorney-General, the Hon Guy Barnett requested that the Institute examine and report on the operation of the *Commissions of Inquiry Act* and the *Evidence Act* s 194K. The following Terms of Reference were received by the TLRI:

> *To examine and report on the operation of the Commissions of Inquiry Act 1995 (Tas), and section 194K of the Evidence Act 2001 (Tas) to:*
>
> *a. examine the need for any extension of the powers of a Commission of Inquiry*
>
> *b. examine any statutory limitations identified by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings in its final report*
>
> *c. specifically examine the appropriateness of sections 18 and 19 of the Commissions of Inquiry Act 1995 (Tas) and section 194K of the Evidence Act 2001 (Tas) in the context of the practical experience of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, and*
>
> *d. make recommendations for any necessary legislative change.*

[7] See discussion in *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23; see also *Commissions of Inquiry Regulations 2021* (Tas).

1.5 Scope of this Research Paper

1.5.1 This Research Paper addresses the Terms of Reference and examines the areas for reform identified by the Child Abuse Commission of Inquiry.

- Part 2 provides an overview of commissions of inquiry. It outlines the nature and purpose of commissions of inquiry and royal commissions, and the legislative framework that exists in Tasmania and other comparable jurisdictions, including the coercive powers provided to a commission of inquiry, and the scope of protections for individuals in relation to these inquiries.
- Part 3 traces the history of commissions of inquiry in Tasmania, relevant law reform papers and associated legislative reforms to provide context for discussion of the areas for review identified in the Terms of Reference for this Research Paper.
- Part 4 discusses the types of procedures available to conduct a commission of inquiry and the requirement that the procedures adopted by an inquiry comply with the principles of procedural fairness. This Part outlines the principles of procedural fairness, the position in Tasmania and other comparable jurisdictions, the discussion from relevant reviews and makes recommendations for reforms to Tasmanian law.
- Part 5 addresses the issue of privilege. A number of privileges exist at common law (and in legislation), including the privilege against self-incrimination (protecting individuals from giving incriminating evidence against themselves, including the fundamental right to remain silent) and client legal privilege (also known as legal professional privilege). The focus of Part 5 is on the privilege against self-incrimination and client legal privilege and the Part contains recommendations for reform.
- Part 6 considers the issue of the protections that exist for individuals arising from the powers of a commission to hold closed hearings and make orders to the restrictions on reporting, and the issues raised by the Child Abuse Commission of Inquiry. It considers the position in Tasmania and other comparable jurisdictions and makes recommendations for reforms to Tasmanian law.
- Part 7 examines the *Evidence Act* s 194K and comparable provisions in other jurisdictions, which prohibit the publication of information that is likely to identify complainants in prescribed sexual offence proceedings. This Part sets out the current law in Tasmania, the approaches used elsewhere, the issues encountered by the Child Abuse Commission of Inquiry in relation to the interaction of the *Evidence Act* s 194K and the desire of victim-survivors to contribute their experiences to the inquiry and makes recommendations for reform.
- Part 8 addresses other matters considered by the TLRI as part of its review of the *Commissions of Inquiry Act* relating to the terminology used in the Act, and the recommendation of the ALRC in relation to a tiered approach to public inquiries.

Part 2

Overview of Commissions of Inquiry

2.1 Introduction

2.1.1 Part 2 provides an overview of commissions of inquiry. It outlines the nature and purpose of commissions of inquiry and royal commissions, and the legislative framework that exists in Tasmania and other comparable jurisdictions, including the coercive powers provided to a commission of inquiry and the scope of protections for individuals in relation to these inquiries.

2.2 Nature of commissions of inquiry and royal commissions

2.2.1 Commissions of inquiry are a type of public inquiry. Broadly speaking, executive government can establish two types of public inquiries: statutory and non-statutory.[8] Both types of inquiries are established by the executive arm of government, however, the distinction lies in how they are appointed and for what purpose. Non-statutory inquiries are regularly established by a government minister, not under a specific Act of Parliament (for example taskforces, departmental and ministerial inquiries, committees and reviews).[9] Unlike statutory inquiries, they do not have the coercive powers found in statute necessary to investigate relevant matters and do not afford the same protections to individuals providing information in a public forum.[10] In contrast, commissions of inquiry are a form of ad hoc statutory public inquiry,[11] and the term is used interchangeably with 'royal commission'.[12] Commissions of inquiry are considered a unique and indispensable institution for investigating weaknesses and deficiencies in the Australian system of government.[13] Commissions of inquiry, as set out at [2.5.1]–[2.5.4], have wide powers to investigate and are generally considered to be independent of the executive, despite being established by the executive.[14] They provide legitimacy for policy change and have the advantages of 'flexibility, objectivity and most importantly, perceived independence'.[15]

2.2.2 The first use of royal commissions in the United Kingdom can be traced back to 1086.[16] In the Australian context, the *Royal Commissions Act 1902* (Cth) was one of the Acts passed during the first Parliament of the Commonwealth.[17] Usually, members of royal commissions have some kind of status (often former judges), have expertise in overseeing complex public processes,[18] and are given powers

[8] Prasser (n 2) [2.26]. Note that Prasser proposes a classification model in accordance with the function of the public inquiry, being either inquisitorial/investigatory (mostly statutory royal commissions and commissions of inquiry) or policy advisory (usually non-statutory inquiries). The two categories are not mutually exclusive. For the purposes of this report, the statutory and non-statutory classification has been adopted.
[9] Ibid [2.26].
[10] For example, see *Commissions of Inquiry Act 1995* (Tas) s 8(5).
[11] Note also that ad hoc statutory inquiries can be distinguished from permanent statutory inquiries created by specific legislation, for example, the Tasmanian Integrity Commission created by the *Integrity Commission Act 2009* (Tas).
[12] *Report on the Commissions of Inquiry Act 1995* (n 1) 5. See also n 1.
[13] Prasser (n 2) [1.16]–[1.17].
[14] Ibid [2.23].
[15] Ibid [10.9].
[16] Ibid [3.4].
[17] *Making Inquiries: A New Statutory Framework* (n 6) [1.3]. The *Royal Commissions Act 1902* (Cth) is still in force and has been amended several times.
[18] Prasser (n 2) [2.27].

to procure all sorts of information relevant to the inquiry in a timely manner.[19] Unlike proceedings of an adversarial nature, there are no 'litigants' in a public inquiry. At least until provisional conclusions are reached, witnesses have no 'case' to advance; their role is to assist the inquiry to establish the facts.[20] Similar to courts, commissions of inquiry conduct public hearings, usually appointing lawyers to advise them and to examine witnesses on their behalf. However, a commission of inquiry is not a court, and may conduct its inquiry and obtain information 'in any matter that it considers appropriate',[21] including by holding private sessions,[22] permitting a person to give evidence anonymously or under a pseudonym,[23] and by receiving written submissions.[24] In this way, royal commissions and commissions of inquiry can be described as inquisitorial/investigative in nature rather than adversarial,[25] with four important differences being identified:

(1) there is no 'proceeding', or issue that is the subject of proceedings between parties in any real or substantial sense, in inquisitorial proceedings (the tribunal directs the inquiry, and the witnesses are, of necessity, witnesses called by or with the authority of the tribunal);

(2) there is no plaintiff or defendant, and no prosecutor or defence, seeking to have a case placed before the inquiry;

(3) there are no pleadings to define the issues to be tried, nor are they any charges, indictments or depositions; and

(4) an inquiry may take a fresh turn at any moment, making it difficult to know in advance of the hearing what allegations may be made.[26]

2.2.3 In discussing the differences between courts and commissions, the Australian Law Reform Commission (ALRC) has observed that '[a]lthough th[e] distinction has its uses, in practice inquiry procedures tend to include elements of both adversarial and inquisitorial methods'. It is not possible to characterise courts as purely adversarial and inquiries as purely inquisitorial.[27]

2.2.4 However, key differences remain between courts and inquiries. Unlike courts, commissions of inquiry do not have the power to make determinations as to whether any particular person has committed a crime or is otherwise legally liable for their actions. Instead, commissions of inquiry can make findings of fact and recommendations for the consideration of executive government.[28] For this reason, the impact of the final report of a commission of inquiry has been questioned. A commission cannot implement its own recommendations, its recommendations are not binding, and it cannot make findings of guilt in relation to criminal activity, or a determination of liability in relation to other wrongdoing.[29] Unlike superior courts (such as the Supreme Court of Tasmania), commissions of inquiry do not have inherent jurisdiction and may only exercise the powers conferred on them by legislation and their terms of reference.[30] However, commissions do have powers to make findings of fact, and the

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[19] See *Commissions of Inquiry Act 1995* (Tas) ss 5, 12, 22–25.
[20] Sir Richard Scott, *Inquiry into Exports of Defence Equipment and Dual-use Goods to Iraq and Related Prosecutions* (Report, 1996) pt 4 s K 1753; Sir Richard Scott, 'Proceedings at inquiries: the duty to be fair' (1995) 111 *Law Quarterly Review* 596.
[21] *Commissions of Inquiry Act 1995* (Tas) s 5(3).
[22] *Commissions of Inquiry Act 1995* (Tas) s 19A.
[23] *Commissions of Inquiry Act 1995* (Tas) s 23B.
[24] *Commissions of Inquiry Act 1995* (Tas) s 5(2)(b).
[25] Prasser (n 2) [2.27].
[26] Royal Commission on Tribunals of Inquiry 1966, *Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon* (Report, 1966) 17 [30] ('*Salmon Report*'), referred to in Geoffrey Lindell, *Tribunals of Inquiry and Royal Commissions* (The Federation Press 2022), 39.
[27] *Making Inquiries: A New Statutory Framework* (n 6) [15.6].
[28] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 2 ch 1 [2.3.3].
[29] See *Commissions of Inquiry Act 1995* (Tas) s 19(2). See [2.5.1]–[2.5.4].
[30] See [2.4].

process governing the use of these powers is central to this Research Paper. In particular, this Paper examines the powers of a commission of inquiry in Tasmania to make a finding of misconduct ('conduct by a person that could reasonably be considered likely to result in a criminal charge, civil liability, disciplinary proceedings, or other legal proceedings, being brought against that person in respect of the conduct')[31] and adverse findings.[32] In considering any extension or change to the statutory framework for commissions of inquiry, it is the TLRI's view that flexibility in how a bespoke commission conducts its investigation (to fulfil its particular terms of reference) must be balanced against the potentially devastating consequences of an adverse finding or a finding of misconduct against an individual. In making recommendations in relation to procedural fairness, the TLRI is not seeking to weaken the protections for individuals, and remains of the view that the robust protections provided by the common law principles of procedural fairness are required to ensure individuals are afforded procedural fairness in a public inquiry. This is discussed further at [2.6.1]–[2.6.5].

2.3 Purposes of commissions of inquiry and royal commissions

2.3.1 Both royal commissions and commissions of inquiry are powerful statutory public inquiries, with coercive information-gathering powers. They are primarily used to investigate major allegations, accidents or calamities. As part of these inquiries, an extensive investigation is undertaken, leading to recommendations aimed at resolving the problem at hand.[33] The usual purpose for establishing a commission of inquiry is to ascertain the truth about some fact, event or circumstance in order to restore public confidence.[34] They can expose government flaws and the failings of public servants, can potentially affect careers and can even bring down governments (as seen in the Fitzgerald Inquiry in Queensland).[35] They can also provide guidelines for future action, address grievances in the public sphere, encourage participation in decision-making, and provide a public report. Recommendations can spur policy change and provide templates for reform.[36]

2.3.2 Traditionally commissions have been held in public. However, it has become increasingly common for royal commissions and commissions of inquiry to complement their information/evidence-gathering via more formal public hearings with private sessions, written submissions, and community engagement and education.[37] Recent amendments to both the *Royal Commissions Act 1902* (Cth) and the *Commissions of Inquiry Act 1995* (Tas) ('*Commissions of Inquiry Act*') allow for private sessions,[38] paving the way for the addition of a 'truth-telling' function to public inquiries.[39] This truth-telling style of inquiry is said to have emerged in Australia as a result of the Commonwealth's *Royal Commission into Institutional Responses to Child Sexual Abuse*.[40] The amendments to the Tasmanian Act—brought in to support the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the 'Child Abuse Commission of Inquiry')—were modelled on the

[31] *Commissions of Inquiry Act 1995* (Tas) ss 3, 18.
[32] *Commissions of Inquiry Act 1995* (Tas) s 19(2A). See further Part 4.
[33] See *Report on the Commissions of Inquiry Act 1995* (n 1) 5–6.
[34] See ibid 8, 16.
[35] See Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct ('Fitzgerald Inquiry') *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989); Crime and Corruption Commission Queensland <https://www.ccc.qld.gov.au/about/about-ccc/our-history/fitzgerald-inquiry>. The Fitzgerald Inquiry resulted in the resignation of the former Premier, Sir Joh Bjelke-Petersen, and the imprisonment of four former Ministers and the former Police Commissioner, Sir Terence Lewis (as well as numerous other convictions of other members of Queensland Police).
[36] Prasser (n 2) [10.10].
[37] Marcia Neave, 'Building Trust: Can Courts Learn from Royal Commissions?' (2021) 12(3) *International Journal for Court Administration* 5.
[38] See *Royal Commissions Act 1902* (Cth) pt 4; *Commissions of Inquiry Act 1995* (Tas) div 1A.
[39] Jonathan Tjandra, 'From Fact Finding to Truth-Telling' (2022) 45(1) *UNSW Law Journal* 341.
[40] Ibid 361.

Commonwealth provisions.[41] As seen in the Child Abuse Commission of Inquiry, giving victim-survivors the opportunity to tell their story in a supported environment, and for their stories to be acknowledged, can be a cathartic process.[42]

2.3.3 Under the *Commissions of Inquiry Act* s 5(1), the 'function of a commission is to conduct an inquiry into the matter in respect of which it is established and report to the Governor on that inquiry'. It is not the role of a commission of inquiry to bring individuals to account. However, the more recent 'truth-telling' function evident in some inquiries may blur community understanding of the powers and functions of a commission in relation to individuals. As noted by Tjandra, inquiries with a truth-telling focus:

> 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.[43]

2.3.4 Commissions in Tasmania can refer matters to appropriate authorities but cannot make findings or express a conclusion about the legal liability of a person.[44] The role of a commission of inquiry is to make recommendations within the ambit of the terms of reference in the order establishing the commission.

2.4 Legislative framework

2.4.1 Historically, royal commissions were established by an exercise of the royal prerogative. Royal commissions were adopted in early European settlement of Australia.[45] All Australian states and territories have legislation that provides for the establishment of royal commissions or other commissions of inquiry, as shown in Table 2.1.[46]

Tasmania

2.4.2 In Tasmania, the *Commissions of Inquiry Act* governs the functions and powers of commissions of inquiry. Pursuant to s 4 of the Act, the Governor may establish a commission by order, if satisfied that it is in the public interest and expedient to do so. The scope of a particular inquiry will be defined by the terms of reference granted to the inquiry.[47] To promote the perception of an inquiry's independence, members of an inquiry are mostly drawn from outside the executive arm of government.[48] Following a process of extensive investigation, a written report is then made to the Governor, with the report to be tabled in Parliament within 10 sitting days.[49]

Other comparable jurisdictions

2.4.3 As set out in Table 2.1, other comparable jurisdictions have legislation that provides for the establishment of commissions of inquiry or royal commissions, with coercive powers.

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[41] Tasmania, *Parliamentary Debates*, House of Assembly,18 March 2021, 54 (Ella Haddad).
[42] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 1, 25–26.
[43] Tjandra (n 39) 358.
[44] *Commission of Inquiries At 1995* (Tas) s 34A. See also discussion at [2.2.4].
[45] Tjandra (n 39) 343.
[46] See Part 2 for more detail.
[47] See *Commissions of Inquiry Act 1995* (Tas) ss 4(1), 5(b)(iii).
[48] *Making Inquiries: A New Statutory Framework* (n 6) [2.15].
[49] *Commissions of Inquiry Act 1995* (Tas) s 10.

Table 2.1: Relevant legislation in other comparable jurisdictions

Jurisdiction	**Legislation**
Australian Capital Territory	*Royal Commissions Act 1991* (ACT) *Inquiries Act 1991* (ACT)
Commonwealth	*Royal Commissions Act 1902* (Cth)
New South Wales	*Royal Commissions Act 1923* (NSW) *Special Commissions of Inquiry Act 1983* (NSW)
Northern Territory	*Inquiries Act 1945* (NT)
Queensland	*Commissions of Inquiry Act 1950* (Qld)
South Australia	*Royal Commissions Act 1917* (SA)
Victoria	*Inquiries Act 2014* (Vic)
Western Australia	*Royal Commissions Act 1968* (WA)
New Zealand	*Inquiries Act 2013* (NZ)
United Kingdom	*Inquiries Act 2005* (UK)
Canada	*Inquiries Act 1985* (Can)

2.4.4 New South Wales has separate legislation that allows for either a royal commission or a special commission to be established. Both types of inquiry have similar coercive powers set out under legislation, however, under the *Special Commissions of Inquiry Act 1983* (NSW), a special commission may only receive evidence that would be likely to be admissible in civil proceedings,[50] the commission is to focus and report on whether there is 'sufficient evidence warranting the prosecution of a specified person for a specified offence',[51] and to be eligible as a Commissioner, the person must either be a current or former judge or justice, or be qualified to be appointed as a judge or justice of a relevant court.[52] In the Australian Capital Territory (ACT), there is separate legislation governing royal commissions and boards of inquiry. The scope of the powers and membership of each type of inquiry differs slightly.[53] However, both inquiries provide for the power to issue search warrants,[54] to summon witnesses to give evidence and/or produce a document or thing,[55] and to take an oath or affirmation.[56] Both types of inquiry also abrogate the privilege against self-incrimination.[57] In Victoria, there are three types of public inquires recognised under the *Inquiries Act 2014* (Vic): royal commissions, boards of inquiry and formal reviews. Modelled on the approach taken in Canada and the recommendations of

[50] *Special Commissions of Inquiry Act 1983* (NSW) s 9(3).
[51] *Special Commissions of Inquiry Act 1983* (NSW) s 10(1).
[52] *Special Commissions of Inquiry Act 1983* (NSW) s 4(2).
[53] The main difference in powers appears to be that a royal commission has the power to inspect and retain documents (*Royal Commissions Act 1991* (ACT) s 26) and members of a royal commission must either be a judge or former judge, or a lawyer with a minimum of five years' experience (*Royal Commissions Act 1991* (ACT) s 5).
[54] *Inquiries Act 1991* (ACT) s 20; *Royal Commissions Act 1991* (ACT) s 20.
[55] *Inquiries Act 1991* (ACT) s 26; *Royal Commissions Act 1991* (ACT) s 34.
[56] See *Making Inquiries: A New Statutory Framework* (n 6) [4.6], [4.24]; Prasser (n 2) [4.8]–[4.9].
[57] *Inquiries Act 1991* (ACT) s 19; *Royal Commissions Act 1991* (ACT) s 24; to be read alongside the *Legislation Act 2001* (ACT) s 171.

the ALRC, these bodies create a hierarchy of public inquiries in terms of the powers provided.[58] In Canada, legislation provides for commission of inquiry and departmental inquiries to be established.[59] Similarly, in New Zealand, the *Inquiries Act 2013* (NZ), provides for two types of inquiries: public inquiries (with powers similar to royal commission and commission of inquiry) and government inquiries.[60] In the United Kingdom, the *Inquiries Act 2005* (UK) provides for inquiries to be established into events of public concern, with broad coercive powers akin to a royal commission.[61]

2.5 Powers of commissions of inquiry and royal commissions

2.5.1 The powers of a commission of inquiry are set out in the relevant legislative framework, which usually contains broad coercive powers. Such powers exist to allow a commission to fulfil its primary function of investigating issues of major public importance.[62] As acknowledged by the ALRC, '[b]y its very nature, a Royal Commission is a "fishing expedition"' and '[it] is argued … requires broad powers to ensure that the issues and facts are fully canvassed'.[63]

2.5.2 Table 2.2 sets out the key powers of commission of inquiry in Tasmania under the *Commissions of Inquiry Act*. The Act provides a commission of inquiry with extensive statutory powers, including powers to compel witnesses to give evidence and produce documents, to examine witnesses under oath or affirmation, to apply for a warrant to enter private premises to conduct a search and take documents, to retain and copy documents, and to apply for a warrant to use surveillance or listening devices.[64] The Act also provides that a commission is not bound by the rules of evidence, and can hold hearings in public or private.[65]

2.5.3 There are additional provisions in relation to the operation of the privilege against self-incrimination and legal professional privilege. As directed by the Terms of Reference, and the comments of the Child Abuse Commission of Inquiry, this Research Paper focuses on statutory limitations that apply in Tasmania and elsewhere regarding claims of privilege, particularly legal professional privilege. A '"privilege" is a right to resist disclosing information that would otherwise be required to be disclosed'.[66] There are several common law privileges, such as the privilege against self-incrimination, legal professional privilege, parliamentary privilege and the privilege in aid of a settlement.[67] The privilege against self-incrimination and legal professional privilege are specifically addressed in the *Commissions of Inquiry Act*. These are discussed in detail in Part 6.

[58] Prasser (n 2) [4.8]. See further, *Inquiries Act 2014* (Vic): for example, both royal commissions and boards of inquiry have powers for the production of documents and other things and obtaining evidence, but only a royal commission has the power to apply for a search warrant and only a royal commission abrogates legal professional privilege and the privilege against self-incrimination.
[59] Prasser (n 2) [3.11].
[60] Ibid [3.18].
[61] Ibid [3.8].
[62] Ibid [2.27].
[63] *Making Inquiries: A New Statutory Framework* (n 6) [11.5].
[64] See Table 2.2.
[65] Ibid.
[66] *Making Inquiries: A New Statutory Framework* (n 6) [3.20], citing Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Routledge-Cavendish, 2nd ed, 2004) 91.
[67] See *Making Inquiries: A New Statutory Framework* (n 6) [3.20]. It is also noted that client legal privilege and the privilege against self-incrimination are also contained in the *Evidence Act 2001* (Tas).

Table 2.2: Key powers of commissions of inquiry in Tasmania set out in the *Commissions of Inquiry Act 1995* (Tas)

Overview	**Nature of power**	**Section**
Function and powers of Commission	Powers of Commissions to hold hearings, receive written submissions and exercise the powers under the Act Power to conduct inquiry in any manner that it considers appropriate, obtain information in any matter that it considers appropriate and determine its own procedures in conducting its inquiry	Section 5
Provisions of other Acts that do not apply[68]	Provisions in certain other Acts that restrict the disclosure of information do not apply to the Child Abuse Commission of Inquiry[69]	Section 7A
General powers and procedures	The Commission has power to control its proceedings	Section 12(1)(a)
	Proceedings are open to the public unless the Commission makes determination that a closed session is appropriate according to the test specified (public interest in open hearing outweighed by any other consideration, including public security, privacy of personal and financial affairs or the right of any person to a fair trial)	Section 13
	The Commission can control public reporting	Section 14
Private sessions	Powers of the Commission to hold private sessions and legal effect of private sessions	Sections 19A and 19B
Evidence and witnesses	The Commission is not bound by the rules of evidence	Section 20
	The Commission may serve notice on a person to attend to give evidence and/or produce a document or thing	Section 22
	The Commission may serve notice on a person to produce a document or statement	Section 23
	If a witness claims that a document or statement (or information in the document or statement) is privileged, the Commission may require production to determine whether privilege applies	Section 23A
Obtaining evidence	Commission can apply for a search warrant	Section 24
	Commission can apply for a warrant to use a listening or surveillance device	Section 24B
	A Commissioner may administer an oath to a person and can examine that person under oath	Section 25
	A person is not excused from giving evidence or producing a document or thing on grounds that this may incriminate that person (privilege against self-incrimination)	Section 26
	It is contempt not to attend the Commission or produce the document or thing if served with a notice	Section 27

2.5.4 Other jurisdictions have broadly similar powers to Tasmania, with some variation.[70] For example, in some jurisdictions, royal commissions can issue arrest warrants on their own motion.[71] In contrast, in Tasmania, a commission may apply to a magistrate for a warrant to have a person apprehended and brought before the commission.[72] In Queensland, South Australia and the ACT,[73] a royal commission can issue a search warrant without a court order, whereas in the Northern Territory there is no need for a warrant.[74] In Tasmania, a commission may apply to a magistrate for a search warrant.[75] There are also different approaches taken to the privilege against self-incrimination and legal professional privilege.[76] However, regardless of jurisdictional differences, it is clear that commissions have wide coercive powers. Indeed, 'the power to compel witnesses to give evidence on oath or affirmation, tested by cross-examination and to compel the production of documents' has been identified as one of the requirements for a successful inquisitorial inquiry.[77]

2.6 Protections for individuals

2.6.1 Given the scope of the powers of a commission of inquiry or a royal commission, there is a need to carefully balance coercive powers with protections of the rights of individuals. The scope of the inquiry powers, and the willingness of government 'to legislate additional powers in response to requests from different inquiries', has not been without criticism.[78] There is a need for a degree of caution in the application of the coercive powers of commissions, to avoid compromising the civil liberties of individuals appearing before them.[79] It is widely recognised that any legislative framework should clearly state the procedures for how a commission of inquiry obtains evidence and information, and how it presents that evidence and information in its final report, particularly given the extraordinary powers given to such inquiries.[80] This acknowledges the importance of protecting the privacy of ordinary citizens and minimising any distress, or injury to their reputations.[81] There are potentially devastating consequences for individuals if a finding of misconduct or an adverse finding is made by a commission. Importantly, an adverse finding may permit an inference that an individual has, for example, committed a criminal offence, and such a finding will be made without a fair trial (which would include the presumption of innocence). As a result, there is a need for a 'balance [to] be

[68] It is noted that a specific regulation was made for the Child Abuse Commission of Inquiry to state that certain Acts did not apply to that Commission of Inquiry, see *Commissions of Inquiry Regulations 2021* (Tas) reg 4. Broadly speaking, these related to statutory confidentiality provisions, discussed further at [3.11.5].

[69] These are: *Personal Information Protection Act 2004* (Tas); *Custodial Inspector Act 2016* (Tas) s 24(1); *Ombudsman Act 1978* (Tas) s 26(1); and *Health Complaints Act 1995* (Tas) s 37. There is also provision for regulations to prescribe that provisions of Acts do not apply. There are numerous provisions of Acts that do not apply to information collected by or on behalf of or provide to the Child Abuse Commission of Inquiry: *Commission of Inquiry Regulations 2021* (Tas) reg 4.

[70] See Prasser (n 2) [6.17].

[71] See, eg, *Royal Commissions Act 1902* (Cth) s 6B; *Royal Commissions Act 1923* (NSW) s 16; *Special Commissions of Inquiry Act 1983* (NSW) s 22; *Royal Commissions Act 1968* (WA) s 16; *Royal Commissions Act 1991* (ACT) s 35; *Commissions of Inquiry Act 1950* (QLD) s 9A.

[72] *Commissions of Inquiry Act 1995* (Tas) s 27(3).

[73] See *Royal Commissions Act 1991* (ACT) s 25(1); *Royal Commissions Act 1917* (SA) s 10; *Commissions of Inquiry Act 1950* (Qld) s 19A.

[74] *Inquiries Act 1945* (NT) s 8.

[75] *Commissions of Inquiry Act 1995* (Tas) s 24.

[76] See Part 5.

[77] Prasser (n 2) [6.19] quoting Geoff Davies, 'Some Reflections on Commissions of Inquiry' in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries* (O'Connor Court Publishing, 2014) 43.

[78] Prasser (n 2) [6.17], [6.19].

[79] See [2.5]. Concerns relating to the civil liberties of individuals were relevant and were identified in the TLRI's consideration of the expansion of powers of a royal commission in 2003: see *Report on the Commissions of Inquiry Act 1995* (n 1) 6.

[80] See [2.5].

[81] *Report on the Commissions of Inquiry Act 1995* (n 1) 6.

maintained between the rights of individuals and the need for the commission conducting the public inquiry to properly and fully investigate and report'.[82]

2.6.2 Accordingly, under legislation and at common law (through the principles of procedural fairness), the powers of commissions of inquiries are balanced with the need to safeguard the rights of individuals. Procedural fairness refers to fairness of the procedure by which a decision is made and has generally been accepted to involve the requirements of the fair hearing rule and the rule against bias.[83] Other protections for witnesses exist in relation to the powers of commissions to close hearings and make prohibitions or restrictions on reporting. Table 2.3 sets out the key provisions that operate under the *Commissions of Inquiry Act*. These are discussed in more detail in subsequent parts of this Research Paper.

Table 2.3: Protections for individuals in Tasmania in *Commissions of Inquiry Act 1995* (Tas)

Overview	**Protection**	**Section**
General powers and procedures	The Commission can make a determination that a closed session is appropriate	Section 13
	Power of Commission to control public reporting	Section 14
	The Commission is required to be satisfied that there are matters which require investigation involving a person, and arising from circumstances relevant to its inquiry, before it investigates that person or their actions	Section 17
	Before a finding of misconduct is made, the Commission is required to give notification to a person if an allegation of misconduct is made or should be made and the person must have an opportunity to respond. This provision must be complied with before the Commission makes a finding of fact related to that misconduct. Misconduct means conduct by a person that could reasonably be considered likely to result in a criminal charge, civil liability, disciplinary proceedings, or other legal proceedings, being brought against that person in respect of the conduct	Sections 3, 18 and 19(1)
	The Commission may make adverse findings about a person but must give notice and the rules of procedural fairness apply An adverse finding means a finding of a Commission under section 19 that is adverse to the interests of a person	Sections 3 and 19
Private Sessions	Powers of the Commission to hold private sessions and legal effect of private sessions	Sections 19A and 19B
Evidence and witnesses	If a witness claims that a document or statement (or information in the document or statement) is privileged, the Commission may require production to determine whether privilege applies	Section 23A
	The Commission has powers in relation to witnesses to protect anonymity or identification, as well as to apply special evidentiary procedures or measures as appropriate if a witness is identified as potentially vulnerable	Section 23B

[82] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 24.
[83] ALRC *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* (Report 129, 2015) [14.18] ('*Traditional Rights and Freedoms*'); see also this Research Paper [4.2.1]–[4.2.3].

2.6.3 In the context of this Research Report, the following provisions of the *Commissions of Inquiry Act* are central to the Terms of Reference and the suggestions for reform set out in the Child Abuse Commission of Inquiry:[84]

- findings of misconduct (s 18) and adverse findings (s 19);
- closed hearings (s 13); and
- restrictions on reporting (s 14).

2.6.4 The approach taken in other comparable jurisdictions, and recommendations for reform, are set out in Part 4 (findings of misconduct and adverse findings) and Part 6 (closed hearings and restrictions on reporting).

2.6.5 Protection of the identity of witnesses in relation to sexual offences is also provided in the *Evidence Act 2001* (Tas) s 194K. The approach taken in Tasmania, concerns raised by the Child Abuse Commission of Inquiry and in other comparable jurisdictions, as well as recommendations for reform, are set out in Part 7.

[84] See *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3); see also [1.3]–[1.4]

Part 3

Commissions of Inquiry in Tasmania: Background

3.1 Introduction

3.1.1 Part 3 traces the history of commissions of inquiry and royal commissions in Tasmania, along with law reform papers and associated legislative reforms, to provide context for discussion of the areas for review identified in the Terms of Reference for this Research Paper.

3.1.2 There has been a long history of royal commissions in Tasmania.[85] The modern legislative structure of commissions of inquiry began with the introduction of coercive powers into the *Evidence Act 1910* (Tas) (‘*Evidence Act*’) to support the Royal Commission into an Attempt to Bribe a Member of the House of Assembly and other Matters (‘Carter Royal Commission’)[86] established in 1990. Until this particular Royal Commission, royal commissions in Tasmania had been conducted with very limited powers.[87] Following the Carter Royal Commission, the Law Reform Commissioner of Tasmania considered a reference on an appropriate legislative framework for commissions of inquiry or royal commissions. This led to the enactment of the *Commissions of Inquiry Act 1995* (Tas) (‘*Commissions of Inquiry Act*’) and there have been two subsequent commissions of inquiry:

(1) in 2000, the Commission of Inquiry into the Death of Joseph Gilewicz (‘Gilewicz Commission of Inquiry’); and

(2) in 2021, the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings (‘Child Abuse Commission of Inquiry’).

3.1.3 Reforms to the *Commissions of Inquiry Act* coincided with both inquiries, reflecting particular difficulties encountered during their conduct, and the final report for each inquiry identified future legislative reforms.

3.1.4 Also relevant to legislative reforms in Tasmania has been the 2009 Report of the Australian Law Reform Commission (ALRC) that made recommendations for a new statutory framework for public inquiries.[88]

3.2 Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly; and Other Matters

3.2.1 In 1990, a Royal Commission was established in Tasmania by Letters Patent to investigate the events surrounding—and to identify those involved in—an attempt to bribe a Member of Parliament to

[85] For a summary of the history of royal commissions in Tasmania, see *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 16–17.
[86] The Carter Royal Commission was established by Letters Patent, but with statutory powers under the *Evidence Act 1910* (Tas).
[87] Tasmania, *Parliamentary Debates,* House of Assembly, 9 April 1991, 206 (Ray Groom).
[88] *Making Inquiries: A New Statutory Framework* (n 6).

cross the floor of the House of Assembly after the 1989 general election. In 1989, Tasmania did not have specific legislation dealing with royal commissions or commissions of inquiry. However, provisions of the *Evidence Act* governed the conduct of royal commissions, including powers to summon witnesses and to send for documents or other property, and to examine witnesses under oath.[89] At the outset of the inquiry, Commissioner Carter QC raised concerns that the relevant provisions in the *Evidence Act* were not sufficient to support the effectiveness of the inquiry.[90] The Commissioner wrote to the Attorney-General, requesting that the Government consider amending certain provisions of the *Evidence Act,* and the following amendments were subsequently made:

- penalties for failing to produce documents; and
- new provisions relating to contempt.[91]

3.2.2 Commissioner Carter presented his final report to the Governor in October 1991, and as part of his findings, he expressed the view that the amended *Evidence Act* was not a satisfactory framework for the efficient and proper management of a royal commission. Accordingly, he recommended that the Tasmanian Law Reform Commissioner be given a reference which may lead to the enactment of a specific Royal Commissions Act or Commissions of Inquiry Act[92] that 'satisfied the community's concern for a proper balance between ensuring on the one hand that a Royal Commission or board of inquiry be assisted in arriving at the truth, and on the other that there be due recognition of civil rights'.[93]

3.3 Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry (1993)

3.3.1 In 1993, the Law Reform Commissioner of Tasmania published the *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* ('1993 Report'). Based on the increased number and breadth of provisions in the *Evidence Act* that govern the conduct of royal commissions,[94] the report recommended a new Act to replace the relevant sections of that legislation.

3.3.2 The 1993 Report provides the basis for the *Commissions of Inquiry Act,* with key recommendations in relation to procedural fairness, public hearings, restrictions on reporting and the privilege against self-incrimination.

Procedural fairness and allegations of misconduct

3.3.3 As discussed further in Part 4, the notion of 'procedural fairness' means to act fairly in administrative decision making. Traditionally, two key components of procedural fairness are recognised: (1) the fair hearing rule, and (2) the rule against bias.[95] Particularly relevant in the context of allegations of misconduct at a commission of inquiry, the fair hearing rule 'requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interest'.[96] Rather than relying on the protections that have developed under the common law for procedural fairness (fair

[89] *Evidence Act 1910* (Tas) ss 14–22.
[90] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 14.
[91] The amendments introduced by the *Evidence Amendment Act 1991* (Tas) were broadly in line with the powers of a commission of inquiry in other states: *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 29.
[92] Noting that all other states and territories, except Victoria, had enacted specific legislation.
[93] *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly; And Other Matters* (1991) vol 2 ch 11 [11.2] 936.
[94] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 29.
[95] *Traditional Rights and Freedoms* (n 83) [14.10].
[96] Ibid.

hearing),[97] the 1993 Report recommended that the principles that apply where allegations or findings of misconduct are to be made should be set out in legislation.[98] These principles were encapsulated in the 'Salmon Rules'. The Commissioner also relied on measures proposed by Professor Sackville, and additional principles that would operate to balance the interests of the individual with the coercive powers of a commission of inquiry. These are set out below.

3.3.4 The Salmon Rules or 'Salmon Principles' refer to six principles of procedural fairness identified in the United Kingdom in a 1966 report on tribunals of inquiry by Lord Justice Salmon. The principles can be summarised as follows:

(1) Before any person becomes involved in an inquiry, the tribunal must be satisfied that there are circumstances which affect them and which the tribunal proposes to investigate.

(2) Before any person who is involved in an inquiry is called as a witness, they should be informed of any allegations which were made against them, and the substance of the evidence in support of the allegations.

(3) They should be given an adequate opportunity to prepare their case and to be assisted by legal advisers, and their legal expenses should normally be met out of public funds.

(4) They should have the opportunity of being examined by their own solicitor or counsel and of stating their case in public at the inquiry.

(5) Any material witnesses they wish to be called at the inquiry should, if reasonably practicable, be heard.

(6) They should have the opportunity of testing, by cross-examination conducted by their own solicitor or counsel, any evidence which may affect them.[99]

3.3.5 The four additional measures proposed by Professor Sackville were set out by the Commissioner:

> - Royal Commissions ... should be used more sparingly than in recent times ... [and] ... their terms of reference should be carefully defined.
>
> - Special care should be exercised in conferring coercive powers on Royal Commissions. This should be done only where the circumstances are so truly exceptional as to warrant the exercise of powers that ... override the privilege against self-incrimination.
>
> - Royal Commissions themselves should show greater restraint in making and publishing findings of criminal guilt against individuals who have been subjected to investigation.
>
> - Australian Courts should be less reticent when asked to review the conduct and findings of Royal Commissions ... they should be prepared to quash adverse findings which have been reached in isolation from the principles of natural justice.[100]

[97] See [4.2.1]–[4.2.3].
[98] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) Recommendation 14.
[99] *Salmon Report* (n 26) 17–18.
[100] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 25 quoting Ronald Sackville, (1984) 60 *Current Affairs Bulletin* 12, 12 - 13.

3.3.6 Further, the Commissioner considered that the Salmon Principles and the Sackville measures:

> may be supplemented by the following guidelines which should apply to Royal Commissions established in Australia to ensure their important work is completed with the minimum of angst to individual citizens:
>
> 1. That commissions of inquiry should operate within the bounds of the principles of natural justice, which require that any matters in relation to a witness before an inquiry should not be raised by surprise. This requirement extends to information about the matter to be presented, and an opportunity to be heard and to test the matter. Every individual has a right to procedural fairness.
>
> 2. Commissions of inquiry should proceed in a considered fashion and not become over-zealous in the pursuit of their investigation.
>
> 3. Those exercising powers must be temperate in the performance of their duties. There is no principle which allows an interference with personal liberty as the basis for the protection of some greater good.
>
> 4. Commissions must be circumspect and careful in their dealings with the media, which may have a tendency to dramatise events and unfairly prejudice reputations. Where there are genuine doubts about the likelihood of adverse press reporting commissions of inquiry should veer on the safe side by holding the proceedings in camera to protect individual reputations.
>
> 5. The resources of commissions are infinitely greater than those of any individual. A commission of inquiry should be exemplary in its practices and not charge up unnecessary expenses to those appearing before them. It goes without saying that the costs of attendance and for necessary legal costs should be met by the commission.
>
> 6. Commissions of inquiry must be scrupulously fair and exemplars of the quality of justice. They must stand apart from the public and the demands of the media and ensure that they do not become instruments for injustice under the guise of protection of the public good.[101]

3.3.7 The Commissioner recommended that procedural fairness provisions be included in the new Act, based on recommendations in the Ontario Law Reform Commission's *Report on Public Inquiries* in respect of allegations and findings of misconduct.[102] These were that:

- where a commission believes that a person will be subject to serious allegations of misconduct in public proceedings of the inquiry, or where the commission proposes to make a finding of misconduct against a person, the commission should give the person notice of such allegations at the commission's earliest convenience (where an allegation has been made);
- such notice to include the substance of the allegation and where appropriate, any relevant evidence (regarding to an allegation of misconduct) or, a summary of the evidence relied on (regarding a finding of misconduct); and
- the person who has received notice should have a right to respond, and, where an allegation has been made, a right to cross-examine witnesses and call witnesses (at the commission's discretion).[103]

3.3.8 The Ontario Commission recommended that the term 'misconduct' should be defined as any finding or conclusion that could reasonably be construed as bringing discredit on an individual.[104]

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[101] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 25–26.
[102] Ontario Law Reform Commission, *Report on Public Inquiries* (Report, 1992) Recommendation 14 ('*Report on Public Inquiries*').
[103] *Report on Public Inquiries* (n 102) Recommendations 9, 10.
[104] Ibid Recommendation 11. Ultimately, these recommendations were not implemented in Ontario: *Report on the Commissions of Inquiry Act 1995* (n 1) 16, n 52. See also *Public Inquiries Act 2009* (Ontario).

Private or public hearings and restrictions on reporting

3.3.9 Within the framework of the principles and guidelines identified above, the Commissioner considered the question of whether the hearings of a commission of inquiry should be private or public. It was noted that a 'prominent feature of the common law system has been the traditional requirement that judicial proceedings are conducted in public'.[105] This was for reasons of accountability. However, in the context of commissions of inquiry, while most hearings are held in public, 'the requirement of the public conduct … is not so strictly applied' and it was appropriate that 'commissions should retain the power to hold proceedings in private when necessary'.[106] It was recommended that the provisions that existed in Tasmania in the *Evidence Act* be included in the proposed new legislation setting out the powers of commissions of inquiry.[107]

3.3.10 The Law Reform Commissioner also recommended that a commission be empowered 'to prohibit reporting of its proceedings on prescribed grounds, particularly reporting allegations about individuals'.[108]

Privileges: privilege against self-incrimination and legal professional privilege

3.3.11 The Law Reform Commissioner noted that the privilege against self-incrimination had a long history in the criminal justice system as a component safeguarding the interests of an individual. The privilege against self-incrimination operates to allow a person to 'refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime'.[109] The Commissioner noted that in Tasmania, the 'privilege allowing refusal to answer questions which tend to incriminate the person extends to the Courts but not commissions of inquiry' and that this rule was set out in the *Evidence Act* s 21, which compelled a person to answer all questions put to them.[110] The abrogation of the privilege against self-incrimination in commissions of inquiry applied for a number of reasons:

- commissions of inquiry are not courts of law;
- the function of a commission is to find the truth, not to try a criminal matter;
- an honest and frank witness who appears before a commission receives the benefit of a witness certificate … ;
- the evidence is not generally admissible in later criminal proceedings.[111]

3.3.12 The reasoning for this approach was that it was 'necessary to forego a criminal prosecution against a witness in return for obtaining relevant evidence which w[ould] assist in arriving at the truth of the matter under investigation by the commission'. The Law Reform Commissioner recommended that such a section be included in the new legislation.[112]

3.3.13 Although not specifically discussing legal professional privilege, the Law Reform Commissioner indicated that it was not necessary to include detailed provisions, and that 'all evidentiary privileges that apply in a public inquiry be the same as the privileges that apply in court proceedings'.[113] As the law stands now, legal professional privilege is such a privilege that allows a person to 'resist the

[105] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 34.
[106] Ibid.
[107] Ibid Recommendation 6.
[108] Ibid Recommendation 19(b).
[109] *Traditional Rights and Freedoms* (n 83) [11.1].
[110] *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) 40.
[111] Ibid.
[112] Ibid Recommendation 7.
[113] Ibid 63.

giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings'.[114] At the time of the 1993 Report, the common law test for legal professional privilege was a 'sole purpose' test (that is, the communication was made, or document prepared, for the sole purpose of the lawyer providing legal advice or legal services), rather than a 'dominant purpose' (as the test now is).[115]

3.4 Commissions of Inquiry Act 1995 (Tas)

3.4.1 Following the 1993 Report, the *Commissions of Inquiry Act* was enacted in Tasmania. In the Second Reading Speech for the Commissions of Inquiry Bill 1995 (Tas), the then Attorney-General stated that it implements the recommendations made by the Tasmanian Law Reform Commissioner, and:

> also contains some additional provisions which, when viewed as a whole, will ensure that commissions of inquiry are conducted fairly, that witnesses are treated equitably and that there are sufficient safeguards to prevent unchecked exercise of this supreme executive power of inquiry.[116]

Procedural fairness and allegations of misconduct

3.4.2 The *Commissions of Inquiry Act* ss 17 and 18 detail the operation of the Salmon Rule relating to the requirements to be met before a person is investigated (s 17, implementing Salmon Rule 1) and in relation to the procedure where there is an allegation or proposed finding of misconduct (s 18, implementing Salmon Rules 2–6).[117] As noted by the TLRI in its subsequent reviews:

> The basic content of the original s 18 reflected the recommendation of the Law Reform Commissioner's 1993 report, *Procedural Aspects of Royal Commissions*. No explanation was given in the 1993 Tasmanian report as to why these rules and principles should be set out in such detail. In debate on the Commissions of Inquiry Bill, it was stated by the Attorney that the provisions now in s 18 address 'concern raised during the bribery royal commission that people could make unsubstantiated allegations without adequate opportunity for them to be rebutted.'[118]

3.4.3 As discussed further in Part 4, no other jurisdiction in Australia has adopted this approach to procedural fairness.

Private or public hearings and restrictions on reporting

3.4.4 Aligned with the recommendations of the Law Reform Commissioner, a commission of inquiry has power to close a hearing if satisfied that the 'public interest in an open hearing is outweighed by any other consideration, including public security, privacy of personal or financial affairs or the right

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[114] ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Final Report 107, 2008) [3.35] ('*Privilege in Perspective: Client Legal Privilege in Federal Investigations*'), referring to the High Court's description of client legal privilege in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552.
[115] The common law privilege was initially limited in scope to a 'sole' purpose test (*Grant v Downs* (1976) 135 CLR 674), but this was expanded to a 'dominant' purpose test in *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, bringing Australia into line with other common law jurisdictions.
[116] Tasmania, *Parliamentary Debates*, House of Assembly, 11 October 1995, 34 (Ron Cornish, Minister for Justice).
[117] The text of the *Commissions of Inquiry Act* (Tas) ss 17, 18, as enacted, is set out in Appendix A.
[118] *Report on the Commissions of Inquiry Act 1995* (n 1) 16.

of any person to a fair trial'.[119] The commission also had the power to prohibit or restrict public reporting.[120]

Privilege against self-incrimination

3.4.5 Reflecting the recommendation of the Law Reform Commissioner, the *Commissions of Inquiry Act* s 26 expressly provides that the privilege against self-incrimination does not apply in relation to answering a question or producing a document or thing. This was balanced against the power of a commission to issue a witness a certificate to stay future legal proceedings (s 23) and to provide that evidence given before a commission is not admissible in subsequent proceedings (s 21).[121] There was nothing in the Act in relation to legal professional privilege. At the time, the position at common law was that client legal privilege applied to the exercise of coercive powers of investigative bodies.[122]

3.5 Establishment of the Gilewicz Commission of Inquiry (2000)

3.5.1 The Gilewicz Commission of Inquiry was established in 2000. The primary purpose of the inquiry was to examine the circumstances and put an end to 'the doubts, innuendos and speculations' surrounding the death of Mr Gilewicz, who was killed by an officer of Tasmania Police.[123] A coronial inquest was held, with the coroner finding that the officer acted in self-defence. After the inquest concluded, it then came to light that there was material available but not received by the coroner. The Gilewicz Commission of Inquiry was established to investigate whether the coronial inquiry was 'likely to have been misled by the evidence tendered to it', and if so, 'to what extent was that likely to have impacted upon the finding of the coroner.'[124]

3.5.2 At the commencement of the Commission, Commissioner Denis Mahoney AO, and Counsel Assisting the Commission, Mr Agius SC, formed the view that s 18 of the *Commissions of Inquiry Act* had the potential to impede the work of the Commission, and by arrangement with the Government, a statement of the recommended statutory amendments were presented to the Attorney-General.[125] The Report does not detail the suggested reforms to s 18, requested prior to the inquiry.

3.6 Commissions of Inquiry Act Amendment Act 2000 (Tas)

3.6.1 Following the Commissioner's representation to Government for reforms, s 18 of the *Commissions of Inquiry Act* was amended by the *Commissions of Act Amendment Act 2000* (Tas). In the Second Reading Speech for the amending Bill, it was stated that:

> The rationale for section 18 is to provide persons, against whom allegations are made during an inquiry, with natural justice. It is only proper that, if an allegation is made against an individual, the person be advised of that allegation and the evidence relating to that allegation so that they

[119] *Commissions of Inquiry Act 1995* (Tas) s 13(2), as enacted. The text is set out in Appendix A.
[120] *Commissions of Inquiry Act 1995* (Tas) s 14, as enacted. The text is set out in Appendix A.
[121] *Commissions of Inquiry Act* (Tas) ss 21, 23, 26, as enacted. The text is set out in Appendix A.
[122] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) 84, referring to the High Court decision of *Baker v Campbell* (1983) 153 CLR 52 as authority for the common law privilege extending to non-curial contexts.
[123] *Commission of Inquiry into the Death of Joseph Gilewicz* (Report, 2000) vol 2, 3 ('*Gilewicz Report*').
[124] Ibid vol 1, 1.
[125] Ibid vol 1, 16: A different amendment was made to s 18. But Government refused the amendments suggested. This decision of Government was a decision of policy: 'I am conscious of the circumstances in which the Act of 1995 was enacted and I infer that that decision was taken in the light of those circumstances and the considerations to which they gave rise', 16.

> have a reasonable opportunity of responding. The express purpose of section 18 is to implement the principles known as the 'Salmon Rules' - that is, the principles identified by Lord Justice Salmon in his 1966 report of the Royal Commission on Tribunals of Inquiry as fundamental to the conduct of a fair inquiry.[126]

3.6.2 However, it was noted that there were problems with the drafting of s 18 that would be likely to hamper the investigations of a commission of inquiry. The first concern related to the requirement to notify a person as soon as any allegation of misconduct is made, or as soon as practicable if the commission expects an allegation of misconduct to be made. These disclosure requirements were said to result in the loss of the opportunity for thorough investigation through 'too early a revelation of evidence of misconduct'.[127] Further problems were identified in relation to the difficulties caused by the requirement to give all relevant evidence to the person, rather than simply the substance of the evidence.

3.6.3 Accordingly, the following changes were made to the *Commissions of Inquiry Act* s 18:

- removing the requirements for a Commission to give notice of an allegation of misconduct as soon as practicable after forming an expectation that an allegation of misconduct is likely to be made or immediately after the making of the allegation; and
- changing the details that must be included in the notice from 'any relevant evidence in relation to the alleged misconduct' to 'the substance of the evidence supporting the allegation'.

3.7 Report of the Gilewicz Commission of Inquiry (2000)

3.7.1 In the Report of the Gilewicz Commission of Inquiry ('Gilewicz Report') there was discussion of the issues that continued to exist with s 18, even following the amendments made in the *Commissions of Inquiries Act Amendment Act 2000* (Tas). It was noted that the reforms to the procedural fairness provisions in the Act (s 18), did not reflect the suggestions made by Commissioner Mahoney and Counsel Assisting, Agius.[128] The Commissioner stated that:

> The amendment to s18 was made following (but not, in accordance with), the representations by myself and Mr Agius SC, Counsel Assisting, what were seen to be deficiencies in the Act which were considered likely to impede the work of the Commission … The section in its amended form, gave rise to difficulties, in its form and in its application in practice during the public hearings of the Commission.[129]

3.7.2 The Commissioner's concerns were primarily that s 18 was overly prescriptive and too rigid. His concern was that, by attempting to prescribe the Salmon Rules within the legislation with such particularity, there was not sufficient flexibility for a commission to fulfil its primary investigative functions. In particular, the Commissioner described s 18(6) (which set out the requirement to provide notice of a finding of misconduct) as 'drastic',[130] and operating 'even though its operation may be unjust and will obviously defeat the purposes of the Act and the section'.[131] The Commissioner noted also that the subsection applied even if the failure to give notice was:

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[126] Tasmania, *Parliamentary Debates*, House of Assembly, 13 April 2000, 69 (Mr Patmore, Minister for Justice and Industrial Relations).
[127] Tasmania, *Parliamentary Debates*, House of Assembly, 13 April 2000, 70 (Mr Patmore, Minister for Justice and Industrial Relations).
[128] *Gilewicz Report* (n 123) vol 3 annexure 17, 1.
[129] Ibid vol 3 annexure 17, 2.
[130] Ibid vol 3 annexure 17, 6.
[131] Ibid vol 3 annexure 17, 7. The wording of the *Commissions of Inquiry Act 1995* (Tas) at the conclusion of the Gilewicz Commission of Inquiry is set out in Appendix A.

> accidental, inadvertent or even an excusable mistake. In particular, it applies even when the failure to give a notice results from a bona fide mistake in the construction of s18 and, perhaps, even if that construction is one that was put forward by the Counsel who subsequently seeks to invoke the operation of the section.[132]

3.7.3 The practical difficulties experienced with s 18 were considered to have stemmed from the operation of the mandatory requirements of sub-s (6), that a finding of misconduct must not be made unless the person has been given notice and an opportunity to respond. Further, it was considered that additional difficulties were created by the broad and uncertain meaning of the term 'misconduct'. Section 3 of the Act defined 'misconduct' as 'conduct by a person that could reasonably be considered likely to bring discredit upon that person'.

3.7.4 The Gilewicz Report stated that the inflexibility of s 18(6):

> creates the risk that an inquiry such as this, with all of its attendant cost for the community, might be wholly or partly frustrated by a failure to fulfil the requirements of the subsection, so opening the way for the findings to be challenged.[133]

3.7.5 Further to this, s 18 was identified as creating uncertainty in two different circumstances that commonly arise during the ordinary course of evidence in a commission of inquiry:

(1) where an assertion is put to a witness in cross-examination that they are deliberately not telling the truth, noting that the purpose of cross-examination is for Counsel to 'test' or 'challenge' the evidence of a witness; and

(2) where misconduct is conceded or admitted by the witness. It was also considered unclear as to whether the section applies to allegations by all counsel appearing at the commission, or only by the commission and counsel assisting the commission.[134]

3.7.6 The Gilewicz Report identified other difficulties with the section, as follows:

- the blanket requirement that the period of notice be not less than 48 hours before the relevant individual is called to give evidence in relation to the allegation does not take into account the nature of the alleged misconduct, or whether the witness already knew that the allegation was going to be raised and was aware of the evidence in support of the allegation;
- the absence of a right to waive the notice period required by sub-s (2);
- the inability to comply with sub-s (2) where the allegation only comes to light while the witness is giving evidence;
- whether the words 'in accordance with this section' in sub-s (6) relates to both the requirement to give notice, and the requirement to give the person the opportunity to respond to the notice;
- the uncertainty around what constitutes a 'finding' for the purposes of sub-s (6) and whether this includes any finding made by a Commission in respect to the credibility or otherwise of a witness who has given evidence before the Commission; and
- the requirement that notice of an allegation of misconduct contain 'the substance of the evidence supporting the allegation' meant that much care needed to be taken to ensure that the relevant notices complied with this requirement. The experience of the Commission was that it proved difficult to draft a form of notice which would (without argument) satisfy the requirements of the section.[135]

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[132] *Gilewicz Report* (n 123) vol 3 annexure 17, 6–7.
[133] Ibid vol 3 annexure 17, 3.
[134] Ibid vol 3 annexure 17, 3–4.
[135] Ibid vol 3 annexure 17, 4.

3.7.7 The Commissioner emphasised the difficulty of applying a construction of s 18 in practice, recommending 'that attention be given to the form of this section and its amendment.'[136]

3.7.8 During the course of the Inquiry, the Commissioner also sought to have the ability to use listening devices, and, in his report, the Commissioner indicated that the lack of power to apply for a warrant to use listening devices had significantly hindered the Commission's investigations.[137]

3.8 TLRI Report on the *Commissions of Inquiry Act 1995* (Tas) (2003)

3.8.1 In 2002, the TLRI was given a reference to examine the complaints made about the *Commissions of Inquiry Act* raised in the Gilewicz Report. The TLRI released its Report in August 2003. The TLRI's recommendations related to extending the powers of a commission of inquiry in relation to search and seizure, and listening devices.[138] Recommendations were also made in relation to procedural fairness and misconduct.[139]

Search and seizure

3.8.2 The TLRI noted that a commission of inquiry has power to apply to a magistrate to obtain a warrant to search for and obtain physical evidence, such as documents, and accordingly, there was no need to provide a power to search and seize physical evidence without a warrant.[140]

Listening devices

3.8.3 In relation to listening devices, it was recommended that that the powers of a commission of inquiry be extended, so that a Commissioner can apply to a magistrate for a warrant to use listening devices. The magistrate would need to be satisfied that the Commissioner holds a reasonable belief that the use of such devices is necessary and appropriate to obtain evidence in relation to a matter relevant to the inquiry.[141]

Procedural fairness

3.8.4 The TLRI addressed the rules of procedural fairness and identified (in the context of commissions of inquiry and findings of misconduct) the most important elements being 'the opportunity to be heard and reasonable notice'.[142] The TLRI also considered the role of the 'Salmon Rules' as principles of fairness for commissions of inquiry and noted that the 'rules are not in any way binding and are only to be used as guide'.[143] In this respect, the TLRI also observed that the 'misconduct' provisions in the *Commissions of Inquiry Act* s 18 'take a unique approach to procedural fairness' and that:

> [r]ather than relying on the protections that have developed under the common law, the Tasmanian Parliament saw fit, upon recommendation of the Law Reform Commissioner, to

[136] Ibid vol 3 annexure 17, 7.
[137] Ibid vol 1, 26.
[138] See *Report on the Commissions of Inquiry Act 1995* (n 1) pt 2 and discussion at [3.8.3] below.
[139] Ibid.
[140] *Report on the Commissions of Inquiry Act 1995* (n 1) 8.
[141] Ibid Recommendation 1.
[142] Ibid 12.
[143] Ibid 13–14.

provide a statutory guarantee of procedural fairness by implementing all of the Salmon Rules in the Act.[144]

3.8.5 Misconduct was defined as 'conduct by a person that could reasonably be considered likely to bring discredit upon that person'.[145]

3.8.6 Table 3.1 indicates the provisions of the *Commissions of Inquiry Act* that corresponded with the Salmon Rules at the time of the TLRI review.

Table 3.1: Salmon Rules and corresponding provision of the *Commissions of Inquiry Act 1995* (Tas)

Salmon Rule	**Section of *Commissions of Inquiry Act 1995* (Tas)**
Before any person becomes involved in an inquiry, the tribunal must be satisfied that there are circumstances which affect them and which the tribunal proposes to investigate.	Section 17
Before any person who is involved in an inquiry is called as a witness, they should be informed of any allegations which were made against them, and the substance of the evidence in support of them.	Section 18(1)
They should be given an adequate opportunity of preparing their case and of being assisted by legal advisers, and their legal expenses should normally be met out of public funds.	Section 18(2) – notice to be given not less than 48 hours before the person is called to give evidence in relation to the allegation Section 18(4) [except in relation to expenses]
They should have the opportunity of being examined by their own solicitor or counsel and of stating their case in public at the inquiry.	Section 18(3)(b)
Any material witnesses they wish to be called at the inquiry should, if reasonably practicable, be heard.	Section 18(3)(d)
They should have the opportunity of testing by cross-examination conducted by their own solicitor or counsel any evidence which may affect them.	Section 18(3)(c)

3.8.7 Further, the *Commissions of Inquiry Act* s 18(6) provided that 'a commission must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section'.

3.8.8 The TLRI referred to the difficulties that had been identified in the Gilewicz Report and made recommendations for reform. These are set out below.

3.8.9 **The term 'misconduct':** As defined in the *Commissions of Inquiry Act* s 3, the term 'misconduct' was said to be problematic in the Gilewicz Report for two reasons: (a) that it was broad enough to cover both conduct that was 'relevant to the subject of the inquiry and conduct of a witness during the commission, such as lying during cross-examination', when it was only intended to apply to

[144] Ibid 14.
[145] *Commissions of Inquiry Act 1995* (Tas) s 3.

the first type of conduct;[146] and (b) it was extremely wide, and this made it difficult to determine with certainty whether or not certain conduct came within its ambit.[147]

3.8.10 The TLRI's view was that the definition of misconduct was 'straightforward and logical' and did not recommend that it be amended. Rather, it was recommended 'that s 18 be amended to make it clear that its provisions do not apply to allegations or findings of misconduct relating to the giving or presentation of evidence at the inquiry'.[148]

3.8.11 **Notice of the evidence: s 18(1)(d).** It was noted that the requirement for a notice of an allegation to contain 'the substance of the evidence supporting the allegation' created difficulties because 'it was often unclear what the "substance of the evidence" was', which hampered the Commission's ability to make a finding of misconduct and also created unnecessary argument by counsel.[149] The TLRI agreed, and recommended that the wording be changed to 'the summary of the evidence which the Commission expects to be given in relation to the allegation'.[150]

3.8.12 **48 hours' notice: s 18(2).** The requirement to give at least 48 hours' notice was seen to be problematic as it was a blanket provision, and its inflexibility was said to have the potential to produce two problems: (a) a person cannot immediately refute an allegation of misconduct made during an inquiry, and so it 'frustrates their ability to preserve and maintain their own personal reputation';[151] and (b) it produces inefficiencies if a witness is fully aware of the relevant evidence (without formal notice) or if the matter 'was of miniscule importance to personal reputation'.[152] In response, the TLRI recommended that a waiver be inserted in s 18(2) so that a person may elect to waive the requirement for 48 hours' notice.[153]

3.8.13 **Findings of misconduct: s 18(6).** The Gilewicz Report identified uncertainty about the meaning of a 'finding' such that it was not clear whether it applied to conclusions drawn by the Commission about the credit of a witness. The TLRI did not agree with this. Further, the Gilewicz Report said that s 18(6) was inflexible and would apply 'even though the failure to give notice [was] … accidental, inadvertent, or even [an] excusable mistake'.[154] In relation to this concern, the TLRI recommended that a 'special circumstances' exemption be created, allowing a commission to make a finding of misconduct even when the notice provision had not been complied with.[155]

3.8.14 As part of its report, the Institute identified an alternative option for reform, in line with the more flexible approach taken by Canada, which would involve essentially repealing the whole of s 18, and providing a simple restatement of the Salmon Rules, compelling commissions of inquiry to provide reasonable notice and give the person responding to an allegation a fair opportunity to do so.[156] However, this approach was not recommended by the TLRI because it concluded that the flexibility of the common law principles of natural justice may offer little reassurance to the public, stating that the:

> clear intention of Parliament in enacting the rules of procedural fairness in s 18 of the Act was to set these down in a manner accessible to the public in order to fully assure the public that commissions of inquiry would be conducted fairly. The political will to maintain this declaration

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[146] *Report on the Commissions of Inquiry Act 1995* (n 1) 18.
[147] Ibid
[148] Ibid. See Recommendation 2 that s 18(1) be amended by replacing the word 'If' with the words 'Subject to subsection (1A), if' and by inserting the following subparagraph after sub-s (1): '(1A) Subsection (1) does not apply to allegations of misconduct in relation to the giving or presentation of evidence to the Commission'.
[149] *Report on the Commissions of Inquiry Act 1995* (n 1) 18–19.
[150] Ibid 19, Recommendation 3.
[151] Ibid 19.
[152] Ibid 20.
[153] Ibid Recommendation 4.
[154] Ibid 22, quoting the *Gilewicz Report* (n 123) 6–7.
[155] *Report on the Commissions of Inquiry Act 1995* (n 1) Recommendation 5.
[156] See ibid pt 5.

of procedural fairness has already been demonstrated by the passing of the amending Act in 2000. There is merit in this aim and for this reason this option is not recommended.[157]

3.9 Australian Law Reform Commission: *Making Inquiries: A New Statutory Framework* Report (2009)

3.9.1 In 2009, the ALRC conducted an inquiry into the operation of the *Royal Commissions Act 1902* (Cth).[158] Relevant to the Tasmanian context, the ALRC considered the scope of powers that should be conferred on a commission, including provisions in relation to procedural fairness, legal professional privilege and other privileges, holding of closed sessions and private hearings, and the restrictions that could be made on reporting of proceedings.

Procedural fairness

3.9.2 The ALRC gave consideration to the requirements of procedural fairness, including the Salmon Rules, and the appropriate legislative response. In relation to procedural fairness, as with the TLRI, the ALRC identified two main aspects:

- the hearing rule ('the requirement that a person who is liable to be affected by a decision must be given notice of all relevant matters, and given an opportunity to put his or her case');[159] and
- the bias rule ('the requirement that a decision maker is not biased or not seen to be biased').[160]

3.9.3 The hearing rule, in the context of an inquiry, was summarised as the requirement 'that an inquiry "cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make a submission against the making of such a finding"'.[161] The ALRC noted that '[t]ypically, such a finding would arise where a person is identified as having been responsible for misconduct, although findings of guilt or innocence, or of professional misconduct, should not be made'.[162]

3.9.4 After reviewing the position in New Zealand (as recommended by the New Zealand Law Commission and the draft provision of the *Inquiries Bill 2009* (NZ) s 17),[163] the provision in the *Royal Commissions Act 1991* (ACT) s 35A, and submissions received, the ALRC's view was that, given their importance, the requirements of procedural fairness should be set out in legislation. However, it was considered that the legislative provisions should allow for a flexible procedure in the discharge of the obligation.[164]

3.9.5 In relation to the Salmon Rules, as noted elsewhere, the ALRC observed that these 'were not intended to operate as statutory rules, but rather as guidelines for the proceedings of inquiries'.[165] The ALRC addressed the question of whether the principles should be included in statute (as occurs in Tasmania), and concluded that while the rules 'provide useful guidance on the kinds of procedural measures that may improve the fairness of inquiry procedures',[166] the principles may not be applicable

[157] *Report on the Commissions of Inquiry Act 1995* (n 1) 24.
[158] See *Making Inquiries: A New Statutory Framework* (n 6) 29–30 for the details of the Terms of Reference.
[159] Ibid [15.24].
[160] Ibid.
[161] Ibid [15.26] quoting *Annetts v McCann* (1990) 170 CLR 596, 600–601.
[162] *Making Inquiries: A New Statutory Framework* (n 6) [15.26].
[163] Now s 14 of the *Inquiries Act* 2013 (NZ) (regulation of inquiry procedure).
[164] See *Making Inquiries: A New Statutory Framework* (n 6) [15.45]–[15.48] Recommendation 51-1. See further discussion at Part 4 of this Research Paper.
[165] *Making Inquiries: A New Statutory Framework* (n 6) [15.51].
[166] Ibid [15.64].

to all inquiries.[167] Accordingly, the ALRC's view was that 'any codification of the Salmon Principles would be too prescriptive'[168] and that the principles should instead be addressed in an 'Inquiries Handbook' to 'enable a more detailed and nuanced discussion of the types of procedural measures addressed by the Salmon Principles'.[169]

3.9.6 The ALRC also considered the Commonwealth provisions and the Salmon Rules in relation to legal representation and the procedure for examination and cross-examination of witnesses. The ALRC's view was that '[i]t would be useful to set out in statutory form the power of an inquiry to determine who should be able to participate in the inquiry and, in a non-exhaustive list, the factors that are relevant to the decision'.[170] This would include legal representation but 'a statutory entitlement to legal representation would be unduly inflexible'.[171] Similarly, in relation to examination and cross-examination, flexibility was considered desirable, with the commission having a discretion in relation to how evidence may be sought from witnesses, subject to the requirements of procedural fairness. It was noted that '[t]he process of examination and cross-examination is only one way of conducting an inquiry. An inquiry is not a court, and its inquisitorial character means that the adversarial procedures used in courts will not always be appropriate or will require modification'.[172]

3.9.7 The duty of procedural fairness, the Salmon Rules and the appropriate legislative framework are discussed further in Part 4.

Privilege: Legal professional privilege and privilege against self-incrimination

3.9.8 Legal profession privilege was considered by the ALRC in its report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*,[173] and the ALRC reiterated its previous recommendations in relation to inquiries.[174] The ALRC was of the view, however, that a strong case could be made for abrogating client legal privilege in the context of royal commissions, observing that:

> the discovery of the truth has been described as a prime function of a Royal Commission. Royal Commissions are established only where a particular area of public concern has been identified for which the usual investigations and proceedings would not suffice, and their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations.[175]

3.9.9 However, the ALRC concluded that there should not be a blanket abrogation of privilege, but rather the 'Act should enable the Governor-General … to determine that client legal privilege should not apply, in relation to either the whole inquiry or particular aspects of the inquiry'.[176]

3.9.10 The ALRC also considered the privilege against self-incrimination and noted that it was abrogated under the *Royal Commissions Act 1902* (Cth) s 6A[177] and that there was a direct use immunity (that is, that evidence given by a witness cannot be used as evidence in subsequent legal proceedings but can be used to obtain further evidence).[178] This was said to 'strike the right balance in relation to Royal Commissions. The function of Royal Commissions is to discover the truth, without the evidential

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[167] Ibid.
[168] Ibid [15.65].
[169] Ibid [15.66].
[170] See ibid [15.80], Recommendation 15-2.
[171] Ibid [15.83].
[172] Ibid [15.99].
[173] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114).
[174] *Making Inquiries: A New Statutory Framework* (n 6) ch 17.
[175] Ibid [17.16] quoting *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.155].
[176] Ibid [17.17].
[177] See ibid [17.28].
[178] Ibid [17.30], [17.38].

or procedural limitations that apply to courts' and that 'the importance of the public interest involved … outweighs the individual interests protected by the privilege'.[179]

3.9.11 The issue of privilege is discussed further in Part 5.

Control of procedure

3.9.12 The ALRC gave consideration to procedural issues that arise in relation to public access to hearings and methods of restricting access to hearings and evidence. These safeguards exist to 'afford protection to the interests of individuals participating in an inquiry, as well as the protection afforded to confidential or sensitive information'.[180] Key procedures include restrictions on access to hearings, evidence and reports through allowing information to be provided to an inquiry privately, to provide a discretion to an inquiry to prohibit or restrict the publication of certain evidence and to decide what evidence of findings are made public, in a report of otherwise.[181] Accordingly, it was recommended that royal commissions and official inquiries be able to make directions to restrict or prohibit: (1) public access to a hearing, (2) the publication of any information that might enable a person to identify a person giving information to an inquiry or (3) the publication of any information provided to an inquiry.[182]

3.9.13 This issue is discussed further in Part 6.

Other key recommendations

3.9.14 Other key recommendations of the ALRC included the recommendation that there should be two tiers of public inquiry ('royal commissions' and 'official inquiries') with distinction in the two tiers relating to the 'tools' provided to the inquiry to 'carry out its investigation without inappropriately infringing on the rights of the persons involved with, or affected by, its processes' and the 'coercive powers that may be exercised by each tier of inquiry'.[183]

3.10 Establishment of the Child Abuse Commission of Inquiry (2020)

3.10.1 On 23 November 2020, the then Premier announced the intention of the Tasmanian Government to establish a commission of inquiry to examine the responses of the Tasmanian Government to allegations of child sexual abuse in institutional settings,[184] and this was established on 15 March 2021. The Child Abuse Commission of Inquiry was set against the backdrop of the 2017 Commonwealth *Royal Commission into Institutional Responses to Child Sexual Abuse Final Report* and recommendations,[185] and corresponding media reports of alleged child sexual abuse within Tasmanian Government institutions, bringing into question the effectiveness of systems in place to prevent and respond to incidents of child sexual abuse.[186]

[179] Ibid [17.53]–[17.54].
[180] Ibid [16.1].
[181] Ibid [16.38]–[16.41].
[182] Ibid [16.74], Recommendation 16-1.
[183] Ibid [31]–[32]. See also Part 8.
[184] Peter Gutwein, *Premier's Statement – Commission of Inquiry* (Media Release, 23 November 2020); *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 1, 3–4.
[185] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 1, 5–6.
[186] It is noted that, prior to the announcement of the Commission of Inquiry, the Government had instigated two non-statutory ministerial inquiries into allegations of child sexual abuse in the education and health systems, and

3.10.2 The Terms of Reference provided to the Commission requested that the Commission inquire into the Tasmanian Government's response to allegations and incidents of child sexual abuse in institutional contexts. In particular, the Commission was asked to advise what the Tasmanian Government should do to: better protect children in the future; achieve best practice in the reporting of, and responding to, reports or information about child sexual abuse; eliminate or reduce impediments that currently exist for responding appropriately to allegations and incidents of sexual abuse; and address or alleviate the impact of past and future child sexual abuse in institutional contexts, including ensuring justice for victims through processes for referral to investigation, prosecution and support services.

3.11 Amendments made by the Justice Miscellaneous (Commissions of Inquiry) Act 2021 (Tas)

3.11.1 In support of the Child Abuse Commission of Inquiry, a number of amendments were made to the *Commissions of Inquiry Act* by the *Justice Miscellaneous (Commissions of Inquiry) Act 2021* (Tas). The Bill for the amending Act was said to implement the work of the Tasmania Law Reform Institute and the ALRC[187] and would:

> enable the appropriate management of circumstances where a witness to the commission or other person may be the subject of a finding constituting 'misconduct' or another finding of the commission which is contrary the person's interest and clarifying the circumstances and procedures for a commission seeking to use listening or surveillance devices.[188]

3.11.2 The purpose of the Bill was to split the definition of misconduct into two categories: 'misconduct' (conduct that could be reasonably considered likely to result in a criminal charge, civil liability, disciplinary proceedings or other legal proceedings) and 'adverse findings' (findings that are adverse to a person's interests, but to a lesser degree than misconduct). The new provisions in s 19 (outlined below) were:

> intended to ensure that people who may be at risk of adverse finding are provided with procedural fairness, but the hearings of the commission are not delayed for conduct less serious than misconduct. This approach reflects the less prescriptive approach to affording procedural fairness used in other Australian jurisdictions.[189]

3.11.3 The key amendments are set out in Table 3.2.

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the Department of Communities had initiated an investigation into the conduct of three employees at Ashley Youth Detention Centre.

[187] Tasmania, *Parliamentary Debates*, House of Assembly, 18 March 2021, 50 (Elise Archer); but see Table 3.2 and the *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) 323: 'the *Justice Miscellaneous (Commissions of Inquiry) Act* was said to implement the work undertaken by the Law Reform Institute and the ALRC. Relevantly, the *Justice Miscellaneous (Commissions of Inquiry) Act* did not implement all the recommendations of either'.

[188] Tasmania, *Parliamentary Debates*, House of Assembly, 18 March 2021, 50 (Elise Archer). It is noted that conversations were had by the Tasmanian Government with Commissioner Neave AO in relation to possible amendments to the Act: see *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23.

[189] Tasmania, *Parliamentary Debates*, House of Assembly, 18 March 2021, 66 (Elise Archer).

Table 3.2: Key amendments to the misconduct provisions of the *Commissions of Inquiry Act 1995* (Tas) introduced by the *Justice Miscellaneous (Commissions of Inquiry) Act 2021* (Tas)

***Commissions of Inquiry Act 1995* (Tas)**	**Summary of Amendment**
Section 3	**Definition of 'misconduct'** changed from 'conduct by a person that could reasonably be considered likely to bring discredit upon that person' to 'conduct by a person that could reasonably be considered likely to result in a criminal charge, civil liability, disciplinary proceedings, or other legal proceedings, being brought against that person in respect of the conduct'.
	Definition of 'reasonable excuse' was inserted, and meant an excuse that would excuse the act by a witness in proceedings of a similar nature in a court of law (if the person is a witness, or providing information to a Commission) or, if the person is the subject of a notice or warrant in relation to a Commission, an excuse that would excuse the act by a person summoned before a court of law in proceedings of a similar nature; or in respect to any act by a person, an excuse that the Commission considers reasonable in the circumstances.
	Definition of 'adverse finding' was inserted, and meant a finding of a Commission under s 19 that is adverse to the interests of a person.
Section 5(3)	Provision inserted that a Commission may **conduct its inquiry and obtain information** in any manner that it considers appropriate and **determine its own procedure** in conducting its inquiry (while observing the rules of procedural fairness and acting within the scope of the s 4(1) order that established the Commission).
Section 18(2A)	Requirement for **notice in s 18(2) does not apply** if the allegation relates to misconduct by a person in respect of giving evidence, or if a person waives the notice requirement.
Section 18(1)	The requirement to give notice of the substance of the 'evidence' was changed to 'evidence, or nature and substance of anticipated evidence'.
Section 19(2A)	Created a new category of finding (**an 'adverse' finding**) and required the Commission to provide written notice to that person, including the details of the adverse finding and allow the person at least 10 working days to make representations to the Commission, before the Commission's report is finalised.
Section 19(2B)	Inserted a requirement to apply **the rules of procedural fairness apply** in respect of a person and a finding if the report of the Commission makes an **adverse finding** in respect of a person.

3.11.4 Other key amendments in support of the Child Abuse Commission of Inquiry were: provisions for the Commission to hold private sessions;[190] additional powers in relation to documents or statements; powers in relation to listening devices; a specific provision in relation to a claim of legal professional privilege; and powers in relation to anonymity and the sharing of information. These are summarised in Table 3.3.

[190] It is noted this reflects amendments made to the *Royal Commissions Act 1902* (Cth) for the purpose of the Commonwealth Royal Commission into Child Sexual Abuse, allowing for the Commission to conduct 'private sessions' with persons affected by child abuse in a trauma-informed and less formal manner than a hearing. The introduction of private sessions received criticism for allowing information to be received by the Commission without proper testing and with possible adverse impacts on an individual's reputation: Prasser (n 2) [112], referring to K Windschuttle, *The Persecution of George Pell* (Quadrant Brooks, Sydney 2020) 128–32.

Table 3.3: Other Key Amendments to the provisions of the *Commissions of Inquiry Act 1995* (Tas) introduced by the *Justice Miscellaneous (Commissions of Inquiry) Act 2021* (Tas).[191]

***Commissions of Inquiry Act 1995* (Tas)**	**Summary of Amendment**
Sections 19A–19C	The Commission may hold **private sessions** to obtain information, as determined by the Commission. A person who appears at a private session is not a witness before the Commission and is not considered to have given evidence before the Commission, except for the purposes of ss 36, 37 and 38 of the Act (relating to legal costs of witnesses and any allowances or compensation for loss of income). There are restrictions on reporting of information in a report or recommendation if given in a private session (only if the information is also given to the Commission other than at a private session, or, if the person's identity is protected). Statements or disclosures made, or documents or things produced in a private session are not admissible in civil or criminal proceedings.
Section 23	New section to empower the Commission to serve a notice on a person, requiring that person to **prepare a document or statement** to the Commission, containing the information known by the person in respect of the matter specified in the notice (replacing provision in relation to witness certificates).
Section 23A	New section providing that if a person refuses to prepare or produce a document or statement on the **grounds of privilege**, the Commission may require the production of the document or statement to assess whether privilege applies. Further, the production to, and use of a document or statement by a Commission does not affect a claim of legal privilege in any other circumstances.
Section 23B	New section for a Commission to permit a person **to give evidence anonymously or under a pseudonym, and/or to prevent the identification** of a person by any means that the Commission considers appropriate. Commission may also identify the person as potentially vulnerable and apply any special evidentiary procedures, including but not limited to measures under the *Evidence (Children and Special Witnesses Act) 2001* (Tas) (such as the use of witness intermediaries), whether or not the prerequisites under that Act are met.
Section 24B	New section allowing the Commission to **apply to a magistrate for a warrant** under Part 4 of the *Listening Devices Act 1991* (Tas).
Section 34A(5)	New subsection providing that a Commission may **communicate any information or evidence** that relates to the **safety and protection of children** to a relevant person or organisation (including child safety services, any person or organisation responsible for the registration and approval of persons working in a particular industry, or a person or organisation responsible for relevant disciplinary proceedings).

3.11.5 The *Commissions of Inquiry Regulations 2021 (Tas)* were also introduced. These regulations state that, for the purposes of the Child Abuse Commission of Inquiry, various provisions from various Acts do not apply in respect of any information to be collected by or provided to the Commission. These provisions would have otherwise restricted the information that could be provided to the Commission,

[191] Other amendments to the *Commissions of Inquiry Act 1995* (Tas) included: an amendment to s 4(3) to allow the Governor to amend or revoke a section 4(1) order (establishing a Commission) for any reason, including to appoint one or more persons as members of the Commission either before or during the inquiry; an amendment to s 24 (entry, search and seizure) and s 27 (contempt) to include vessels as well as buildings or vehicles; and an amendment to allow for alternative electronic means of service of notice in s 35.

particularly in the case of State Service employees. For example, s 9(7) of the *State Service Act 2000* (Tas) provides that an employee must maintain appropriate confidentiality about dealings and information acquired in the course of their employment.

3.12 Report of the Child Abuse Commission of Inquiry (2023)

3.12.1 The final report of the Child Abuse Commission of Inquiry was released in August 2023. Despite the amendments made to the *Commissions of Inquiry Act* (as outlined at [3.11.1]–[3.11.5]), the Commission of Inquiry formed the view that several provisions in the Act remained problematic. As set out in Part 1, the Commission recommended that the Act be amended to make it less onerous to make adverse findings or a finding of misconduct against an individual. The requirements of procedural fairness in the Act were seen to be 'out of step with other states and territories and make it too hard to do what commissions of inquiry are tasked to do – which, in some cases, involves holding individuals to account'.[192] This is discussed further in Part 4. Further, the Commission of Inquiry noted that the *Commissions of Inquiry Act* does not reflect the ALRC's recommended approach of having different tiers of public inquiries, with flexibility in the powers and privileges that may apply to those different tiers.[193]

3.12.2 The Commission of Inquiry also experienced challenges in the information that it could publish under the *Evidence Act 2001* s 194K. Broadly, this related to the identification of complainant, witnesses and (in some cases) accused in sexual assault proceedings, and is discussed further in Part 7.

3.12.3 The Commission of Inquiry identified opportunities for reform in its Final Report, encouraging the Tasmanian Government to actively pursue the following potential framework for legislative reform:

> 1. Amend the Commissions of Inquiry Act 1995 to:
>
> (a) establish greater flexibility in the powers and privileges applying to different inquiries, including expressly abrogating legal professional privilege in relevant inquiries
>
> (b) repeal the definitions of 'adverse finding' and 'misconduct' (section 3) and sections 18, 19(2A) and (2B)
>
> (c) use consistent terminology and achieve drafting coherence across the various ways in which a commission of inquiry might obtain, manage and protect those who provide information
>
> (d) provide for more practical ways in which to make decisions about closing hearings and making prohibition or restricted publication orders.
>
> 2. Amend section 194K of the *Evidence Act 2001*, considering equivalent provisions in other Terminology.

[192] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 1 Executive Summary 26.
[193] Ibid vol 8 ch 23, 324.

3.13 Confidential Assessment for the Premier of Tasmania: Did any or all of six selected Secretaries potentially breach the Code of Conduct Review (2024)

3.13.1 Following the release of the Child Abuse Commission of Inquiry's final report, several independent reviews were held into aspects of the Report.[194] This included a review conducted by the former Tasmanian Auditor-General Mike Blake AM of the actions of Heads of Agency (that is, departmental secretaries). The Review considered whether their conduct breached the Tasmanian State Service Code of Conduct. In 2024, the report of the Confidential Assessment for the Premier of Tasmania: Did any or all of six selected Secretaries potentially breach the Code of Conduct Review ('Blake Review') was released. Unlike this Research Paper, which is focussed on the broader legislative framework in which commissions of inquiry operate, the Blake Review was specifically tasked with examining the conduct of Department Secretaries. In this regard, as described in Chapter 2 of the report, the Blake Review found that there was no such misconduct.[195]

3.13.2 The Blake Review also considered, in part, the challenges faced by the Child Abuse Commission of Inquiry arising from the operation of the *Commissions of Inquiry Act* ss 18 and 19. The Review's Terms of Reference specifically asked the Review to address the question of whether the Commission of Inquiry, but for the challenges it identified in its report, would have made a finding of misconduct against any of the Secretaries:

> My [Terms of Reference] required that I, as a matter of process, assess 'where findings were unable to be made (Volume 1, Chapter 5.1 Challenges we faced), are fully considered'. I considered these 'challenges' while carrying out my assessment and, having done so based on the approach I adopted as outlined in Chapter 5, did not alter my conclusions as outlined in Chapter 2.

3.13.3 This issue was addressed further in an *Addendum to the Report*, which analysed the meaning of the submission provided to the Blake Review by the former Commissioners, that 'the Commission did not identify any specific findings of misconduct against any specific person that it would otherwise have intended to make but for the challenges presented by the Act'.[196] In the Addendum, Blake stated that the correct interpretation of this sentence was:

- what the Commission stated [wa]s that, on the evidence before them, they did not identify allegations of any specific misconduct against any specific persons (including the Secretaries);[197]

- it is supposition as to whether any findings of misconduct against any specific person would have been made if the Commission had adopted a different procedural fairness process; and

[194] See Keeping Children Safe, *Reviews* <https://keepingchildrensafe.tas.gov.au/reviews/>.
[195] Mike Blake, *Confidential Assessment for the Premier of Tasmania: Did any or all of six selected Secretaries potentially breach the Code of Conduct Review* (Report, 2024) ch 2 ('*Blake Review Report*'). This was confirmed in the Addendum report: Mike Blake, *Confidential Assessment for the Premier of Tasmania: Did any or all of six selected Secretaries potentially breach the Code of Conduct Review: Addendum to my Report to the Premier dated 28 March 2024* 3 ('*Blake Review Addendum Report*') <https://assets.keepingchildrensafe.tas.gov.au/media/documents/Blake_review_final_addendum_report.pdf>.
[196] See *Blake Review Report* (n 195) app B.
[197] *Blake Review Addendum Report* (n 195) 3, n 2. It is noted in a footnote that this means: 'Other than the one finding of misconduct referred to in Volume 6 of their report – refer page 14 in Chapter 1 Establishment, scope and conduct in Volume 2 of the COI report. Of relevance was the Commission's advice to me that this one finding did not relate to any Secretaries'.

- it is supposition to infer that the Commission, had it not been faced with the challenges presented by the Act, might have, or might not have, made an allegation of a finding of misconduct against any Secretary.[198]

3.13.4 More broadly, in both the Report and the Addendum, Blake addressed the need for statutory reform to the *Commissions of Inquiry Act* relating to the requirements for procedural fairness, and in both cases recommended that: 'Government take note of the matters raised by the Commissioner as these related to changes needed to the COI Act and initiate changes to this Act to address these'.[199] Blake further stated:

> However, for the reasons outlined here, I believe action is needed by Government to address, at least, those aspects raised by the Commissioners as these relate to section 18 and 19 of the *Commissions of Inquiry Act 1995* (the COI Act).
>
> How I reached this view:
>
> - Studied the challenges outlined in Chapter 5.1 noting in particular the observation that "… the Commissions of Inquiry Act should be changed to make it less onerous to make adverse findings or a finding of misconduct against an individual. We agree that procedural fairness in these processes is fundamental but consider that the requirements in the Act are out of step with other states and territories and make it too hard to do what commissions of inquiry are asked to do – which, in some cases, involves holding individuals to account."
>
> - Having noted their view that the COI Act should be changed, no explicit recommendation was made by them.
>
> - Chapter 5 also discusses other challenges including the implications of section 194K of the Evidence Act 2001.
>
> - Chapter 23 Afterword discusses these and other matters. However, I limited my review of these matters to observations related to sections 18 and 19 of the COI Act and I concluded support for the changes proposed based on the reasoning provided.[200]

[198] Ibid 3.
[199] *Blake Review Report* (n 195) Recommendation 1; *Blake Review Addendum Report* (n 195) 3.
[200] *Blake Review Report* (n 195) 15.

Part 4

Protections for Individuals: Procedural Fairness and Sections 18 and 19

4.1 Introduction

4.1.1 This Part discusses the types of procedures available to conduct a commission of inquiry and the requirement that the procedures adopted by an inquiry comply with the principles of procedural fairness. Procedural fairness is a principle of the common law, but in the Tasmanian context the principles of procedural fairness are encapsulated in the requirements of the *Commissions of Inquiry Act 1995* (Tas) (‘*Commissions of Inquiry Act*’) ss 18 and 19. This Part outlines the principles of procedural fairness, the position in Tasmania and other comparable jurisdictions, the discussion from relevant reviews, and makes recommendations for reforms to the Tasmanian law.

4.2 Procedural fairness at common law

4.2.1 It is well established in Australia that unless specifically excluded by the legislature, the common law obligation to afford procedural fairness applies to any decision that may affect a person’s rights and interests in a direct and immediate way.[201] As stated at [2.6.2], there are two main aspects of procedural fairness:

(1) the fair hearing rule; and

(2) the rule against bias.

4.2.2 The High Court of Australia has repeatedly confirmed that the requirements of procedural fairness are not to be found in a fixed body of rules, and instead have a ‘flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power’.[202] The variety of interests that may be affected are ‘almost infinite’[203] and include a person’s reputation (personal or commercial) or status. These interests often arise in commissions of inquiry tasked to investigate alleged improper, corrupt or illegal conduct.

4.2.3 It is clear that in the context of commissions of inquiry, principles of procedural fairness apply. While ‘the essential role of an inquisitorial body is to gather evidence, question witnesses and determine the process and direction of the inquiry’,[204] the public expectation is often that commissions of inquiry are conducted in a manner similar to a courtroom, with formal examination, cross-examination and re-

[201] *Mahon v Air New Zealand Ltd* [1984] AC 808; *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[202] See *Kioa v West* (1985) 159 CLR 550 at 629; 60 ALJR 113 (Brennan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [18]; 80 ALJR 228 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *AB (a pseudonym) v Independent Broad-based Anti-Corruption Commission* [2024] HCA 10; 98 ALJR 532 [25].
[203] *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).
[204] Lindell (n 26) 39–40.

examination of witnesses.[205] Yet, unlike a courtroom, a commission of inquiry is not bound by the rules of evidence and may conduct its inquiry and obtain information in any manner that it considers appropriate.[206] The principal requirement of procedural fairness in the context of an inquiry is that 'the [inquirer] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding'.[207] The duty to provide a person the opportunity to be heard arises when an inquiry 'has reached the stage of contemplating the making of an unfavourable finding against [a] person.'[208] Further, the person does not have the right to be heard on the general subject of an inquiry, only on the subject of the potential adverse finding.[209]

4.3 Current position in Tasmania

4.3.1 Under the *Commissions of Inquiry Act*, a commission of inquiry may conduct its inquiry and obtain information in any manner that it considers appropriate, and may determine its own procedures in conducting its inquiry.[210] Alongside public hearings, a commission of inquiry may decide to inform itself by any other means, including the use of written submissions, private sessions, community and stakeholder consultations, site visits, research, roundtables and expert reports.[211] The procedures to be adopted will vary from inquiry to inquiry, depending on the terms of reference and subject matter. In conducting an inquiry, a commission must observe the common law rules of procedural fairness, must comply with the *Commissions of Inquiry Act* and act within the scope of the relevant terms of reference.[212]

4.3.2 A commission of inquiry is required to observe the rules of procedural fairness by the *Commissions of Inquiry Act*[213] and the common law. However, rather than relying on the protections of procedural fairness that have developed under the common law, the Tasmanian Parliament, following the recommendation of the Law Reform Commissioner, went a step further by incorporating all six of the Salmon Principles into the Act.[214] In the Second Reading Speech on the Commissions of Inquiry Bill 1995 (Tas), the then Minister for Justice stated that the aim of the Act was to 'ensure that commissions of inquiry are conducted fairly, that witnesses are treated equitably, and that there are sufficient safeguards to prevent the unchecked exercise of this supreme executive power of inquiry.'[215]

4.3.3 In the context of this Research Paper, the statutory provisions relating to findings of misconduct (s 18) and adverse findings (s 19) are central. Pursuant to s 19 of the Act, a commission of inquiry has the power to make an adverse finding against a person. Despite s 19 already stating that the rules of procedural fairness apply if a commission makes an adverse finding about a person in their final report,[216] prior to making such a finding, the commission also has to notify the individual in writing, including details of the proposed adverse finding, and allowing the person at least 10 working days to respond to the intended adverse finding, prior to the commission's report being finalised.[217]

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[205] *Making Inquiries: A New Statutory Framework* (n 6) [15.7].
[206] See *Commissions of Inquiry Act 1995* (Tas) s 5(3)(a).
[207] *Annetts v McCann* (1990) 170 CLR 596, 600–601, cited in *Making Inquiries: A New Statutory Framework* (n 6).
[208] *Annetts v McCann* (1990) 170 CLR 596, 610, cited in *Making Inquiries: A New Statutory Framework* (n 6).
[209] *Annetts v McCann* (1990) 170 CLR 596, 601, cited in *Making Inquiries: A New Statutory Framework* (n 6).
[210] *Commissions of Inquiry Act 1995* (Tas) s 5(3)(a).
[211] See, eg, *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 1, 22.
[212] *Commissions of Inquiry Act 1995* (Tas) s 5(3)(b).
[213] *Commissions of Inquiry Act 1995* (Tas) s 5(3)(b)(i), noting this is also repeated in s 19(2B).
[214] See [3.4.1]–[3.4.5]; see also Table 3.1 above.
[215] Tasmania, *Parliamentary Debates*, House of Assembly, 30 June 1995, 63 (Ron Cornish, Minister for Justice).
[216] *Commissions of Inquiry Act 1995* (Tas) s 19(2B).
[217] *Commissions of Inquiry Act 1995* (Tas) s 19(2A).

4.3.4 Under s 18 of the *Commissions of Inquiry Act*, a commission also has the power to make a finding of misconduct against a person. Misconduct is defined as 'conduct by a person that could reasonably be considered likely to result in a criminal charge, civil liability, disciplinary proceedings, or other legal proceedings, being brought against that person in respect of the conduct'.[218] Similar to the process under s 19 of the Act, a commission must give notice of the alleged misconduct to the person, not less than 48 hours before the person is called to give evidence in relation to the allegation.[219] However, unlike s 19, a commission must allow the person a 'reasonable period' to prepare their response and obtain legal representation,[220] and the person who receives notice may respond by doing all or any of the following:

> (a) making oral or written submissions to the Commission;
>
> (b) giving evidence to the Commission to contradict or explain the allegation or evidence, including the giving of oral evidence under examination by the person's counsel;
>
> (c) cross-examining the person making the statement constituting the allegation or evidence;
>
> (d) calling witnesses on matters relevant to the allegation or evidence.[221]

4.3.5 As noted at [3.11.2], the distinction between findings of misconduct ('the most serious examples of wrongdoing') and less serious 'adverse findings' was intended to reduce the prescriptive statutory requirements of procedural fairness in respect to making an 'adverse finding'. However, the Tasmanian position in relation to procedural fairness remains unique in two regards. First, no other jurisdiction imposes a distinction between an adverse finding and misconduct, and second, no other jurisdiction provides such specificity in relation to the application of the principles of procedural fairness.

4.4 Other jurisdictions

4.4.1 A summary of the legislative position in relation to procedural fairness is set out in Table 4.1. A more detailed discussion of significant aspects of other legislation follows.

Table 4.1: Comparison of provisions relating to procedural fairness across jurisdictions

Relevant Act	**Section**	**Summary**
Inquiries Act 2014 (Vic)	Section 12	A royal commission may conduct its inquiry in any manner that it considers appropriate, subject to the requirements of procedural fairness; the Letters Patent establishing the royal commission; the Inquiries Act; the regulations; and any other Act.
	Section 36	If a royal commission proposes to make a finding that is adverse to a person, the royal commission must be satisfied that the person: (a) is aware of the matters on which the proposed finding is based; and

[218] *Commissions of Inquiry Act 1995* (Tas) s 3.
[219] *Commissions of Inquiry Act 1995* (Tas) s 18(2).
[220] *Commissions of Inquiry Act 1995* (Tas) s 18(4).
[221] *Commissions of Inquiry Act 1995* (Tas) s 18(3).

Relevant Act	Section	Summary
		(b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters. A royal commission must consider a person's response, before making a finding that is adverse to the person and must fairly set out the response in their report (if an adverse finding is made).[222]
Royal Commissions Act 1991 (ACT)	Section 35A	The commission must not include a comment in a report that is adverse to an entity who is identifiable from the report, unless the commission has, before making the report, given the entity a copy of the proposed comment and written notice telling the entity that they may make a submission or give a written statement in relation to the proposed adverse comment and that the submissions or written statement will be included in the commission's report (or, if excessively long or contains defamatory or offensive language, a fair summary). The written notice must also state the time period for submissions or a statement to be given, no earlier than 14 days from the time that the notice if given.
Inquiries Act 2013 (NZ)	Section 14	(1) An inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified— (a) by this Act; or (b) in the terms of reference of the inquiry. (2) In making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must— (a) comply with the principles of natural justice; and (b) have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry. (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person (a) is aware of the matters on which the proposed finding is based; and (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters. (4) Without limiting subsections (1) to (3), an inquiry may determine matters such as— (a) whether to conduct interviews, and if so, who to interview: (b) whether to call witnesses, and if so, who to call: (c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held: (d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry:

[222] This also applies in relation to boards of inquiry (*Inquiries Act 2014* (Vic) s 76) and formal reviews (*Inquiries Act 2014* (Vic) s 108). There is no definition of 'adverse finding'.

Relevant Act	Section	Summary
		(e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions: (f) whether to allow or restrict cross-examination of witnesses.
Public Inquiries Act 2009 (Ontario)	Section 17	A commission shall not find misconduct by a person unless reasonable notice of the possible finding and a summary of the evidence supporting the possible finding have been given to that person; and the person has been given a reasonable opportunity to respond.
Inquiries Act 1985 (Can)	Section 13	No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.
Inquiries Act 2005 (UK)	Section 17	The chairperson of the inquiry may make decisions in respect to the procedure and conduct of an inquiry (subject only to the Act), and in making any decisions, the chairperson must act with fairness and with regard to the need to avoid any unnecessary cost.

Victoria

4.4.2 In Victoria, a royal commission may conduct its inquiry into any matter that it considers appropriate, subject to the requirements of procedural fairness, the Letters Patent establishing the royal commission and the legislative framework.[223] The background to the current Victorian legislative position arose out of the 2009 Victorian Bushfires Royal Commission final report (delivered July 2010), which recommended that legislation be developed for the conduct of inquiries, and in particular, royal commissions.[224] The Royal Commission relied upon the ALRC's 2009 Report in preparing its recommendations,[225] and the then Victorian Attorney-General drafted the Inquiries Bill 2014 (Vic) in response to the recommendations.[226] Like the Tasmanian *Commissions of Inquiry Act*, the application of the rules of procedural fairness when determining the conduct of inquiries is explicitly referred to in the *Inquiries Act 2014* (Vic) s 12.[227] Further, the Act provides statutory guidance in relation to the making of an adverse finding. The *Inquiries Act 2014* (Vic) s 36 provides that if a royal commission proposes to make a finding that is adverse to a person, the commission must be satisfied that the person is aware of the matters on which the proposed finding is based and has had an opportunity, at any time during the course of the inquiry, to respond on those matters.[228] Further, a royal commission must consider a person's response before making a finding that is adverse to the person and must fairly set out the response in their report.[229] However, this differs from the Tasmanian position in that there is no

[223] *Inquiries Act 2014* (Vic) s 12.
[224] *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) Recommendation 67.
[225] Victoria, *Parliamentary Debates*, Legislative Council, 18 September 2014, 3114 (Mr Scheffer). See discussion in relation to procedural fairness at [3.9].
[226] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 September 2014, 3216 (Mr Newton-Brown). Recommendation 67 of the *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) recommended that the state consider the development of legislation for the conduct of inquiries in Victoria, and in particular, royal commissions.
[227] *Inquiries Act 2014* (Vic) s 12. It is noted that Victoria has a tiered inquiry structure, providing for royal commissions, boards of inquiry and formal reviews.
[228] *Inquiries Act 2014* (Vic) ss 36 (royal commissions), s 76 (boards of inquiry), s 108 (formal reviews).
[229] *Inquiries Act 2014* (Vic) s 36.

distinction between findings of misconduct and adverse findings, and does not require anything more than the common law position that notice be given and an opportunity to respond be provided.

4.4.3 There have been four royal commissions in Victoria since the *Inquiries Act 2014* (Vic) was enacted,[230] with one royal commission currently being conducted.[231] The Royal Commission into the Management of Police Informants made one formal recommendation in respect to the legislative framework,[232] and suggested several potential reform options, but no criticism was made of the operation of ss 12 and 36 of the *Inquiries Act 2014* (Vic). The provisions appear to be providing the appropriate level of flexibility that was intended by Parliament.

Australian Capital Territory

4.4.4 In the Australian Capital Territory (ACT), a royal commission is not bound by the rules of practice of any court or tribunal as to procedure or evidence, but may conduct their proceedings and inform their minds on any matter in such manner as they think proper.[233] As with Victoria, the *Royal Commissions Act 1917* (ACT) also provides statutory guidance on the application of the rules of procedural fairness. The Act provides that a commission must not include an adverse comment in a report unless the commission has provided a copy of the proposed comment and written notice. The notice must tell the person or entity that they may make a submission or give a written statement in relation to the proposed adverse comment and that the submission or written statement will be included in the commission's report (or, if excessively long or if it contains defamatory or offensive language, a fair summary).[234] The Act goes further than Victoria by requiring that the written notice must also state the timeframe for submissions or a statement to be given, no earlier than 14 days from the time that the notice is given.[235] However, there are still key differences with the specificity of the position in Tasmania.

Other Australian states and territories

4.4.5 The legislation in all other Australian states and territories (including the Commonwealth's *Royal Commissions Act 1902)* makes no specific reference to the principles of procedural fairness and does not provide any statutory rules of procedure.[236]

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[230] Royal Commission into Family Violence (2015–2016); Mental Health Royal Commission (2018–2021); Royal Commission into the Management of Police Informants – An inquiry into Victoria Police's use of Nicola Gobbo as a human source (2018–2020); and Royal Commission into the Casino Operator and Licence – An inquiry into the suitability of Crown Melbourne Limited to hold a casino licence (2021).

[231] Yoorrook Justice Commission (2021–2025 expected).

[232] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 139–146. One recommendation made by the Royal Commission was to remove the ability for a person to refuse to comply with a notice to give information on the basis that the information is subject of public interest immunity (Recommendation 91). The Royal Commission also identified three further aspects of the *Inquiries Act 2014* (Vic) that the Victorian Government could consider addressing through legislative amendments: introducing a clear power to compel a person to make a written statement, modernising the requirement to publish non-publication orders, and introducing more flexibility in the requirement for service of notices.

[233] *Royal Commissions Act 1917* (ACT) s 7.

[234] *Royal Commissions Act 199*1 (ACT) s 35A.

[235] *Royal Commissions Act 1991* (ACT) s 35A(3).

[236] Note Ann Vanstone QC, *Review of the Royal Commissions Act 1917 (SA) Report to the Attorney-General* (Report, June 2020) [5] ('*Review of the Royal Commissions Act 1917 (SA)*'). This review, prepared for the Attorney-General in South Australia, recommended that the Victorian wording be adopted, except in relation to considering a person's response and setting out that response in their report. The recommendation to the Attorney-General was to let a commission deal with a person's response as it sees fit. The Inquiries Bill 2021 (SA) was circulated for comment but was never introduced into Parliament.

United Kingdom

4.4.6 In the United Kingdom, the *Inquiries Act 2005* (UK) does not include any statutory rules of procedure, and simply states that the chairperson of an inquiry may make decisions in respect to the procedure and conduct of an inquiry (subject only to the governing Act), and in making any decisions, the chairperson must act with fairness and with regard to the need to avoid any unnecessary cost.[237]

4.4.7 The report of the Royal Commission on Tribunals of Inquiry (1966) ('Salmon Report') considered the issue of additional procedural protections in inquiries in the United Kingdom and recommended six 'cardinal principles' to safeguard the interests of affected parties (known as the 'Salmon Principles'). When laying down the 'six cardinal principles' to be observed by a Tribunal of Inquiry, Lord Justice Salmon considered whether these principles should be encapsulated in statutory rules of procedure. Lord Justice Salmon identified that the disadvantage of statutory rules would be that they would 'necessarily be detailed and rigid',[238] and therefore unsuitable for meeting the circumstances and needs of each particular inquiry. The recommended approach was that the Salmon Principles should be considered general principles to be followed by future Tribunals of Inquiry in the United Kingdom.[239]

4.4.8 The Salmon Principles have received a significant amount of criticism, triggering a debate in the United Kingdom about how best to safeguard the rights of witnesses called to give evidence before public inquiries armed with coercive powers.[240] In a report prepared by the House of Commons Public Administration Select Committee in February 2005,[241] the Committee received evidence from chairpersons of previous inquiries regarding the conduct of their inquiries in the context of the Salmon Principles. The Committee was told that: 'the so-called Salmon [P]rinciples are problematic and not altogether helpful';[242] the Salmon Report sets out the principles in 'rather rigid terms';[243] and the principles are 'not to be applied inflexibly or rigidly and they have to be adapted to the circumstances of the particular inquiry.'[244] The Committee recommended that 'the time has clearly come to reformulate the Salmon [P]rinciples',[245] suggesting that there should be consideration of how to appropriately safeguard the interests of those appearing before an inquiry, while minimising the 'adversarial, legalistic element of inquiries'.[246]

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237 *Inquiries Act 2005* (UK) s 17.
238 *Salmon Report* (n 26) ch V [69]–[70].
239 Ibid ch V.
240 See Scott (1996) (n 20), pt 4 s K (often referred to as the 'Scott Report'); Scott (1995) (n 20). Sir Scott argued that the Salmon Principles were not appropriate to be applied to inquisitorial proceedings, identifying three primary objectives of an inquiry: (1) to be fair and to be seen to be fair to those whose rights and interests may be adversely affected; (2) to conduct the inquiry efficiently and with as much expedition as is practicable; and (3) to keep the inquiry's costs within reasonable bounds. It was recognised that there was an inevitable tension between the need to be fair and the need for an efficient process, and that the second and third objectives should never be allowed to submerge the first. Sir Scott proposed that the Salmon Principles do not support these objectives, emphasising the differences between the inquisitorial function of public inquiries, and the adversarial nature of litigation. Following the Scott Report, the Council on Tribunals (UK) was asked to provide guidance in respect to the recommendations: Council on Tribunals, *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (Report, 1996). The Council's report, endorsed by the then United Kingdom Government, appeared to downplay the difference between the two approaches and avoided favouring one approach over the other, saying that the hallmark of its approach was flexibility, and that it believed that it was wholly impracticable to devise a single set of model rules or guidelines that will apply to every inquiry.
241 House of Commons Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004-05* (Report, 2005) vol 1 ('*Government by Inquiry*').
242 Ibid 39.
243 Ibid.
244 Ibid.
245 Ibid 82.
246 Ibid.

Canada

4.4.9 Prior to the late 1970s, public inquires in Canada were only advisory in nature, and the rules of natural justice did not apply.[247] By the early 1990s, as public inquiries took on a more investigative role, Canadian courts increasingly applied a general duty of fairness on inquiries. However, fairness remained a 'flexible concept', dependent on the nature of the inquiry and whether a person had a substantial and direct interest in its subject matter.[248] It was in this context that the Ontario Law Reform Commission[249] made recommendations for additional statutory measures to 'recognize the prejudice that a person might suffer by being commented upon adversely in public proceedings, even though such comments might be rejected or ignored in the commission's report.'[250] However, the more prescriptive wording recommended was not adopted in Ontario, Canada. The *Public Inquiries Act 2009* (Ontario) s 17 simply reflected the common law position that a commission must not find misconduct by a person unless reasonable notice of the possible finding, and a summary of the evidence supporting the possible finding, have been given to that person; and the person has been given a reasonable opportunity to respond.

New Zealand

4.4.10 In New Zealand, the *Inquiries Act 2013* (NZ) provides that an inquiry may conduct its inquiry as it considers appropriate (subject to the Act and the terms of reference of the inquiry). In making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must comply with the principles of natural justice. It must also have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.[251]

4.4.11 The *Inquiries Act 2013* (NZ) was enacted following a comprehensive review of the legislative framework by the New Zealand Law Commission ('NZLC').[252] The NZLC was commissioned to review the legislative framework, which was considered to be out of date and to have an inappropriate focus on formality and adversarial methods. The NZLC recommended that new legislation should be enacted that would maximise flexibility, and 'free inquiries from the procedural constraints that have dogged commissions.'[253] At the same time, the NZLC was of the view that the rules regarding adverse findings should be set out in the statute to 'give clear direction to those conducting and participating in inquiries'.[254] It recommended that the legislation provide that where a person or body will be the subject of adverse comment or findings by an inquiry, the inquiry must: give prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings; disclose the relevant material relied upon, and state the reasons on which the finding or allegation is based; give the person or body reasonable time and reasonable opportunity to refute or respond to the proposed findings or allegations; and give proper consideration to those representations.[255]

4.4.12 This approach was reflected in the initial Bill introduced into Parliament but was subsequently amended following the views expressed in the reports of two Royal Commissions. In June 2013, Cabinet agreed to implement a number of improvements to the Bill based on insights gained from the

[247] *Report on Public Inquiries* (n 102) 45.
[248] Ibid 46–48.
[249] Ibid.
[250] Ibid 202, Recommendations 9–11, 215–216. As noted at [3.3.7], the *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry* (n 1) recommended that Tasmania adopt the same wording as recommended by the Ontario Law Reform Commission.
[251] *Inquiries Act 2013* (NZ) s 14.
[252] See New Zealand Law Commission (NZLC), *A New Inquiries Act* (Report No 102, 2008) ('*A New Inquiries Act*').
[253] Ibid 13.
[254] Ibid Recommendation 15, 71.
[255] Ibid Recommendation 5, 71.

completed Royal Commissions.[256] The review of the Bill found that 'constraints and complexity in procedures and processes can unduly hinder the smooth operation and effectiveness of an inquiry' and that the intention of the legislation should be to 'provide an inquiry with flexibility as to how the principles of natural justice must be applied, while still providing some direction for minimum requirements.'[257]

4.4.13 Accordingly, the *Inquiries Act 2013* (NZ) s 14(3) provides that if an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person:

- is aware of the matters on which the proposed finding is based; and
- has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

4.4.14 Further, s 14(2) provides that in making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must comply with the principles of natural justice, and have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry. It can be seen that, instead of giving a person notice of an intention to make an adverse finding (including disclosing to the person the relevant material on which the proposing finding is based), an inquiry only needs to be satisfied that the person is aware of the matters on which the proposed finding is based. Further, instead of requiring a response to the notice, an inquiry only needs to be satisfied that the person has had an opportunity to respond to the matters at any time during the course of the inquiry. This same wording is reflected in the Victorian *Inquiries Act 2014* (Vic).[258]

4.4.15 Since the enactment of the *Inquiries Act 2013* (NZ) there have been three Royal Commissions of Inquiry established in New Zealand.[259] No specific comments or recommendations have been made in respect to the operation of s 14 of the Act by those Royal Commissions.

4.5 Child Abuse Commission of Inquiry (2023)

4.5.1 As mentioned at [3.12.1]–[3.12.3], in its Final Report, the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Child Abuse Commission of Inquiry') identified that the *Commissions of Inquiry Act* ss 18 and 19 created significant practical challenges for the inquiry. In the course of the Inquiry, the Commission noted that there was uncertainty about the interpretation of the provisions, with various legal arguments being advanced about the meaning of the provisions, and the interaction between them, particularly with respect to state servants.

4.5.2 The Commission considered that there should be scope for a commission of inquiry to make an adverse finding under s 19 in respect to a state servant, without this also triggering s 18 under the definition of misconduct. However, in respect to state servants, an argument was made that if a commission of inquiry wanted to make an adverse comment about the conduct of a state servant under s 19, this may amount to a breach of the State Service Principles or Code of Conduct, which could

[256] New Zealand, Cabinet Economic Growth and Infrastructure Committee, *Minute of Decision 'Inquiries Bill: Proposed Improvements'* (12 June 2013).
[257] Ibid.
[258] See *Inquiries Act 2014* (Vic) s 36.
[259] See: Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions (established in 2018); Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques (established in 2019); and Royal Commission of Inquiry into COVID-19 Lessons Learned (established in 2022). At the time of writing, the Royal Commission of Inquiry into COVID-19 Lessons Learned is still ongoing. Note that neither of the reports of the two completed Royal Commissions suggests that the *Inquiries Act 2013* (NZ) s 14 be improved or amended.

arguably amount to a finding of misconduct against that person pursuant to s 18. The argument advanced by the State focused on the Inquiry being:

> "out of the ordinary" in that it focuses on workers who are in a highly regulated profession ... Any adverse findings will bring the full effect of the Code of Conduct into play against any named individual and accordingly, [an] adverse finding is likely to result in the consideration of disciplinary proceedings against that worker (that is misconduct).[260]

4.5.3 Accordingly, the State advocated that state servants must also have the protections available to them pursuant to s 18 of the Act.

4.5.4 As a resolution to this issue, and to avoid the inevitable delay caused by prolonged legal argument, the Commission indicated that it had adapted their processes to align with the interpretation put forward by the State, and avoided adverse findings against individuals where there was a risk that they may have constituted findings of misconduct. The Commission noted that this interpretation made it 'difficult and, in some cases, impossible for us to make some of the findings we might otherwise have made'.[261]

4.5.5 Another difficulty identified by the Commission in relation to the *Commissions of Inquiries Act* ss 18 and 19 was where the person making the statement constituting the allegation may have been recalled and cross-examined under s 18(3) of the Act, potentially further contributing to their distress and trauma.[262]

4.5.6 Given the nature of the Commission of Inquiry, and the significant concerns identified in respect to existing institutions of the State (in particular, the Ashley Youth Detention Centre), the Commission reported that it was required to make some difficult decisions when drafting its final report, including how it framed its findings. In its view, this exercise involved balancing the public interest in holding individuals and systems to account, with the public interest in prioritising the funding and efforts of the Inquiry towards drafting recommendations that could be implemented swiftly to urgently protect Tasmanian children. Addressing the difficulties encountered, the Commission stated that:

> [w]e consider the *Commissions of Inquiry Act* should be changed to make it less onerous to make adverse findings or a finding of misconduct against an individual. We agree that procedural fairness in these processes is fundamental but consider that the requirements in the Act are out of step with other states and territories and make it too hard to do what commissions of inquiry are tasked to do—which, in some cases, involves holding individuals to account.[263]

4.5.7 In its Final Report, the Child Abuse Commission of Inquiry stated that a commission of inquiry should be able to make any findings it wishes, subject to complying with the common law rules of procedural fairness. The Commission considered it 'appropriate and necessary'[264] for the *Commissions of Inquiry Act* to expressly provide that the rules of procedural fairness apply to a commission of inquiry, however, it considered that s 18 in particular 'imposes requirements that are unnecessary, counterproductive, onerous and not in the public interest'.[265] While giving a person notice about potential findings concerning them and providing them with an opportunity to respond simply reflect what is required under the common law rules of procedural fairness, the practical challenge identified by the Commission relates to a person's rights in responding pursuant to s18(3). Under that section, the person may choose to make oral or written submissions, give evidence to a commission of inquiry, cross-examine the person who made the allegation or call witnesses. The Commission noted that this could essentially allow that person to control the commission of inquiry process, which 'creates legal

[260] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 2 ch 1, 15.
[261] Ibid vol 1 Executive Summary 25.
[262] Ibid vol 1 Executive Summary 26.
[263] Ibid.
[264] Ibid vol 8 ch 23, 321.
[265] Ibid.

complexities that prevent inquiries from being as effective and efficient as they might otherwise be'.[266] The Commission noted that there were numerous difficulties arising from the operation of s 18:

- Hearings are resource-intensive, expensive and time-consuming. It was important that the Commission (rather than an individual) have control in relation to scheduling of hearings reflecting the complexity of factors that needed to be considered.[267]
- There may be a need to hold repeated s 18 hearings, given that most inquiries continue to discover information throughout their term that may be relevant to findings they wish to make, and that a s 18 hearing may give rise to new potential findings of misconduct.
- There is a possibility for the procedural requirements to be manipulated by an 'individual seeking to "run the clock" and delay providing information until after the commission's planned hearings conclude, and to then require a further hearing if the commission were to propose making a misconduct finding based on the information they subsequently provide'.[268]
- In making decisions about process, a commission of inquiry must consider numerous factors, 'including how to advance its inquiry for the benefit of the public, how to appropriately manage the public cost of its inquiry, how to sequence its work to meet its reporting deadline, how to weigh the information and position of each party and, of course, how to comply with the rules of procedural fairness'.[269] Accordingly, it was appropriate for a commission of inquiry to be able to control its own proceedings.[270]

4.5.8 The Commission's view was that while procedural fairness required notice to be given and an opportunity to respond provided, this could be achieved by other means, such as 'through written submissions and written evidence without requiring the substantial expense, delay and potential trauma of further public hearings'.[271] The Commission ultimately considered that it would be better for an inquiry to make any findings that it wishes, including adverse findings, subject to complying with the common law principles of procedural fairness, concluding:

> In this context, we consider section 18 does not achieve an appropriate balance between facilitating a commission of inquiry controlling its own proceedings (while complying with the rules of procedural fairness) and protecting the rights of a person subject to an allegation or potential finding of misconduct. We consider that further amendments to section 18, or the definition of 'misconduct', will not redress this imbalance. The Tasmanian Government should consider simply repealing section 18 and that definition.[272]

4.5.9 While the *Commissions of Inquiries Act* s 19 is less prescriptive than s 18, the Commission also considered it unnecessary for the Act to include the specific procedural requirements for an adverse finding to be made. The Commission noted that it had complied with the requirements of section 19, sometimes providing the State and other people with more than 10 business days to respond, recognising that what is fair and reasonable will largely be determined by the circumstances, as part of a commission's compliance with the common law rules of procedural fairness.[273]

4.5.10 The Commission reported that a commission of inquiry should be required to consider a response from a person in relation to potential adverse content or findings about them. However, the Commission reserved the right to redact any information from a submission, including for legal, privacy and/or safety reasons, prior to publishing a submissions or statement to its website. The Commission

[266] Ibid vol 8 ch 23, 319.
[267] Ibid vol 8 ch 23, 320. These factors included: the availability of a venue, commissioners, witnesses, parties, lawyers for all relevant parties, technical operators and other relevant supports (such as counselling).
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid 321.

also reserved the right not to publish any submission or statement if it considered it inappropriate to do so, including where the person did not consent to, or requested not to, have their information publicly disclosed, if it included content relevant to an ongoing criminal investigation, or if it was not relevant to the inquiry.[274]

4.6 ALRC recommendations (2009)

4.6.1 As discussed at [3.9.2]–[3.9.7], the ALRC gave detailed consideration to the application of rules of procedural fairness to commissions. In its 2009 Report, the ALRC was of the view that it was desirable to provide statutory guidance on the application of the rules of procedural fairness, particularly for the benefit of persons involved in an inquiry.[275] However, its view was that this guidance needed to provide for flexibility in the application of procedural fairness and not contain prescriptive rules. On the basis that there was a need to accommodate the wide range of procedural fairness issues that may arise in any particular inquiry, the ALRC identified that only one clear obligation should be included in legislation—the right to be given an opportunity to respond before an adverse finding is made.[276] The ALRC recommended that an inquiry:

> should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give notice of the proposed adverse findings or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given.[277]

4.6.2 The ALRC did not recommend that the ACT wording be adopted, preferring a more flexible procedure for discharging the obligation.[278] Any codification of the Salmon Principles was considered ‘too prescriptive, failing to recognise competing interests such as the desirability of flexibility and efficiency in the conduct of inquiries, and would promote an overly judicial approach to inquiries’.[279]

4.6.3 To reinforce that commissions of inquiry may adopt a wide variety of procedures when conducting an inquiry, the ALRC was of the view that an approach like that in New Zealand should be included in the Commonwealth’s *Royal Commissions Act 1902*. Similarly, the NZLC had considered that the inclusion of such a provision would help inquiry participants, inquiry members and the general public to understand the scope of the inquiry’s powers.[280]

4.6.4 The ALRC also considered the introduction of a requirement to publish responses to adverse findings, and so allow a person affected by such findings to have their response published and form part of the inquiry record. This is the approach in the ACT.[281] The ALRC was of the view that the requirements in the *Royal Commissions Act 1991* (ACT) are too prescriptive. Its view was that the publication of a person’s response may be achieved in different ways, depending on the context. For example, in the context of public hearings, a person may respond to the risk or likelihood of an adverse finding by giving further evidence, and so this would discharge any obligation to publish the response due to transcripts of evidence being made publicly available on the commission’s website. In the event

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[274] See <https://www.commissionofinquiry.tas.gov.au/faq>.
[275] *Making Inquiries: A New Statutory Framework* (n 6) [15.45].
[276] Ibid [15.46].
[277] Ibid Recommendation 15-1.
[278] Ibid [15.47].
[279] Ibid [15.65].
[280] *A New Inquiries Act* (n 252) [4.11]. The ALRC also commented on the use of a handbook to provide guidance on matters of procedure, ultimately recommending the publication of an *Inquiries Handbook,* in line with the handbook published in New Zealand: see New Zealand, Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (Guidelines, 2001).
[281] *Royal Commissions Act 1991* (ACT) s 35A(4).

that people or entities are invited to make written submissions, these may be annexed to the commission's final report or published as exhibits on the commission's website. The ALRC also recognised that there may be circumstances where it would be inappropriate to publish a person's response (or part of their response), including where the person wishes for their response to remain confidential. In light of this, the ALRC recommended that an inquiry should have a broad discretion to summarise responses, and that the obligation to publish should only arise if a person requests the publication (for example, where a response is invited by way of written submission or in the course of a private session).[282]

4.7 TLRI's views and recommendations

4.7.1 As noted at [3.8.4]–[3.8.14], in 2003 the TLRI recognised the importance of commissions' obligations to provide procedural fairness to any person whose interests may be affected. The Institute maintains that view today. This is undisputed and fundamental to the operation of a commission of inquiry. In a smaller jurisdiction, like Tasmania, the potential for a finding of misconduct or an adverse finding to damage an individual's reputation (professional and personal) is particularly acute. It is also not the function of a commission of inquiry to hold individuals to account (as a criminal court may, for example). A commission does not have powers to enforce its findings and cannot make a determination that a person has committed a crime. Its role is to make recommendations within the ambit of the terms of reference in the order establishing the commission. At the most, the findings of a commission will ensure that the appropriate enforcement authorities are informed.[283] While a commission of inquiry can provide information to Tasmania Police or the Director or Public Prosecutions,[284] the commission cannot make any findings in respect of the legal liability of a person,[285] and evidence given by a person before a commission is not admissible in subsequent legal proceedings.[286] It is the role of a commission to make recommendations for the consideration of executive government.

4.7.2 However, in examining the operation of the *Commissions of Inquiry Act* ss 18 and 19 in the context of the Child Abuse Commission of Inquiry, the basis for those sections, and the approach in other jurisdictions, the TLRI's views are now that greater flexibility is required in the application of the principles of procedural fairness. It is noted that the 2024 Confidential Assessment for the Premier of Tasmania: Did any or all of six selected Secretaries potentially breach the Code of Conduct Review also recommended that the Government take note of the matters raised by the Commissioners relating to ss 18 and 19 and initial changes to the Act to address them.[287] It also reflects the experience in New Zealand, where prescriptive provisions in relation to the requirements for procedural fairness were changed to a model that allowed for more flexibility. As noted at [4.4.12], based on difficulties experienced by two royal commissions in New Zealand, a review found that 'constraints and complexity in procedures and processes can unduly hinder the smooth operation and effectiveness of an inquiry'. The preferred approach is that the statutory framework for a commission should 'provide an inquiry with flexibility as to how the principles of natural justice must be applied, while still providing some direction for minimum requirements'.[288]

4.7.3 The TLRI's views are that the current provisions in Tasmania are out of step with the approach taken elsewhere and are unduly complex. Despite the 2021 reforms, aimed at reducing the prescriptive

[282] *Making Inquiries: A New Statutory Framework* (n 6) Recommendation 15–3, 399.
[283] It is noted that the Child Abuse Commission of Inquiry referred more than 100 people to appropriate authorities, including making more than 230 referrals to Tasmanian and other government authorities regarding risks or potential risks to the welfare of children: *Blake Review Report* (n 195) app B.
[284] *Commissions of Inquiry Act 1995* (Tas) s 34A.
[285] See *Commissions of Inquiry Act 1995* (Tas) s 19(2).
[286] See *Commissions of Inquiry Act 1995* (Tas) ss 19(3), 21.
[287] *Blake Review Report* (n 195) Recommendation 1.
[288] New Zealand, Cabinet Economic Growth and Infrastructure Committee *Minute of Decision 'Inquiries Bill: Proposed Improvements'* (12 June 2013).

nature of the provisions by narrowing the types of conduct to which the detailed rules set out in s 18 applied, further reform is desirable. Prescriptive provisions about the content of procedural fairness are undesirable. In expressing this view, the TLRI does not agree with the statement in the Child Abuse Commission of Inquiry report that the legislation should be changed to make it 'less onerous' for a commission to make a finding of misconduct or an adverse finding. Instead, the TLRI's view is that the prescriptive rules in the current legislation in relation to findings of misconduct, and the lack of clarity in relation to the distinction between adverse findings and findings of misconduct, create unnecessary complexities in the application of the rules of procedural fairness. It is fundamental that the rules should be applied flexibly consistent with the intent of the legislation and according to the circumstances of the case, including the subject matter of the inquiry. The idea is to avoid practical injustice. In this context, it is important to note that the response that is required to afford procedural fairness should not be 'one size fits all'. For example, in some situations procedural fairness may require that an individual have the opportunity to give evidence or to cross-examine witnesses. It is for these reasons that the TLRI's view is that reform is required. However, in terms of procedural fairness, in amending the provisions of the Act, the TLRI observes that this amendment may not make a commission's task easier, particularly where the finding to be made is a grave one.

4.7.4 As a final matter, it is noted that the recommendations below differ from the 2003 recommendations of the TLRI. As discussed at [3.8.14], in 2003, the TLRI did not recommend reform to the prescriptive approach set out in s 18 relating to misconduct on the basis that it was important for public confidence that commissions of inquiry are conducted fairly.[289] The TLRI wrote that 'the clear intention of Parliament in enacting the rules of procedural fairness in s 18 of the Act was to set these down in a manner accessible to the public in order to fully assure the public that commissions of inquiry would be conducted fairly'.[290] However, the Tasmanian legislation in 2025 is not the same as the legislation that existed in 2003, as distinction is now made between a finding of misconduct and an adverse finding.[291]Further, the recent Child Abuse Commission of Inquiry provided the first opportunity to put the legislative reforms subsequent to the TLRI's 2003 Report into practice. There have also been legislative changes in Victoria, the ACT and in New Zealand that have provided statutory guidance on the application of procedural fairness to individuals without incorporating the prescriptive 'Salmon Rules'. These laws have operated in those jurisdictions for some time, with royal commissions being held that are subject to them. There have been several law reform papers released since 2003 that have considered the application of the common law rules of procedural fairness to royal commissions. In light of all these factors, the TLRI has taken the opportunity to reflect on its prior views and now considers that a 'hybrid' approach—as exists in Victoria and the ACT—is preferred. This model clearly sets out the key components of procedural fairness (the requirement for notice, and a fair opportunity to respond) while still allowing flexibility to determine what the requirements of procedural fairness require to afford these protections, depending on the circumstances of the case, including the nature or seriousness of the potential finding.

Findings of misconduct

4.7.5 It is the TLRI's view that the continuation of s 18 in its current form creates unnecessary complexities for the operation of any future commissions of inquiry due to its overly prescriptive and impractical requirements. As noted, no other jurisdiction in Australia or overseas adopts the current approach in Tasmania of separate and distinct misconduct and adverse findings processes. The key issue underpinning the provisions is to ensure is that procedural fairness be afforded when making any finding that is adverse to a person's interests. Further, given the modern view towards the relevance of the Salmon Principles to inquiries, it is not clear that the *Commissions of Inquiry Act* needs to maintain this distinction over and above an explicit provision that the commission comply with the rules of procedural fairness. This would include the requirement to ensure that a person is aware of the matters on which a

[289] *Report on the Commissions of Inquiry Act 1995* (n 1) 16, 24.
[290] Ibid 24.
[291] See [3.11.2].

proposed adverse finding is based (which would include any findings of misconduct) and has had a reasonable opportunity to respond on those matters. In particular, confidence can be gained from the robust testing of Victoria's *Inquiries Act 2014* and New Zealand's *Inquiries Act 2013* in subsequent royal commissions.[292] Accordingly, the TLRI's view is now that the *Commissions of Inquiry Act* should be amended to repeal: the definition of 'misconduct' in s 3, s 18, and s 20(2).

4.7.6 It is important to be clear that in making recommendations for reform to the misconduct provisions, the TLRI is not seeking to undermine or reduce protections for individuals. Indeed, the TLRI is firmly of the view that it is appropriate and necessary that procedural fairness is afforded to an individual given the potentially significant impact on individuals from an adverse finding or a finding of misconduct, noting such findings can be made without the protections of criminal trial. Rather, this reform is intended to provide for flexibility appropriate to the circumstances of the case, including the subject matter of the inquiry.

Recommendation 1

The *Commissions of Inquiry Act 1995* (Tas) should be amended to repeal:

- the definition of 'misconduct' in s 3;
- section 18; and
- section 20(2).

Adverse findings

4.7.7 In relation to adverse findings, the TLRI considers that the *Commissions of Inquiry Act* s 19 requires amendment. Despite the 2021 reforms that limited its scope, the TLRI's view is that it remains overly prescriptive in its requirements of procedural fairness and does not provide for appropriate flexibility. For example, it does not allow for the possibility that a person may already have had adequate notice of a proposed adverse finding during the course of the inquiry and already had the opportunity to respond by giving evidence. Instead, the TLRI's view is that the more flexible approach taken in the Victorian Act or New Zealand Act is preferred. As indicated at [4.7.3], the TLRI's view is that s 19 should be the single provision to apply regardless of the nature of the adverse finding—that is, it should apply from serious misconduct (formerly addressed in s 18) to more minor adverse findings (as dealt with in the current s 19). In other words, the TLRI's views are that a more flexible approach should be applied to conduct that could be described as serious (for example, findings that could reasonably be considered likely to result in a criminal charge) as well as more minor adverse findings.

[292] For example, the Victorian Royal Commission into the Management of Police Informants (2020) held a formal adverse findings process, providing certain people and organisations with copies of, or extracts from, Counsel Assisting submissions, and inviting them to make a submission to the Commission in response. Where possible, the Commission gave additional time for people to respond, and accepted late submissions. After publication of the responsive submissions to the Commission's website, members of the public who considered that they may be adversely affected by proposed findings contended by Counsel Assisting or by responsive submissions were provided with seven days to make a submission to the Commission. Additionally, people and organisations who had already made a responsive submission were provided with the opportunity to make further submissions in response to submissions made by other parties. The Commission set out the relevant responses where it made an adverse finding or comment in its final report, including findings of statutory misconduct. The Commission considered the duties and standard of professional behaviour required by police and lawyers, as well as the tests set down in law, to establish whether persons may have engaged in misconduct.

4.7.8 The TLRI considers that s 19 should be amended to provide an inquiry with appropriate flexibility as to how procedural fairness should be applied but also setting out legislative direction for the minimum requirements of procedural fairness. In this regard, the TLRI's view is that the *Commissions of Inquiry Act* s 19(2A) should be amended to remove the requirement for a specified period of notice to be given and should instead provide that if a commission proposes to make a finding that is adverse to any person, the rules of procedural fairness apply in respect of that person and that finding. The commission must ensure that the person is aware of the matters on which the proposed finding is based and has had an appropriate opportunity to respond on those matters. As contained in the Salmon Rules, depending on the circumstances, this may include giving evidence, making submissions, adducing evidence and/or cross-examination. Accordingly, this reform is not intended to reduce protections but to make it clear that the key requirements of procedural fairness apply and to allow for flexibility as to what procedural fairness will require in a practical sense.

4.7.9 In addition, the commission must consider a person's response before making an adverse finding. This is specifically set out in the *Inquiries Act 2014* (Vic) s 36(2), and the rules of procedural fairness would require that this be a real and genuine consideration. This requirement is given effect under the requirement to afford procedural fairness. Further, the TLRI does not consider it necessary to include a specific provision that a person's response must be fairly set out by the commission in its report (as required by *Inquiries Act 2014* (Vic) s 36).[293] As noted the by the ALRC, there may be circumstances where it would not be appropriate to publish a person's response, or part of it, and so a commission should have a broad discretion to summarise responses. The report to the South Australian Attorney-General also supports this approach.[294]

Recommendation 2

The *Commissions of Inquiry Act 1995* (Tas) s 19(2A) should be amended to remove the requirement for a specified period of notice.

Instead, s 19(2A) should provide (as set out currently in s 19(2B)) that if a commission proposes to make a finding that is adverse to any person:

- the rules of procedural fairness apply in respect of that person and that finding;
- the commission must ensure that the person is aware of the matters on which the proposed finding is based; and
- the commission must ensure that the person has had an appropriate opportunity to respond on those matters.

[293] See discussion at [4.4.2].
[294] *Review of the Royal Commissions Act 1917 (SA)* (n 236) 5.

Part 5

Protections for Individuals: Client Legal Privilege and Other Privileges

5.1 Introduction

5.1.1 Legal privileges and public interest immunity are fundamental aspects of the justice system that ensure the protection of individual rights and interests while also serving broader public interests, such as national security.[295] Privilege is a recognised exemption from disclosing certain information that would otherwise need to be disclosed. There are well-developed principles of privilege that apply to judicial proceedings. However, while a commission's powers to require information may be subject to claims of privilege, it has been recognised that, as investigatory bodies, the restrictions on evidence that apply to judicial proceedings should not necessarily be applied to a public inquiry. This recognition is on the basis that such exemptions from disclosure may impede the investigative function of an inquiry.[296]

5.1.2 A number of privileges that developed as a common law protection have since been recognised under the uniform Evidence Acts (such as the *Evidence Act 2001* (Tas) ('*Evidence Act*')), including the privilege against self-incrimination[297] (protecting individuals from giving incriminating evidence against themselves, noting the fundamental right to remain silent), and client legal privilege[298] (also known as legal professional privilege).[299] Client legal privilege may be claimed in a judicial or non-judicial compulsory process where answering a question or summons would disclose confidential communications arising from the lawyer–client relationship. These communications must have been made for the dominant purpose of preparing for actual or contemplated litigation, or to enable the client to obtain, or the lawyer to provide, legal advice.[300] The privilege belongs to the client, not the lawyer. Communications with a third party can also fall under client legal privilege if they are sought for the dominant purpose of legal advice or impending litigation.[301] A client can 'waive' privilege, and privilege can also be lost in circumstances where the client, their lawyer or a third party engages in communications or prepares documents to commit a fraud, an offence or other illegal act, or as part of a deliberate abuse of power.[302] The rationale for client legal privilege is that it:

[295] *Making Inquiries: A New Statutory Framework* (n 6) [17.2].
[296] Ibid; *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.2]. Whilst civil procedure rules for litigation prevent 'fishing expeditions', the nature of royal commissions and commissions of inquiry mean that they are empowered and often required to engage in a far broader forensic process than is available in ordinary litigation.
[297] See *Evidence Act 2001* (Tas) ss 128, 128A.
[298] See *Evidence Act 2001* (Tas) s 118.
[299] Note that the ALRC described the doctrine as 'client legal privilege', reflecting the terminology of the uniform Evidence Acts and expressing the privilege as based on the relationship of a client with their lawyer: *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114).
[300] Gino Dal Pont, *Law of Confidentiality* (LexisNexis Australia, 2nd ed, 2020) [18.14]. Privileged communications fall under two classes, 'litigation privilege' and 'advice privilege'.
[301] Dal Pont (n 300) [18.10].
[302] *Evidence Act 2001* (Tas) s 125.

> serves the public interest in the administration of justice by facilitating freedom of consultation between the client and the legal adviser. By enabling persons to conduct their affairs with the benefit of legal advice, legal professional privilege conforms to and underpins the rule of law.[303]

5.1.3 Client legal privilege also applies to legal advice sought or received by the Crown (this includes Government ministers, agencies and other statutory authorities comprising the Crown). The Crown can claim privilege and the custodian of the privilege is the Attorney-General.[304]Other privileges include parliamentary privilege, public interest immunity[305] and statutory privileges relating to confidential professional relationships.

5.1.4 To what extent these privileges (in particular, client legal privilege) should apply to public inquiries is not settled across Australia. The debate around client legal privilege in the context of commissions of inquiry underscores the ongoing challenge of reconciling individual rights with collective interests in the pursuit of the truth (a primary function of commissions of inquiry). As noted by the ALRC, 'client legal privilege clearly conflicts with other important public interests, including that all relevant materials should be available'.[306] The focus of Part 5 is on the privilege against self-incrimination and client legal privilege.

5.2 Current position in Tasmania relating to the privilege against self-incrimination and client legal privilege

Privilege against self-incrimination

5.2.1 In Tasmania, the privilege against self-incrimination is expressly abrogated by the *Commissions of Inquiry Act 1995* (Tas) ('*Commissions of Inquiry Act*'),[307] but the incriminating evidence given by a person before a commission is not admissible in subsequent legal proceedings, other than proceedings under the Act.[308] This is known as a 'direct use immunity'. The direct use immunity does not prevent the incriminating evidence provided to a commission of inquiry being used to obtain further evidence. The wider 'derivative use immunity' means that the incriminating evidence and any evidence obtained as a result of that evidence is inadmissible in subsequent proceedings.[309]

Client legal privilege (legal professional privilege)

5.2.2 Client legal privilege (legal professional privilege) is not expressly abrogated under the Tasmanian Act.[310] The *Commissions of Inquiry Act* s 27 provides that a person who has been served with a s 22(1) notice and who fails, without reasonable excuse, to attend before the commission or

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303 AGS, *Legal Professional Privilege and the Government* (Legal Briefing No 117, 2021) <https://www.ags.gov.au/legal-briefing-no-117>.
304 See Tasmanian Government, *Guidelines for the Disclosure of Communications protected by Client Legal Privilege* (nd) <https://www.crownlaw.tas.gov.au/__data/assets/pdf_file/0005/788792/Guidelines-for-the-Disclosure-of-Communications-protected-by-Client-Legal-Privilege.pdf>.
305 It is recognised that public interest immunity is a separate legal doctrine, distinct from traditional legal privileges.
306 *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.2].
307 *Commissions of Inquiry Act 1995* (Tas) s 26.
308 *Commissions of Inquiry Act 1995* (Tas) s 21.
309 *Making Inquiries: A New Statutory Framework* (n 6) [17.38].
310 If Parliament intends to abrogate client legal privilege, this must be made unmistakeably clear in the language of the Act: see *Baker v Campbell* (1983) 153 CLR 52*; The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

produce the document or thing specified in the notice is guilty of contempt.[311] The definition of 'reasonable excuse' is found in s 3 of the Act and means:

> (a) if the person is a witness, or providing information, to a Commission, an excuse that would excuse the act by a witness in proceedings of a similar nature in a court of law; or
>
> (b) if the person is the subject of a notice, or warrant in relation to a Commission, an excuse that would excuse the act by a person summoned before a court of law in proceedings of a similar nature in the court; or
>
> (c) in any case, an excuse that the Commission considers reasonable in the circumstances in relation to the act by the person.[312]

5.2.3 However, the *Commissions of Inquiry Act* s 23A(1) provides that if a person refuses to prepare or produce a document or statement on the grounds that the information contained within that document or statement is protected by privilege, the commission may require the production of the document or statement to assess whether privilege applies.[313]

5.2.4 In circumstances where the commission requires the production of a document or statement to make a determination of whether privilege applies, this does not waive client legal privilege for other purposes. Further, even if the commission makes a finding that the document is not privileged, client legal privilege still attaches to the document for other purposes. The *Commissions of Inquiry Act* s 23A(2) makes it clear that the production of the document or statement to the commission, or the use of the document or statement by the commission does not affect whether the document or statement is protected by privilege in any other circumstances.[314] There are also additional powers that a commission has to protect the confidentiality of such material, including holding closed hearings, restricting the publication of materials and holding private sessions, as well as allowing a witness to not be identified as a consequence of giving evidence.[315]

5.2.5 Accordingly, in Tasmania the current position under the *Commissions of Inquiry Act* is that client legal privilege applies, with a power afforded to a commission of inquiry to inspect a document or statement to determine privilege. However, the Act is silent about the circumstances where a commission may require the production of a document to assess whether privilege applies, how a determination is to be made, and by whom. Unlike the process that applies in a court, where a court would only exercise its discretion where there is a challenge to a claim for privilege and the applicant seeking disclosure has satisfied the court that there is a sufficient basis for the judge to make an inspection,[316] similar procedural matters are not set out in the *Commissions of Inquiry Act.* In addition, there is no legislative requirement that members of a commission have relevant legal backgrounds in order to make such a determination. A commission of inquiry can, however, issue practice guidelines in relation to the conduct of proceedings, including in relation to making claims of client legal

[311] *Commissions of Inquiry Act 1995* (Tas) s 22(1) provides that a commission may, by notice served on a person, require that person to appear before it to give evidence and/or produce any document or thing in that person's possession or control which the commission considers relevant to the inquiry.
[312] *Commissions of Inquiry Act 1995* (Tas) s 3 (definition of 'reasonable excuse').
[313] The *Commissions of Inquiry Act 1995* (Tas) s 23A(1) was introduced in the *Justice Miscellaneous (Commissions of Inquiry*) *Act 2021* (Tas). The basis of s 23A is unclear, with little commentary on this section provided in the explanatory memorandum or second reading speech. There is also limited case law in respect to the operation of s 23A.
[314] *Commissions of Inquiry Act 1995* (Tas) s 23A(2).
[315] See discussion in Part 6. See also *Commissions of Inquiry Act 1995* (Tas) s 23B.
[316] Ronald J Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths Australia, 3rd ed, 2016) 109–110.

privilege.[317] These guidelines provide advice as to the process to be followed if a claim of privilege is made in relation to a document that has been the subject of a summons or where a notice to produce has been issued. However, they do not set out details about how the commission will determine claims. If the commission determines that privilege does not apply, a party retains the right to appeal against that determination.[318] Even if the claim of privilege is upheld by the commission or a court on appeal, this does not remove concerns that an inquiry has seen the privileged document and so may be 'tainted by the knowledge of privileged, and potentially prejudicial, matters, notwithstanding that the Commission [is required] to disregard matters subject to privilege'.[319]

5.3 Other jurisdictions

Privilege against self-incrimination

5.3.1 In other comparable jurisdictions, the approach differs. In jurisdictions where the privilege against self-incrimination is abrogated, the general approach (as with Tasmania) is to abrogate the privilege against self-incrimination in relation to indirect use. This applies in Victoria, New South Wales and Queensland.

5.3.2 In contrast, the Australian Capital Territory (ACT) has wider protections and the 'derivative use immunity' applies.[320] As discussed at [5.2.1], this means that means that the incriminating evidence, and any evidence obtained as a result of that evidence, is inadmissible in subsequent proceedings.

5.3.3 The privilege against self-incrimination is not abrogated in the Northern Territory (NT), Western Australia and South Australia.[321]

Client legal privilege

5.3.4 Similarly, there is no uniform approach taken to claims of client legal privilege by commissions in Australia, with four approaches identified:

(1) Client legal privilege applies and there is no statutory power for a commission to inspect documents to determine whether the document is privileged (ACT, Queensland, the NT, Western Australia and South Australia).

(2) Client legal privilege applies and there is a statutory power for a commission to inspect documents to determine whether the document is privileged (Tasmania and the Commonwealth).

[317] See, eg: <https://disability.royalcommission.gov.au/system/files/2020-08/Practice%20guideline%202%20-%20Legal%20professional%20priviledge.pdf>; <https://www.childabuseroyalcommission.gov.au/sites/default/files/practice-guideline-4.pdf>; <https://www.commissionofinquiry.tas.gov.au/__data/assets/pdf_file/0003/613371/Practice-Direction-No.-3-Production-of-Documents-and-Document-Management-Protocol.pdf>.

[318] *AWB Ltd v Cole [No 1]* (2006) 152 FCR 382 [187] (Young J).

[319] Law Council of Australia, Submission 75 to ALRC *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (March 2015) [124]. See *Royal Commissions Act 1902* (Cth) s 6AA(4).

[320] See *Royal Commissions Act 1991* (ACT) s 24(3); *Inquiries Act 1991* (ACT) s 19(3).

[321] See *Royal Commissions Act 1902* (Cth) s 6A; *Royal Commissions Act 1991* (ACT) s 24; *Inquiries Act 1991* (ACT) s 19; *Commissions of Inquiry Act 1950* (Qld) s 14(1A); *Royal Commissions Act 1923* (NSW) s 17(1); *Inquiries Act 2014* (Vic) s 33 (in relation to royal commissions only).

(3) Client legal privilege does not apply in relation to some commissions (New South Wales, as set out in Letters Patent, and previously at the Commonwealth level by inquiry-specific legislation).

(4) Client legal privilege is abrogated for the purposes of a royal commission (with the privilege still available for some office-holders) (Victoria).

5.3.5 (1) **Client legal privilege applies and there is no statutory power for a commission to inspect documents to determine whether the document is privileged**. In the ACT, Queensland, the NT, Western Australia and South Australia, the legislative frameworks for royal commissions do not abrogate legal professional privilege. The legislative framework may be silent as to client legal privilege or it may be expressly preserved as in the ACT, where the *Legislation Act 2001* (ACT) s 171(1) states that '[a]n Act or statutory instrument must be interpreted to preserve the common law privilege in relation to client legal privilege (also known as legal professional privilege)'. If there is a dispute in relation to privilege, it is possible to commence court proceedings to determine a claim.[322]

5.3.6 Further, unlike a court, a commission of inquiry or royal commission does not have an inherent power to inspect documents to assess a claim for privilege.[323]

5.3.7 (2) **Client legal privilege applies and there is a statutory power for a commission to inspect documents to determine whether the document is privileged.** This is the position in Tasmania and the Commonwealth. The approach in Tasmania reflects the approach under the *Royal Commissions Act 1902* (Cth), where the commission can require production of a document or statement to determine if client legal privilege applies.[324] The *Royal Commissions Act 1902* (Cth) s 6AA(1)(a) provides that if a court has determined that a document (or part of a document) is subject to client legal privilege, then the privilege will apply. In other circumstances, the *Royal Commissions Act 1902* (Cth) s 6AA(1)(b) provides that the commission may require production of a document to determine whether to accept or reject a claim of legal professional privilege, if a claim has been made. Section 6D(3) of that Act provides that the commission may make a non-publication order in respect to any evidence given before it, any document produced under a notice issued by the commission, or a suppression order in respect to any person who has given evidence before the commission.

5.3.8 The *Royal Commissions Act 1902* (Cth) s 6AA was enacted against the background of the 2006 inquiry undertaken by Commissioner Cole QC into the Australian Wheat Board (AWB) and the Oil-for-Food Programme ('AWB Royal Commission'). There were extensive claims for privilege made by AWB during the AWB Royal Commission. The claims of client legal privilege in that Royal Commission resulted in delays to the inquiry for over a year,[325] including Federal Court consideration of the powers of a royal commission to require the production of documents and determine claims of privilege.[326] Following the decision of Young J in *AWB Ltd v Cole,*[327] Commissioner Cole expressed concerns to the Australian Government and sought urgent amendments to the *Royal Commissions Act 1902* (Cth), with the Government accepting that it was desirable to amend the Act to enable the inquiry to be completed.[328] This led to an amendment to the insertion of s 6AAA, allowing a commissioner to inspect a document in respect of which client legal privilege has been claimed, and to determine whether

[322] See *Arno v Forsyth* (1986) 65 ALR 125, 129; *AWB Ltd v Cole [No 1]* (2006) 390–2.
[323] See *Grant v Downs* (1976) 135 CLR 674 and *AWB Ltd v Cole [No 1]* (2006) 152 FCR 382.
[324] *Royal Commissions Act 1902* (Cth) s 6AA.
[325] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) 26.
[326] *AWB Ltd v Cole [No 1]* (2006) 152 FCR 382.
[327] Ibid. The AWB challenged Commissioner Cole's decision to reject a claim for client legal privilege over a particular document, as well as his capacity to determine claims of privilege at all. Justice Young held that the document in question was not subject to privilege and that the litigation limb of legal professional privilege does not extend to documents relating to a commission of inquiry.
[328] Explanatory Memorandum to the Royal Commissions Amendment Bill 2006 (Cth) 1. Note that the Second Reading Speech states that the amendment sought to reflect what the government understood was the practice prior to the decision by Young J, that a royal commissioner has no power to inspect a document in respect of which legal professional privilege has been claimed.

the claim is made out.[329] Despite this amendment to the Act, the AWB Royal Commission's final report recommended that consideration be given to further amending the *Royal Commissions Act 1902* (Cth) to permit the Governor-General, by Letters Patent, to abrogate client legal privilege in relation to an entire inquiry, or particular aspects of the subject of an inquiry.[330] This issue has been considered further in the subsequent ALRC reviews.[331]

5.3.9 (3) **Client legal privilege does not apply in relation to some commissions (New South Wales, as set out in Letters Patent).** In New South Wales, client legal privilege is expressly overridden if the Governor declares by Letters Patent that the *Royal Commissions Act 1923* (NSW) s 17 applies to the commission.[332] This provision appeared since the initial version of the Act. Under the *Royal Commissions Act 1923* (NSW), a commissioner's powers depend on their status and qualifications. Only commissioners who are a judge, a former judge, or qualified to be appointed as a judge, may exercise the 'special powers' under Division 2 (including s 17) of the Act.[333] It is also noted that the *Royal Commissions Act 1923* (NSW) s 17(1) states that 'a witness summoned to attend or appear before the commission shall not be excused from answering any question or producing any document or other thing on the ground ... of privilege or on any other ground'. In cases involving the privilege against self-incrimination, the view has been expressed that s 17(1) applies to client legal privilege as well as to the privilege against self-incrimination.[334] Based on information available at the time of writing, s 17 has been declared applicable to eight of the 56 Royal Commissions enacted since the 1923 Act, as follows:

(1) the Royal Commission into the New South Wales Police Service (investigating the nature and extent of corruption within the Police Service, and the adequacy of investigations relating to crimes involving paedophilia);[335]

(2) the Royal Commission into Productivity in The Building Industry in New South Wales (investigating intimidation and violence, secret commissions, extortions and other corrupt conduct in the NSW building industry);[336]

(3) the Royal Commission into certain committal proceedings against K. E. Humphreys (investigating whether the then Premier, the Chairman of the Bench of Magistrates or a Magistrate had acted improperly in relation to those proceedings);[337]

(4) the Royal Commission in respect of certain matters relating to allegations of organised crime in NSW clubs;[338]

(5) the Royal Commission into Deep Sleep Therapy (investigating a number of deaths associated with the therapy);[339]

[329] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.41]. See *Royal Commissions Act 1902* (Cth) ss 6AA(2)–(3).
[330] *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* (November 2006) vol 1, Recommendation 4.
[331] See [5.4.1]–[5.4.18].
[332] *Royal Commissions Act 1923* (NSW) s 17(4)
[333] *Royal Commissions Act 1923* (NSW) s 15.
[334] See *R v Hood* (1997) 91 A Crim R 526, 535 (Hunt CJ at CL) cited in *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.44].
[335] *Royal Commission into the New South Wales Police Service (The Paedophile Inquiry)* (Final Report, August 1997).
[336] *Royal Commission into Productivity in the Building Industry in New South Wales* (Final Report, January 1992) vol 7.
[337] *Royal Commission of Inquiry into Certain Committal Proceedings Against K E Humphreys* (Report, August 1983) 17.
[338] *Royal Commission into Allegations of Organized Crime in Clubs* (Report, August 1974) 859–1116.
[339] *Royal Commission into Deep Sleep Therapy* (Report, December 1990) vol 1 Introduction.

(6) the Royal Commission on Matters Affecting Callan Park Mental Hospital (investigating the circumstances of allegations that patients had been subjected to neglect or cruelty by staff);[340]

(7) the State Letters Patent establishing Royal Commission into the Activities of the Nugan Hand Group;[341] and

(8) the State Letters Patent establishing the Royal Commission into Institutional Responses to Child Sexual Abuse.[342]

5.3.10 (4) **Client legal privilege is abrogated for the purposes of a royal commission (with the privilege still available for some office holders)**. In Victoria, which has adopted the two-tiered approach to inquiries recommended by the ALRC, legal professional privilege is abrogated under the *Inquiries Act 2014* (Vic) for royal commissions only.[343] The *Inquiries Act 2014* (Vic) s 32 states that:

> (d) (1) It is not a reasonable excuse for a person to refuse or fail to comply with a requirement under this Act to give information (including answering a question) or produce a document or other thing to a Royal Commission that the information, document or other thing is the subject of legal professional privilege;
>
> (e) (2) Information or a document or other thing does not cease to be the subject of legal professional privilege only because it is given or produced to a Royal Commission in accordance with a requirement to do so under this Act.

5.3.11 This provision means that client legal privilege cannot be used to provide a reasonable excuse for refusing or failing to give information or produce a document to a royal commission. However, a party can seek an order to prohibit or restrict the publication of a document (or part of it) on the basis of legal professional privilege.[344]

5.3.12 In addition, pursuant to the *Inquiries Act 2014* (Vic) s 123(1), some organisations and office-holders are exempt from the commission's coercive powers under the Act, including a judicial officer and the Director of Public Prosecutions. However, this does not prevent a person or body from giving evidence or information or producing a document or other thing to a royal commission, voluntarily.[345]

5.3.13 This occurred in the Royal Commission into the Management of Police Informants, where it was noted that the limits on the Commission's power imposed by s 123 were overcome by the voluntary cooperation from certain office-holders (including the courts, the Office of Public Prosecutions, the Commonwealth Director of Public Prosecutions, Victorian oversight and integrity agencies and the Commonwealth intelligence and law enforcement agencies). This assistance was considered 'vital' to the Commission's ability to fulfil its terms of reference in conducting its inquiry, with the Commission endorsing the policy reasons behind the introduction of s 123.[346]

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[340] *Royal Commission on Matters Affecting Callan Park Mental Hospital* (Report, August 1961).
[341] *Royal Commission of Inquiry into the Activities of the Nugan Hand Group: Extension of the Royal Commission of Inquiry into Drug Trafficking 1981–1983* (Interim Report No 1, December 1983).
[342] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Interim Report, June 2014) vol 1.
[343] *Inquiries Act 2014* (Vic) s 32.
[344] See, eg, Royal Commission into Victoria's Mental Health System, *Practice Direction No. 2 – Production of Materials and Document Management Protocol* (June 2019) 8–9 <https://rcvmhs.archive.royalcommission.vic.gov.au/Practice_Direction_2_and_attached_Document_Management_Protocol.pdf>; *Inquiries Act 2014* (Vic) s 26.
[345] *Inquiries Act 2014* (Vic) s 123(3).
[346] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 122–123.

5.4 ALRC recommendations (2008 and 2009)

5.4.1 The ALRC has considered the application of client legal privilege and the privilege against self-incrimination in relation to royal commission on two occasions. The first was in 2007 (reporting in 2008), in the context of a reference examining the application of privilege for federal investigatory bodies (*A Review of Legal Professional Privilege and Federal Investigatory Bodies*),[347] and the second was in 2009, in a reference that examined the framework for royal commissions and inquires (*Making Inquiries: A New Statutory Framework*).[348]

Privilege against self-incrimination

5.4.2 In relation to the privilege against self-incrimination, the abrogation of the immunity for indirect use was supported by the ALRC, which considered that abrogation of this privilege was appropriate.[349] The ALRC considered that [t]he present abrogation of the privilege, coupled with a use immunity, strikes the right balance in relation to Royal Commissions'.[350] The ALRC noted that the purpose of a royal commission was discovering the truth, rather than determining legal rights, also that royal commissions were established in relation to matters of significant public interest, and that this interest generally outweighed an individual's right to the protection.[351] The ALRC's view was that to allow more than a use immunity would potentially frustrate these ends and negate the purpose of abrogation because of the limits placed on the use of the information.[352] The only exemption considered appropriate was where a person is facing a charge that has not been finally dealt with (an approach that is reflected across the legislative frameworks in the states and territories).[353]

Client legal privilege

5.4.3 ***A Review of Legal Professional Privilege and Federal Investigatory Bodies* (2007)**. In relation to client legal privilege, in its report released in 2008, the ALRC considered whether modifying or abrogating client legal privilege would be desirable to improve the investigative functions of Commonwealth bodies. The ALRC reported that the 'overwhelming thrust'[354] of submissions and consultations (from a wide range of stakeholders) was in favour of the continuation of the privilege, on the basis that the doctrine plays a key role in protecting the citizen against the state.[355] In the context of

[347] See *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114).
[348] *Making Inquiries: A New Statutory Framework* (n 6) ch 17.
[349] Ibid [17.53].
[350] Ibid.
[351] Ibid [17.53]–[17.54].
[352] Ibid [17.55]. See also *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [7.143]–[7.145].
[353] *Making Inquiries: A New Statutory Framework* Recommendation 17-1(b). See, for example, *Inquiries Act 2014* (Vic) s 33(2). This is the position in Tasmania, see *Commissions of Inquiry Act 1995* (Tas) s 22(2).
[354] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.65].
[355] For example, NSW Bar Association raised the question of why Commonwealth investigatory bodies should be the 'sole beneficiaries of the loosening of the immunity when they typically enjoy uniquely broad enforcement resources and machinery', *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.72], referring to the New South Wales Bar Association, Submission LPP 41 (5 June 2007). The Law Council of Australia submitted that client legal privilege is 'a fundamental protection and pillar of the Australian legal system' and 'must not be abrogated in any circumstance', *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.75]–[2.76], referring to Law Council of Australia, Submission LPP 94 (1 November 2007). The Commonwealth Director of Public Prosecutions (CDPP) noted that 'compliance with the law, the facilitation of the administration of justice and the right to a fair trial' were 'important public interests' and that the CDPP were supporting of laws that best achieve these public interests, meaning questions of modification or abrogation should be considered by asking 'to what extent client legal privilege serves these public interests', noting that client legal privilege can undermine the administration of justice by concealing evidence

royal commissions specifically, there was some support for abrogation of the privilege given that these are inquiries of significant public importance.[356] However, several stakeholders (such as the Law Society of New South Wales, the Australian Corporate Lawyers Association and the New South Wales Bar Association) argued against abrogation in any circumstances.[357]

5.4.4 A different approach was suggested by the Law Council, who did not support abrogation of privilege being made by Letters Patent. The Law Council expressed concern that, in the context of royal commissions, public pressures and the need for political expediency may see governments adopting a standard practice of abrogating privilege for all royal commissions. Instead, the Law Council considered that legislation should require Parliament to consider the success of any procedures to resolve privilege claims before looking at abrogation as an option.[358] This was the approach taken in investigations of the James Hardie Group in 2004 ('James Hardie Investigations'), with the Parliament passing legislation to abrogate the privilege for that particular investigation.[359]

5.4.5 In making its recommendations in relation to the application of client legal privilege to federal investigative bodies, the ALRC recommended that client legal privilege should apply to the coercive information-gathering powers of federal bodies, in the absence of any clear, express statutory intention to the contrary.[360] However, the ALRC was of the view that a strong case could be made for abrogating client legal privilege in the context of royal commissions observing that:

> the discovery of the truth has been described as a prime function of a Royal Commission. Royal Commissions are established only where a particular area of public concern has been identified for which the usual investigations and proceedings would not suffice, and their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations.[361]

5.4.6 The ALRC ultimately did not recommend a blanket abrogation of client legal privilege in all royal commissions, on the basis that it was not possible to predict the circumstances in which the public interest in discovering the truth should prevail over the private interest in maintaining client legal privilege.[362] It was accepted that, depending on the subject matter, not every commission would require the abrogation of the privilege, and 'consistent with the importance of the privilege, abrogation should be minimised and limited to circumstances where it is both necessary and beneficial to a successful

that would reveal the truth, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.90]–[2.92], citing Commonwealth Director of Public Prosecutions, Submission LPP 101 (2 November 2007).

[356] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.97].

[357] The Law Society of NSW submitted that the restrictions identified by the ALRC such as 'special circumstances' and 'major public importance' 'will prove to be illusory and paper thin': *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.109]. The Australian Corporate Lawyers Association (ACLA) expressed concern that the ALRC's approach to abrogation on an investigation-by-investigation basis was too 'open ended' and that the relationship between lawyer and client would be 'undermined if at some future time a 'major investigation' or a Royal Commission could override the confidentiality of those communications: *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.110], referring to the ACLA, Submission LPP 83 (31 October 2007). This view was shared by the NSW Bar Association.

[358] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.123].

[359] Law Council of Australia, Submission 75 (2007). See also *James Hardie (Investigations and Proceedings) Act 2004* (Cth), abrogating client legal privilege in relation to a James Hardie investigation or proceeding, or James Hardie 'material'. This allowed the Commonwealth Director of Public Prosecutions and the Australian Securities and Investments Commission to obtain and use records produced to the James Hardie Special Commission of Inquiry (NSW). In the context of the James Hardie investigations, it was argued that 'a thorough investigation of the conduct of James Hardie, with proceedings brought where misconduct is found, is essential to maintaining community confidence in the Australian corporate regulatory regime' (Commonwealth, *Parliamentary Debates,* House of Representatives, 2 December 2004, 1 (Peter Costello, Treasurer)).

[360] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) Recommendation 6-1.

[361] Ibid [6.155].

[362] Ibid [6.159]–[6.160]. This was the approach suggested by the NSW Bar association [6.160].

outcome for a particular Royal Commission'.[363] However, it was recommended that client legal privilege could be abrogated for certain royal commissions.

5.4.7 The final recommendation of the ALRC differed from the proposal outlined in its Discussion Paper, where the ALRC initially proposed that the abrogation of the privilege should only occur by passing an Act of Parliament (as was done in relation to the James Hardie investigations).[364] In its final report, the ALRC instead recommended that the *Royal Commissions Act 1902* (Cth) should be amended to enable the Governor-General (as part of issuing the Letters Patent that establish a royal commission) to determine, in exceptional circumstances, that client legal privilege should not apply. The ALRC was ultimately persuaded that it may not be possible for legislation to be passed in the timeframe required for a commission to commence its inquiry.[365] Further, given that a royal commission is established by executive government, it was more appropriate for the executive to have the discretion to determine if exceptional circumstances exist that would warrant an abrogation or modification of the privilege. In the view of the ALRC, this determination should be guided by three factors:

- The subject of the royal commission or inquiry, including whether it concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or a section of the community;
- Whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and *especially*
- The degree to which a lack of access to the privileged information will hamper or frustrate the operation of the royal commission or inquiry, and in particular, whether the legal advice itself is central to the issues being considered.[366]

5.4.8 In making this recommendation, the ALRC noted that it had 'received no evidence suggesting that the abrogation of the privilege in NSW or Victoria had led to any problems'.[367] In contrast, the Law Council of Australia indicated that even though such evidence was not received by the ALRC, 'there is simply no basis or foundation for reaching a view that the behaviour of those seeking legal advice has not been affected, or their willingness to either seek advice or disclose relevant information has not been diminished'.[368] The ALRC did not accept this argument, on the basis that royal commissions are both rare and serious. It was therefore considered unlikely that clients would not seek legal advice or be frank with their lawyers, on the basis that the subject matter of the advice may, in the future, be the subject of a royal commission.[369]

5.4.9 The ALRC also considered whether any safeguards should be put in place, in circumstances where client legal privilege might be abrogated. There was a range of opinions relating to the application of either a direct use immunity or a derivative use immunity to royal commissions, with the ALRC concluding that trying to find a 'one-size-fits-all' approach was 'fraught with difficulties'.[370] In the end, the ALRC recommended that there should be a presumption against the use of otherwise privileged evidence, subject to judicial discretion,[371] and that this would be an appropriate safeguard to apply to any royal commission where exceptional circumstances warrant abrogation or modification of the

[363] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.159].
[364] Ibid [6.161]–[6.162].
[365] Ibid [6.163]–[6.164].
[366] Ibid Recommendation 6-1.
[367] Ibid [6.156].
[368] Law Council of Australia, Submission LPP 94, (1 November 2007) quoted in *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.157]
[369] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.158].
[370] Ibid ch 7 [7.132].
[371] Having regard to the public interest in limiting the effects of the abrogation, whether the privileged information was obtained pursuant to the exercise of a covert investigatory power, and the probative value of the otherwise privileged evidence: *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [7.152].

privilege.[372] Further, if client legal privilege is abrogated, the ALRC recommended that the *Royal Commissions Act 1902* (Cth) should be amended to provide that a relevant factor to be considered by a royal commissioner in making an order that evidence be disclosed in private or be subject to a non-publication order is whether the evidence may or will disclose communications subject to client legal privilege.[373]

5.4.10 Aside from matters relating to the broader question of whether or not client legal privilege should apply to royal commissions, the ALRC separately considered the issue of procedure. A common theme in the submissions received by, and consultations with, the ALRC was that the real problem was not with the doctrine itself, but with the mechanisms by which claims of privilege are managed and resolved when dealing with federal investigatory bodies.[374] This discussion provides useful context for a consideration of different approaches to the procedural issues that arise in relation to determination of privilege. For example, some stakeholders expressed concerns about the onerous nature of electronic information requests or broadly worded notices issued by federal bodies.[375] Some submissions suggested that inquiries like the AWB Royal Commission do not reflect a 'pervasive practical misuse of the privilege sufficient to justify its substantial curtailment or abolition'.[376] It was recognised that if a claim of privilege could only be legally determined by a court, claims of client legal privilege may frustrate or delay investigations, even where the claims are made in good faith. However, efficiency was not seen to be an appropriate basis for abrogation of the privilege. There were, however, some submissions that recognised that there were a limited set of special circumstances in which there was an overriding public interest in the availability of otherwise privileged material.[377] In this regard, a number of submissions agreed that the development of efficient practices and procedures to resolve privilege claims was more likely to be of assistance than modification or abrogation of the privilege.

5.4.11 Stakeholders proposed different models for the most appropriate mechanism to resolve claims of privilege, including a process for referring a disputed claim to an independent third party, such as:

- a body of persons with legal expertise in client legal privilege, who could sit for set periods or on an ad hoc basis to deal with disputed privilege claims;[378]
- barristers, who could be made available on short notice to act as arbitrators of privilege claims;[379]
- an external expert, who could be appointed through a legislated process for resolving privilege disputes;[380] or
- an independent third party, who could be engaged to determine the claim, and if either party declines to be bound by the view of that third party, they would have seven days to commence proceedings seeking declaratory orders from the court in relation to whether the material is privileged.[381]

5.4.12 In the context of a royal commission and the procedure for determining claims of client legal privilege, the ALRC were ultimately of the view that the recently amended *Royal Commissions Act 1902* (Cth) set out the preferred process for determining a claim of privilege, by requiring production

[372] Ibid [7.154], Recommendations 7-2, 7-3.
[373] Ibid Recommendation 7-4.
[374] Ibid [2.114].
[375] Ibid [8.2].
[376] Ibid [2.116] referring to the New South Wales Bar Association, Submission LPP 41 (5 June 2007).
[377] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.77].
[378] Ibid [8.263] referring to R. Desiatnik, Submission LPP 2 (1 June 2006).
[379] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [8.263] referring to the New South Wales Bar Associations, Submission LPP 4 (5 June 2007).
[380] Ibid [8.264].
[381] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [8.266], referring to Law Council of Australia, Submission LPP 26 (4 June 2007).

of a disputed document to the commission in order for it to decide whether or not to accept a claim for privilege.[382]

5.4.13 For other investigatory bodies, the ALRC recommended that federal legislation should provide a mechanism for the making of privilege claims, including:

- that a person or organisation responding to a Notice to Produce be given a reasonable opportunity to claim privilege;
- if the federal body requests particulars of privileged communications not produced, that the grounds on which privilege is claimed, and the facts relied upon, be provided;
- where claims are made in respect of communications contained in documents, that the document (or bundle of documents) are described in sufficient detail to enable the document or bundle to be identified, including the date of the document (or bundle of documents), the nature of the document and type of communication, the names and positions of the authors, and the recipients of the communications;
- if the federal body requests, that the particulars and the basis of the claims be verified on oath or affirmation by the person making the claim and/or, where the person is legally represented, that their lawyer certifies that, having reviewed the documents, in their opinion, based on their client's instructions, there are reasonable grounds for the making of the claim;[383]
- legislation should clarify that providing a description of the documents or bundle of documents in compliance with the legislative requirements does not amount to waiver of privilege (receiving widespread support);[384] and
- where a federal body has requested particulars of documents, or the verification or certification of privilege claims, these are to be provided within the requested timeframe, which must be reasonable having regard to the circumstances of each particular request.[385]

5.4.14 The ALRC considered that:

> increasing the transparency of claims of privilege may have the salutary effect of decreasing the likelihood of blanket claims or other inappropriate claims—and therefore maximising the production of relevant non-privileged material to federal investigatory bodies pursuant to their coercive powers.[386]

5.4.15 In response to the ALRC's recommendations, the Law Council of Australia has stated that it supported the development of guidelines and best practice procedures to enable the efficient resolution of legal professional privilege claims raised in the context of investigations by Commonwealth bodies.[387]

5.4.16 ***Making Inquiries: A New Statutory Framework* (2009).** In its 2009 report, the ALRC again gave consideration to the operation of privilege for royal commissions and commissions of inquiry. The ALRC considered that consistency did not require the abrogation of client legal privilege solely on the basis that the privilege against self-incrimination was abrogated. This was because both privileges rest upon different foundations and are expressions of different public policy principles.[388] As noted, client

[382] Ibid [8.296].
[383] Ibid Recommendation 8-3.
[384] Ibid Recommendation 8-4.
[385] Ibid Recommendation 8-5.
[386] Ibid [8.140].
[387] Law Council of Australia, *Policy Agenda: Client Legal Privilege* (29 November 2016) <https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/client-legal-privilege>.
[388] *Making Inquiries: A New Statutory Framework* [6.58]–[6.64].

legal privilege is based on the fundamental importance of allowing clients to communicate freely with their lawyer, which is essential for the proper administration of justice. As stated by the ALRC:

> the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients—both individual and corporate, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.[389]

5.4.17 In relation to client legal privilege, the ALRC reiterated its comments from its earlier report that:

> The ALRC supports the doctrine of client legal privilege as a fundamental principle of common law that facilitates compliance with the law. The ALRC agrees … that, in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator.[390]

5.4.18 However, given that the 2008 Report on this topic was under consideration by government, the ALRC did not reconsider the issue.

5.5 South Australian review (2020)

5.5.1 In 2020, a review of the *Royal Commissions Act 1917* (SA) was released, which considered, among other matters, the application of client legal privilege and the privilege against self-incrimination to commissions. In considering the application of these privileges, the Hon Ann Vanstone QC noted that '[t]he inability to insist on answers in the face of a valid claim of … privilege … puts a South Australian Royal Commission at a disadvantage compared with the position in other jurisdictions'.[391] It was also noted that 'a Royal Commission would be slow to insist on production or answers in the face of such a claim, unless they are centrally relevant'.[392] Accordingly, it was considered that client legal privilege should be abrogated (while providing an exception where there are proceedings on foot), on the basis that the search for truth should prevail.[393] It was recommended that there be a provision that statements made or documents produced to a royal commission that are subject to client legal privilege are not admissible against that person in any other proceedings[394]and that a commission be given the power to seal evidence, information or materials where it may be particularly sensitive.[395] These recommendations were made on the basis that there should be a new 'Inquiries Act' providing for a tiered system of public inquiries (based on the models in Victoria and New Zealand) where legal professional privilege would be abrogated for royal commissions, but not for lower-tier public inquiries.[396]

[389] Ibid [17.9] quoting *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.118].
[390] *Making Inquiries: A New Statutory Framework* (n 6) [17.14] quoting *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [6.133].
[391] *Review of the Royal Commissions Act 1917 (SA)* (n 236) 10.
[392] Ibid 14.
[393] Ibid.
[394] Ibid Recommendation 7.
[395] Ibid Recommendation 12.
[396] Ibid Recommendation 17.

5.6 Child Abuse Commission of Inquiry (2023)

5.6.1 The *Justice Miscellaneous (Commissions of Inquiry) Act 2021* (Tas) amended the *Commissions of Inquiry Act* to empower a commission of inquiry to inspect documents to decide if a claim of privilege is valid. However, the amended provisions do not expressly override legal professional privilege. The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Child Abuse Commission of Inquiry') issued a Practice Direction with respect to the production of documents and the Commission's document management protocol.[397] Where a person or organisation considered that a Notice required the production of documents, evidence or other material that was subject to privilege (or any other reasonable excuse for not complying with a Notice), they were required to notify the Commission of the objection (by the date set out in the Notice) and provide a 'brief general description of the document(s), evidence or other material to which privilege is claimed and brief reasons in support of the claim'.[398] Further, the Practice Direction provided that in addition, all documents or materials must include a description of the nature of the document (date, type etc), the author(s) and where applicable, the addressee(s) of the document. Confirmation of whether privilege was claimed in respect of all or part of the document, whether the person or organisation claimed that the document(s) should not be produced at all, or should only be produced for the Commission to assess whether privilege applies, was required. (Note that a commission has the power under s 23A of the *Commissions of Inquiry Act* to require production of a document to assess whether privilege applies, even if the person or organisation do not produce the document for this purpose). Additionally, confirmation of whether the person or organisation consented to the production of the document(s) on 'appropriate terms' was required.[399] If privilege was claimed in respect of an entire document, the Commission still required the document to be identified in the person or organisation's electronic document index, with confirmation of the reason for the document being withheld. Where a claim was made in respect to parts of a document, those parts were to be redacted before including the document in the index.[400]

5.6.2 There was also a separate field requiring the person or organisation to confirm whether legal professional privilege had been claimed or not (for example, somebody may have claimed legal professional privilege but still produced the document for the Commission to make an assessment pursuant to s 23A).

5.6.3 In its Report, the Child Abuse Commission of Inquiry outlined the process, from its perspective, of resolving claims of privilege. It:

> worked with the Tasmanian Government to manage State claims of privilege and was grateful for the approach adopted by the Tasmanian Government of seeking to confidentiality share such material with us and, in some cases, waive privilege where it was possible to do so. Otherwise, we respected the State's claims for privilege. Nonetheless, it would be appropriate to consider whether the Commissions of Inquiry Act should be amended to create greater flexibility in the powers and privileges that apply to future inquiries, including abolishing legal professional privilege in relevant inquiries.[401]

5.6.4 The Commission also noted that in Tasmania, commissions of inquiry have been far less frequent than in other Australian jurisdictions, which may explain why the *Commissions of Inquiry Act* does not reflect the approach of having different tiers of inquiry with flexibility in the powers and privileges that might apply to those different tiers.[402] The Commission, as indicated at [3.12.3],

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[397] Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse, *Practice Direction No. 3: Production of Documents and Document Management Protocol* (1 June 2021).
[398] Ibid [14].
[399] Ibid [15].
[400] Ibid [50].
[401] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse,* (n 3) vol 8 ch 23, 324–325.
[402] Ibid vol 8 ch 23, 324.

encouraged the government to 'actively pursue … legislative reform' relating to 'establish[ing] greater flexibility in the powers and privileges applying to different inquiries, including abrogating legal profession privilege in relevant inquiries'.[403]

5.7 Other privileges

Parliamentary privilege

5.7.1 The most important parliamentary privilege is the privilege of freedom of speech in Parliament, providing legal immunity to Members of Parliament for anything they may say or do in the course of parliamentary proceedings or anything that is incidental to those proceedings.[404] This enables Parliament to perform its primary functions—legislating, debating and inquiring—more effectively.[405] Since the privilege is that of the Parliament, it cannot be waived by individual Members of Parliament. It may be waived by Parliament as a whole, with the ALRC referring to the issue that arose in the context of a Special Commission of Inquiry in NSW in 1997.[406] The New South Wales Parliament amended the *Special Commissions of Inquiry Act 1983* (NSW) to enable a Special Commission of Inquiry into the alleged misconduct by Members of Parliament. The amending Act expired six months after its commencement. The validity of the amending Act was challenged but was upheld by the NSW Court of Appeal and the High Court of Australia refused special leave to appeal.[407]

5.7.2 The ALRC's view was that modifying the application of parliamentary privilege in a royal commission should be a decision taken by Parliament in the context of the particular inquiry, as was done in New South Wales.[408]

Public interest immunity

5.7.3 Public interest immunity is a rule of substantive law that may be claimed in response to a request for information, preventing the disclosure of information relating to matters of the State, where the public interest in not disclosing the information outweighs the public interest in disclosure.[409] In this regard, the 'public interest' arises in the context of 'the conduct of governmental functions'[410] or national security information.[411] The ALRC identified that this immunity operates as a balancing test and can be claimed by the State, a non-governmental party or the court (on its own motion), therefore differing from a legal privilege.[412]

5.7.4 Claims for public interest immunity are most commonly made by the government. The ALRC has noted that past inquiries have had difficulties in obtaining access to national security information, but claims of public interest immunity in relation to other types of information in a royal commission

[403] Ibid vol 8 ch 23, 326.
[404] The source of the privilege is Article 9 of the Bill of Rights 1688, which is incorporated into Australian law by the *Australian Constitution* s 49 and the *Parliamentary Privileges Act 1987* (Cth): *Making Inquiries: A New Statutory Framework* (n 6) [17.100]. The privilege is preserved by legislation in each jurisdiction. In Tasmania this consists primarily of the *Parliamentary Privilege Act 1858* (Tas); elements of the *Defamation Act 2005* (Tas); and the *Criminal Code Act 1924* (Tas).
[405] See generally <https://www.parliament.tas.gov.au/resources/about-parliament/parl_priv>.
[406] *Making Inquiries: A New Statutory Framework* (n 6) [17.106].
[407] Ibid [17.107].
[408] Ibid [17.108]–[17.109].
[409] *Sankey v Whitlam* (1978) 142 CLR 1, 38 cited in *Making Inquiries: A New Statutory Framework* (n 6) [17.111].
[410] *R v Young* (1990) 46 NSWLR 681 [54] cited in *Making Inquiries: A New Statutory Framework* (n 6) [17.111].
[411] *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 [34] cited in *Making Inquiries: A New Statutory Framework* (n 6) [17.111].
[412] *Making Inquiries: A New Statutory Framework* (n 6) ch 17, [17.112].

appear quite rare.[413] The ALRC recommended that the immunity should be included as a reasonable excuse for refusing to comply with a royal commission notice to produce, or to answer questions.[414] This recommendation from the ALRC was provided before the Victorian Royal Commission into the Management of Police Informants. During that Royal Commission, Victoria Police and other law enforcement agencies made thousands of public interest immunity claims.[415] The Royal Commission experienced considerable challenges with managing and resolving these claims of public interest immunity, largely due to the specific provision in the *Inquiries Act 2014* (Vic) that allows a person or organisation to claim this privilege in respect to a notice to produce or attend.[416] The Act does not provide any guidance on the process for managing and resolving those claims.[417] The Royal Commission ultimately found that Victoria Police's approach to making public interest immunity claims had a detrimental impact on the inquiry. It recognised that some inquiries have considered whether legislative amendment should be made to allow a royal commission's Letters Patent to specify a process for resolving issues relating to privileges and immunities, for example providing that public interest immunity claims or client legal privilege claims do not apply to that particular inquiry.[418] In an attempt to manage the volume of public interest immunity claims, the Royal Commission, Victoria Police and the State of Victoria adopted a public interest immunity protocol as follows:

- Any public interest immunity claims were to be articulated with precision and supported by sufficient evidence.
- If Victoria Police were of the view that relevant documents or evidence were subject to a public interest immunity claim, and were likely to be referred to during the Royal Commission's hearings, the Royal Commission was provided with the relevant documents prior to the claim being made, except for materials that would identify a human source or a somebody in witness protection.
- If the Royal Commission was unable to resolve public interest immunity claims with Victoria Police, the documents and details of the claims were to be provided to the Department of Justice and Community Safety in an attempt to resolve the dispute.
- If the dispute was unable to be resolved, the Commissioner would determine the claim at a hearing as soon as possible.[419]

5.7.5 This was the first Victorian Royal Commission that 'heavily relied on the use of the investigative and coercive powers that the Act provides', with the final report concluding that:

> the *Inquiries Act* is intended to provide a royal commission with the flexibility to conduct its inquiry in the manner it considers appropriate, subject to the express requirements of the Act and its Letters Patent. In large measure, it does so.[420]

5.7.6 The only formal recommendation made by the Royal Commission related to the resolution of claims of public interest immunity. It was recommended that the *Inquiries Act 2014* (Vic) s 18 be

[413] Ibid [17.114].
[414] Ibid ch 17, [17.126], Recommendation 19-5.
[415] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 124.
[416] *Inquiries Act 2014* (Vic) s 18: it is reasonable to refuse to give information to a royal commission if the information is the subject of public interest immunity.
[417] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 126.
[418] Ibid 127, citing *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (November 2006); John Clarke, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008).
[419] Royal Commission into the Management of Police Informants, *Protocol: In relation to claims of public interest immunity over documents required to be produced to the Royal Commission into the Management of Police Informants* (5 June 2019) 2. Public interest immunity disputes arose regularly (sometimes many times a day) which led to the Commission trying to resolve these disputes during the hearings: *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 125.
[420] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 139.

amended to remove the ability for a person to refuse to comply with a notice to give information to a royal commission on the basis of public interest immunity. The Act should, however, specify that any such information (or document or other thing) does not cease to be the subject of public interest immunity only because it is given or produced to a royal commission in accordance with a requirement under the Act.[421] This reflects the approach taken in New South Wales and Western Australia, where the legislation appears to abrogate public interest immunity for the purposes of a commission conducting its inquiry.[422]

5.7.7 Similarly, in the 2020 report prepared for the South Australian Attorney-General, the Hon Ann Vanstone QC referred to the Royal Commission into the Management of Police Informants and the thousands of public interest immunity claims that had caused issues in the conduct of its inquiry.[423] Vanstone QC formed the view that public interest immunity should not be a reasonable excuse for declining to comply with a requirement of a royal commission:

> If the Commission's terms of reference require examination of matters usually kept from the public forum, it should be able to obtain the relevant information. That is not to say it will publicly release that information. Advice that such material would usually be protected will lead to great care in the way in which the Commission treats the material.[424]

5.7.8 Other jurisdictions (including Tasmania) do not expressly mention the application of the public interest immunity.

Statutory privileges

5.7.9 The *Evidence Act* contains a number of privileges beyond those available under common law, including confidential professional relationships privilege,[425] religious confessions privilege,[426] medical communications,[427] communications to counsellor,[428] the exclusion of evidence of matters of state[429] and the exclusion of evidence of settlement.[430] The ALRC recommended that these statutory privileges should not apply to royal commissions or public inquires of similar status.[431] The C*ommissions of Inquiry Act* s 23A applies to claims of 'privilege' in a broad sense.[432] However, a commission of inquiry is not bound by any rule of law which relates to evidence in judicial proceedings,[433] and where a claim of privilege is made, a commission may require the production of the relevant document or statement to assess whether privilege applies.[434] It is also noted that potential claims of statutory confidentiality and secrecy provisions were managed in the lead up to the Child Abuse Commission of Inquiry with the enactment of the *Commission of Inquiry Regulations 2021* (Tas), providing that certain provisions

[421] Ibid ch 16, Recommendation 91, 141.
[422] The *Royal Commissions Act 1968* (WA) s 8A(5)(a) provides that a Commission may require a public authority to produce information despite any rule of law that might justify an objection to its production on 'grounds of public interest'; the *Royal Commissions Act 1923* (NSW) s 17(1) gives royal commissions (when chaired by a judge or experienced legal practitioner) the power to prevent a person relying on the privilege against self-incrimination 'or on the ground of privilege or on any other ground'.
[423] *Review of the Royal Commissions Act 1917 (SA)* (n 236) 15.
[424] Ibid.
[425] *Evidence Act 2001* (Tas) div 1A.
[426] *Evidence Act 2001* (Tas) s 127.
[427] *Evidence Act 2001* (Tas) s 127A.
[428] *Evidence Act 2001* (Tas) s 127B.
[429] *Evidence Act 2001* (Tas) s 130.
[430] *Evidence Act 2001* (Tas) s 131.
[431] *Making Inquiries: A New Statutory Framework* (n 6) [17.134]. See also *Inquiries Act 2014* (Vic) s 34.
[432] 'Privilege' is not defined in the Act.
[433] *Commissions of Inquiry Act 1995* (Tas) s 20.
[434] *Commissions of Inquiry Act 1995* (Tas) s 23A(1).

in other Acts did not apply in respect of any information to be collected by, or on behalf or, or provided to that Commission.[435]

5.8 TLRI's views and recommendation

Privilege against self-incrimination

5.8.1 In relation to the privilege against self-incrimination, taking into account the existing Tasmanian approach, the approach elsewhere, and the discussion in reviews, the TLRI's view is that no reform is required to the *Commissions of Inquiry Act*. The position should remain that the privilege is abrogated for a commission of inquiry (that is, that a person is not excused from answering a question or producing a document or thing on the basis of self-incrimination) and that there should continue to be a 'direct use immunity' other than in relation to proceedings against a person under the Act. This means that evidence provided to a commission of inquiry cannot be used as evidence in subsequent legal proceedings but may be used to obtain further evidence. The current Tasmanian position is that evidence given by a person is admissible in proceedings against that person under the *Commissions of Inquiry Act)* (eg, contempt matters).[436]

Recommendation 3

The *Commissions of Inquiry Act 1995* (Tas) should <u>not</u> be amended in relation to the privilege against self-incrimination.

Client legal privilege

5.8.2 As discussed at [5.1.4], there is a significant tension between the need for confidentiality in the provision of legal advice (as protected by client legal privilege) and the imperative of uncovering the truth in matters of public concern (as is the purpose of a commission of inquiry). At general law, the rationale for client legal privilege and the need to protect it in the context of public inquiries, has been described by the ALRC as broadly categorised under 'instrumental rationales' (which focus on the outcome) and 'rights-based rationales' (which focus on privacy rights and rights of access to justice).[437]

5.8.3 Arguments under the heading of instrumental rationales include:

- encouraging full and frank disclosure and compliance, discouraging litigation and encouraging settlement, and promoting the efficient operation of the adversarial system; and[438]
- the protection of communications between a client and their lawyer is said to foster 'trust and candour'[439] in the relationship, which in turn is said to contribute to the 'general level of respect for and observance of the law within the community'.[440]

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[435] *Commissions of Inquiry Regulations 2021* (Tas) reg 4.
[436] *Commissions of Inquiry Act 1995* (Tas) s 21.
[437] *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.7].
[438] Ibid [2.9].
[439] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ), cited in ALRC 2008 Report [2.11].
[440] *Baker v Campbell* (1983) 153 CLR 52, 95. See also *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 127–128 cited in *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.13].

5.8.4 Arguments under the heading of rights-based rationales emphasise the privacy of the client against intrusion from state agencies.[441] The ALRC has considered that the privilege is better seen as part of the right of access to a fair hearing, as opposed to a right in and of itself.[442]

5.8.5 This is consistent with the views of Dal Pont, who draws a distinction between the duty of confidentiality ('which prevents lawyers from talking about their client's affairs outside of court') and legal professional privilege ('which prevents lawyers from disclosing certain types of confidential information during the course of proceedings').[443] In considering circumstances where privilege is not afforded to a person's communication, Dal Pont writes that 'merely because a communication is confidential is no ground, by itself, to privilege it from being disclosed upon compulsory (court) process.'[444] Further that:

- Whatever private (or public) interest is fostered by a confidentiality obligation, it must yield to society's broader interest in truth seeking.[445]
- The importance of truth seeking dictates, to this end, that only compelling reasons can justify the exclusion of probative and reliable evidence under the banner of privilege.[446]
- Also, privilege rests not on a contractual, equitable or professional duty owed to clients — though it is premised on at least the perception, from the perspective of a client, of a lawyer-client relationship — but on the wider ground of public policy.[447]
- Its public policy foundation also dictates that once the privilege arises, it is absolute and unqualified.[448]

5.8.6 In the context of commissions of inquiry and royal commissions, the TLRI has reviewed the different approaches to client legal privilege, from the approach where client legal privilege applies with no power for a commission to inspect documents to determine a claim of privilege (the majority of Australian jurisdictions) through to the Victorian approach, where privilege is abrogated under legislation for the purposes (only) of the royal commission. As noted, the different models have been discussed in ALRC reviews, in the South Australian review and in the reports of commissions of inquiry or royal commissions. As also noted, there is a need for a balance between the truth-seeking function of a commission, the extent to which claims of privilege might frustrate an inquiry, and the need to protect the confidentiality of communications between clients and legal advisers. The model that the TLRI sets out aims to provide a principled framework to provide for an approach balance, as well as to address procedural issues that may diminish the ability of a party to make a claim of privilege. In the context of the Child Abuse Commission of Inquiry, the TLRI understands the difficulties that arose in relation to client legal privilege related to the process adopted. For example, situations where the commission made requests for large volumes of documents to be provided within a relatively short timeframe, and how this created difficulties for a party seeking to utilise the formal process (as set out at [5.6.1]–[5.6.4]) created to assert claims of privilege. Accordingly, it appears that there are two issues in Tasmania to consider relating to client legal privilege: (1) the broader question of whether client legal privilege should apply to commissions of inquiry, and (2), if client legal privilege does apply to commissions of inquiry, what is an appropriate process for determining claims of privilege.

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441 *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.38]; see *Baker v Campbell* (1983) 153 CLR 52, 120 (Deane J).
442 *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (n 114) [2.119].
443 Dal Pont (n 300) [18.13].
444 Ibid [18.9].
445 Ibid.
446 Ibid [18.5].
447 Ibid [18.13] citing *R v Bell* (1980) 146 CLR 141 at 161 (Wilson J).
448 Dal Pont (n 300) [18.13] citing *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128 (Brennan J) and at 133–7 (Deane J).

5.8.7 In response to the first issue, the TLRI's view is that, as a general principle, client legal privilege should apply to commissions of inquiry. This accords with the current approach under the *Commissions of Inquiry Act*. However, the TLRI also considers there is merit in the approach taken by the Commonwealth Parliament in the James Hardie Investigations, where Parliament passed legislation to abrogate privilege for a particular inquiry (see [5.4.4]). This approach would not result in a blanket abrogation of the privilege for all commissions of inquiry as exists in Victoria. It has similarities with the NSW approach, where the executive can determine that privilege is waived and set this out in the Letters Patent establishing a particular inquiry. However, unlike NSW, it is the view of the TLRI that Parliament, and not the executive government, should make the determination that client legal privilege does not apply for a particular commission of inquiry, as this makes the determination part of a public process informed by parliamentary debate. It is envisaged that this would only be done in appropriate cases, where in the view of Parliament, the public interest in discovering the truth should prevail over the private interest of maintaining client legal privilege. This should only be in exceptional circumstances, in relation to material that is relevant and necessary for the conduct of the inquiry. In making this determination, Parliament should be guided by the approach of the ALRC, discussed at [5.4.7], that this would be in exceptional circumstances where:

- The subject of the inquiry is of major public importance, including whether it concerns a matter (or matters) of major public importance that have a significant impact on the community (either in general or a section of the community);
- The ability to obtain the information in a timely and complete way is not possible by using another means; and especially
- The degree to which lack of access to the privilege information will hamper or frustrate the operation of the commission and whether the legal advice itself is central to the issues being considered.

5.8.8 In addition, the TLRI considers that a commission of inquiry should have the power to inspect documents to determine claims of privilege as exists in the *Commissions of Inquiry Act* s 23A. However, the TLRI's view is that there needs to be a clear and workable statutory framework within which claims of privilege can be made and determined. This statutory framework needs to address the following matters:

- The opportunity, in a practical sense, for a party to assert privilege. This would mean that sufficient time must be given to a party to respond to a request from a commission of inquiry to produce documents and to determine whether privilege should be claimed for some documents and/or parts of some documents.
- The opportunity for a party to be heard in relation to the assertion of privilege.
- A clear mechanism by which claims of privilege are to be determined. At a minimum, this assessment must be made by person with appropriate legal qualifications and experience. For example, this may be the commissioner (in a smaller inquiry) where this person is a retired judge, or it may require outsourcing the determination of a claim of privilege to a person attached to the commission who has appropriate legal qualifications and experience. There are several models for such a mechanism outlined by the ALRC's review.[449]

5.8.9 Further, it is also important to clarify in legislation that if a person waives privilege for the purpose of assisting a commission of inquiry, this does not equate to privilege being waived for any other purpose. This accords with the current position in s 23A of the Act, that if a document for which privilege is claimed is produced to or used by a commission, this does not amount to a waiver of privilege for any other purpose.

[449] See [5.4.11]–[5.4.13].

5.8.10 In summary, the TLRI's recommended approach has four components:

(1) Retaining the current position, which is that client legal privilege applies to commissions of inquiry, as a general principle.

(2) A legislative statement that production to—or use by—a commission of documents for which privilege is claimed, does not amount to a waiver of privilege for any other purposes. (This already exists in s 23A).

(3) Parliament should consider passing inquiry-specific legislation to abrogate privilege if this is required, in exceptional circumstances, for a particular commission of inquiry.

(4) A statutory framework is needed to provide a process whereby a party has the opportunity to assert privilege, be heard in relation to the claim of privilege, and have the claim of privilege determined by a person with appropriate legal qualifications and experience.

5.8.11 It is the TLRI's view that this approach achieves an appropriate balance between the need to uphold the fundamental principle of client legal privilege and the need to ensure that claims of privilege do not frustrate the purposes of a commission of inquiry.

Recommendation 4

Client legal privilege should continue to apply to commissions of inquiry established under the *Commissions of Inquiry Act 1995* (Tas), unless Parliament has passed legislation that abrogates privilege for a particular commission of inquiry.

Recommendation 5

A statutory framework should be included in the *Commissions of Inquiry Act 1995* (Tas) to provide a clear process as to how claims of privilege can be made and determined. This statutory framework should provide for the following:

- An opportunity, in a practical sense, for a party to assert a claim of client legal privilege. This would mean that sufficient time must be given to a party to respond to a request from a commission of inquiry to produce documents and to determine whether privilege should be claimed for some documents and/or parts of some documents.

- An opportunity for a party to be heard in relation to the assertion of privilege.

- A clear mechanism by which claims of privilege are to be determined. At a minimum, this assessment must be made by person with appropriate legal qualifications and experience.

Recommendation 6

The *Commissions of Inquiry Act 1995* (Tas) should continue to provide that the production to or use by a commission of documents for which privilege is claimed, does not amount to a waiver of privilege for any other purposes.

Public interest immunity

5.8.12 In relation to public interest immunity, until the Royal Commission into the Management of Police Informants, such issues were considered rare. Unlike the *Inquiries Act 2014* (Vic), the *Commissions of Inquiry Act* does not include specific reference to public interest immunity as constituting a reasonable excuse not to comply with a request for information from a commission. Accordingly, the TLRI does not consider that any specific recommendation needs to be made in relation to public interest immunity. However, if the issue of public interest immunity is anticipated to arise in any future Tasmanian inquiries, appropriate protocols and procedures could be developed by the relevant commission to manage these issues. The Victorian model could be a useful guide in this regard.

Part 6

Protections for Individuals: Closed Hearings and Restrictions on Reporting

6.1 Introduction

6.1.1 Part 6 considers the issue of protections for individuals arising from the powers of a commission to hold closed hearings and make orders restricting reporting, and the issues raised by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Child Abuse Commission of Inquiry'). It considers the position in Tasmania and other comparable jurisdictions.

6.2 Current position in Tasmania

6.2.1 Under the *Commissions of Inquiry Act 1995* (Tas) ('*Commissions of Inquiry Act*'), the general position is that the hearings of a commission are open to the public.[450] This is consistent with the principle of open justice.[451] However, there are several ways in which the interests of individuals can be protected by providing a commission with the discretion to:

(1) hold closed hearings;

(2) restrict the publication of material; or

(3) hold private sessions.

6.2.2 The commission has a discretion to limit or prevent the public from attending (that is, hold closed hearings). The *Commissions of Inquiry Act* s 13(2) provides that a commission may refuse to admit the public or any person to a hearing if it is satisfied that the public interest in an open hearing is outweighed by other consideration, including public security, privacy of personal or financial affairs or the right of any person to a fair trial.

6.2.3 A commission also has a discretion under the *Commissions of Inquiry Act* s 14 to control the public reporting of a hearing. Section 14(1) provides that '[a] Commission may, by order, prohibit or restrict the public reporting of a hearing or the publishing of any evidence taken or received by it if it is satisfied that the public interest in the reporting of that hearing or the publishing of that evidence is outweighed by any other consideration, including public security, privacy of personal or financial affairs or the right of any person to a fair trial'.

6.2.4 In both of these circumstances, the commission must provide reasons for closing a hearing (s 13(3)) or making an order to prohibit or restrict publication (s 14(2)).

6.2.5 Further, as indicated at [6.2.1], the commission also has the discretion to hold private sessions. Under the *Commissions of Inquiry Act* s 19A, there are differences in the way in which information received from a person in a private session is dealt with by the commission compared to information

[450] *Commissions of Inquiry Act 1995* (Tas) s 13(1).
[451] See [7.1.1].

received in a public hearing. A person who appears at private session does not appear at a 'hearing of the Commission' and is not a witness and does not give evidence.[452] There are also limits on the use of the information provided in a private session, which are set out in the *Commissions of Inquiry Act* s 19A(5):

> Information that relates to an individual that has been provided at a private session of a Commission, or given to a member of a Commission solely for the purposes of a private session or proposed private session, may be included in a report or recommendation of the Commission only if the information –
>
> (a) is also given in evidence to the Commission other than at a private session; or
>
> (b) does not disclose the identity of, or lead to the identification of, the individual.

6.3 Other jurisdictions

6.3.1 Several other jurisdictions make provision for closed hearings, restrictions on reporting and/or private sessions.

6.3.2 For royal commissions initiated by the federal government under the *Royal Commissions Act 1902* (Cth), there is power to close hearings, restrict reporting and hold private sessions. Section s 6D(2) of that Act provides a discretion for the commission to hold closed hearings if a witness requests that the evidence be taken in private 'on the ground that the evidence relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person'. Section 6D(3) of the Act also contains a power for a direction to be given that evidence or information not be published, or only published in such a manner as the commission specifies. Further, s 6D(5) of the Act provides that 'this section shall be read as in aid of and not as in derogation of the Commission's general powers to order that any evidence may be taken in private'. There are no provisions that provide for the manner in which notices relating to closed hearings or publication restrictions are to be provided.

6.3.3 The *Royal Commissions Act 1902* (Cth) also provides for private sessions to be held for certain royal commissions in Part 4. As with the Tasmanian approach, a private session isn't a hearing, and the person is not a witness and does not give evidence.[453] There are also restrictions on the use of the information provided at a private session.[454]

6.3.4 In Victoria, there is a discretion to hold closed hearings and restrict publication. There is no explicit power to hold private sessions. The *Inquiries Act 2014* (Vic) sets out the circumstances in which a royal commission may make an order excluding access to proceedings[455] or restricting the publication of information.[456] The relevant circumstances include: if prejudice or hardship might be caused to any person, including harm to their safety or reputation; or the nature and subject matter is sensitive; or there is a possibility of any prejudice to legal proceedings; or the conduct of the proceeding would be more efficient and effective; or the commissioner otherwise considers the exclusion or restriction appropriate.[457] The Act also provides that if a royal commission makes such an order, the commission must cause a copy of the order to be posted on a door of the place where the proceeding is being

[452] *Commissions of Inquiry Act 1995* (Tas) ss19(A)(2)–(3).
[453] *Royal Commissions Act 1902* (Cth) s 6OC.
[454] See *Royal Commissions Act 1902* (Cth) ss 6OC, 6OJ, 6ON, 6OP.
[455] *Inquiries Act 2014* (Vic) s 24.
[456] *Inquiries Act 2014* (Vic) s 26.
[457] *Inquiries Act 2014* (Vic) ss 24(1), 26(2).

conducted, or in another conspicuous place where notices are usually posted at the place where the hearing is being conducted.[458]

6.3.5 In New South Wales, a commissioner may give directions preventing or restricting the publication of evidence or information given to the commission, or of matters in documents produced to or before the commission, and may direct that any part of an inquiry is to take place in private.[459] There are no provisions that provide for the manner in which notices relating to closed hearings or publication restrictions are to be provided.

6.3.6 In South Australia, a commission may take evidence in public or private.[460] A commission may also, by order, direct that any persons be excluded from the proceedings or a specified part of the proceedings. A commission may also forbid publication of any identifying information or of specified evidence, or of any account or report of specified evidence.[461] There are no provisions that provide for the manner in which notices relating to closed hearings or publication restrictions are to be provided.

6.3.7 In Queensland, a commission may order that any evidence given before it, or the contents of any book, document, writing or record produced at the inquiry, shall not be published.[462] The commission must not refuse to allow the public, or any portion of the public, to be present at any of the sittings of the commission unless, in the opinion of the commission, it is in the public interest expedient to do so, for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.[463] There are no provisions that provide for the manner in which notices relating to closed hearings or publication restrictions are to be provided.

6.3.8 In the Australian Capital Territory, if satisfied that it is desirable to do so because of the confidential nature of any evidence or matter, or for any other reason, a royal commission may direct that a hearing, or part of a hearing, take place in private. The commission may also give directions prohibiting or restricting the publication or disclosure of evidence given at a hearing (whether held in private or public) or matters contained in documents lodged with, or received in evidence by the commission.[464] There are no provisions that provide for the manner in which notices relating to closed hearings or publication restrictions are to be provided.

6.3.9 In the Northern Territory, a Board or commissioner may direct that the whole or any part of the proceedings on an inquiry be heard in private if the Board or commissioner considers that it is desirable in the public interest to do so.[465] There are no provisions relating to closed hearings or publication restrictions.

6.3.10 In Western Australia, a commission has a general power to order that any evidence may be taken in private.[466] Any person who publishes any recording of the proceedings, without leave of the commission, is in contempt. Further, any publication of a written record or transcript of proceedings, or of evidence given before the commission, or of any documents, books or writings produced to or obtained by the commission, which the commission has directed not be published is also a contempt of

[458] *Inquiries Act 2014* (Vic) ss 24(2), 26(3).
[459] *Royal Commissions Act 1923* (NSW) s 12B. Note also *Special Commissions of Inquiry Act 1983* (NSW) s 7, which gives a commissioner the power direct that a hearing (or any part of the hearing) take place in private, if satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter, or for any other reason. A Commissioner may also give directions preventing or restricting the publication of evidence given before the Commissioner, or of matters contained in documents lodged with the Commissioner: s 8.
[460] *Royal Commissions Act 1917* (SA) s 6.
[461] *Royal Commissions Act 1917* (SA) s 16A.
[462] *Commissions of Inquiry Act 1950* (Qld) s 16.
[463] *Commissions of Inquiry Act 1950* (Qld) s 16A.
[464] *Royal Commissions Act 1991* (ACT) s 28(3). In considering whether to give a direction under sub-s (3), a commission must take, as the basis of its consideration, the principle that it is desirable that hearings be public: s 28(4). See also *Inquiries Act 1991* (ACT) ss 21(3)–(4) relating to boards of inquiry.
[465] *Inquiries Act 1945* (NT) s 16.
[466] *Royal Commissions Act 1968* (WA) ss 19(5), 19A.

the commission.[467] There are no provisions that provide for the manner in which notices or orders relating to closed hearings or publication restrictions are to be provided.

6.4 Child Abuse Commission of Inquiry (2023)

6.4.1 The Child Abuse Commission of Inquiry commented on procedural aspects of its powers to control its own proceedings, determine whether its hearings are open to the public, and determine whether to prohibit or restrict the public reporting of a hearing, or the publication of any evidence received. In particular, the Commission's experience was that, in practice, the requirement that a commission of inquiry announce its intention to close a hearing or make an order restricting publication at a hearing that is open to the public, could be 'disruptive and inefficient'.[468] Instead, it suggested that there may be other ways to provide the intended notice to the public. These included, for example, requiring notices to be published 'at any relevant commission of inquiry office or hearing venue, or on the commission of inquiry's website, a reasonable period before they take effect'.[469]

6.5 Relevant Victorian Royal Commission reviews

6.5.1 Since the commencement of the *Inquiries Act 2014* (Vic), there have been five Royal Commissions,[470] covering a range of subject matters, which have encountered difficulties as a result of procedural requirements relating to notice under the Act. As discussed at [6.3.4], the notice provisions for closed hearings or publication restrictions in Victoria require notices to be placed on the door of the proceedings or in another conspicuous place.

6.5.2 In the Royal Commission into the Management of Police Informants several challenges that arose in the conduct of that inquiry under the Victorian framework were identified. While many of these challenges related to the operation of specific provisions unique to the Victorian Act, one of the challenges identified was particularly relevant in the Tasmanian context. This related to how to manage compliance with the requirement to place orders excluding any person from a proceeding of a commission in a conspicuous place. Given the sensitive nature of the inquiry, the Commission made in excess of 370 exclusion and non-publication orders,[471] and so, the door of the hearing room was soon covered with orders. As the number of orders grew, Commission staff implemented various practical solutions in order to comply with the Act (including compiling a folder of orders to place near the hearing room, and emailing orders to members of the media so they could create their own databases).[472] In addition, when the Commission conducted its policy hearings in May 2020, the COVID-19 pandemic and related restrictions required these hearings to be conducted remotely, meaning there was no physical hearing room door. The Commission published these orders on the Commission's website, which it considered to be another 'conspicuous place.'[473] The Commission noted that:

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[467] *Royal Commissions Act 1968* (WA) s 19B(5).
[468] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23, 326.
[469] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23, 326.
[470] Royal Commission into Family Violence chaired by Marcia Neave AO (2015–2016); Mental Health Royal Commission chaired by Penny Armytage AM (2018-2021); Royal Commission into the Management of Police Informants – An inquiry into Victoria Police's use of Nicola Gobbo as a human source, chaired by the Hon Margaret McMurdo AC (2018–2020); Royal Commission into the Casino Operator and Licence – An inquiry into the suitability of Crown Melbourne Limited to hold a casino licence, chaired by Raymond Finkelstein KC; and the Yoorrook Justice Commission (2021–2025 expected).
[471] *Royal Commission into the Management of Police Informants* (Final Report, November 2020) ch 16, 145.
[472] Ibid ch 16, 135.
[473] Ibid.

> the requirement in the *Inquiries Act* is clearly designed to draw public and media attention to the existence of these orders. The Commission considers that this requirement could be modernised by instead providing for orders to be made available on the Commission's website. A notice could still be posted on the hearing room door where practical, alerting people to the existence of the orders and referring them to the inquiry's website or a contact person to obtain access to the orders.[474]

6.5.3 The Commission noted that it received 'multiple media clarification requests' to confirm whether non-publication orders had been made, concluding that publishing all non-publication orders on the Commission's website would provide clarity and certainty for the media about what information cannot be published and would have reduced the administrative burden on the Commission by being able to direct the media to the non-publication orders online.[475]

6.6 TLRI's views and recommendations

6.6.1 Given the wide variety of procedures that a commission of inquiry in Tasmania may adopt (depending on the subject matter of the inquiry and its terms of reference) and practical factors relating to the number of notices that need to be given (and the now-standard practice of establishing a website dedicated to an inquiry), the TLRI's view is that amendment is required to notice provisions relating to closing hearings and restricting or prohibiting the publication of material. The TLRI's view is that the *Commissions of Inquiry Act* s 13(3) be amended to change the requirement that notice of the intention to take or receive evidence at hearing which is not open to the public be given at a previous public hearing. That section should instead allow a commission to announce its intention to take or receive evidence at a closed hearing at a previous hearing which was open to the public, and/or on the commission of inquiry's website.

6.6.2 Further, the *Commissions of Inquiry Act* s 14(2) should also be amended to enable a commission to publish an order prohibiting or restricting the public reporting of a hearing, or the publishing of any evidence taken or received by it, on the commission of inquiry's website and/or at a hearing which is open to the public.

Recommendation 7

The *Commissions of Inquiry Act 1995* (Tas) s 13(3) should be amended to allow a commission to announce its intention to take or receive evidence at a closed hearing at a previous hearing which was open to the public, and/or on the commission of inquiry's website.

Recommendation 8

The *Commissions of Inquiry Act 1995* (Tas) s 14(2) should be amended to enable a commission to publish an order prohibiting or restricting the public reporting of a hearing, or the publishing of any evidence taken or received by it, on the commission of inquiry's website and/or at a hearing which is open to the public.

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[474] Ibid ch 16, 145.
[475] Ibid.

Part 7

Protections for Individuals: *Evidence Act 2001* (Tas) s 194K

7.1 Introduction

7.1.1 Legislative provisions that prohibit the publication of information that identifies (or is likely to lead to the identification of) sexual assault complainants and victim-survivors represent an exception to the principle of open justice. The principle of open justice ensures that justice is administered in open court unless the subject matter requires that the court be closed, or there is a risk that parties may be discouraged from seeking justice in the absence of restrictions on the publication of identifying details relating to the proceedings.[476] Open justice is a fundamental feature of the Australian justice system and the conduct of proceedings in public is an essential characteristic of the Australian court system. However, in some circumstances, competing policy considerations have led to the modification, restriction and in some cases, the abrogation of the open justice principle. An exception to the principle of open justice exists for complainants and victim-survivors of sexual offences. Under the *Evidence Act 2001* (Tas) ('*Evidence Act*') s 194K, and comparable provisions in other jurisdictions, the publication of information that is likely to identify the complainants in prescribed sexual offence proceedings is prohibited.[477] These provisions arose out of a concern to provide protection to sexual assault complainants by ensuring anonymity and to encourage the reporting of sexual offences.[478] In this way, the provisions are designed to further the privacy interests of complainants by seeking to avoid further harm and distress. However, in the context of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Child Abuse Commission of Inquiry'), difficulties arose in relation to the interaction of the *Evidence Act* s 194K and the desire of victim-survivors to contribute their experiences to the inquiry. This Part sets out the current law in Tasmania in relation to s 194K, the approaches elsewhere to the prohibition on the publication of the identification of sexual assault complainants, the issues encountered in the Child Abuse Commission of Inquiry, and makes recommendations for reform.

[476] See TLRI, *Protecting the Anonymity of Victims of Sexual Crimes* (Final Report No 19, November 2013) [2.1.1] ('*Protecting the Anonymity of Victims of Sexual Crimes*'); South Australia Law Reform Institute, *Stemming the Unstoppable Tide? An Evaluation of the Role and Operation of 'Suppression Orders' in South Australia* (Report 19, 2024) pt 4 ('*Stemming the Unstoppable Tide?*').

[477] In particular, *Criminal Code Act 1924* (Tas) ('*Criminal Code*') s 33 (Incest) (*Evidence Act 2001* (Tas) ('*Evidence Act*') s 194K(1(a)); *Criminal Code* ss 124 (Penetrative sexual abuse of a child or young person), 124A (Penetrative sexual abuse of a child or young person by person in position of authority), 125 (Person permitting penetrative sexual abuse of child or young person on premises), 125A (Persistent sexual abuse of child or young person), 125B (Indecent act with child or young person), 126 (Penetrative sexual abuse of person with mental impairment), 127 (Indecent assault), 129 (Procuring a person for penetrative sexual abuse by threats or fraud), 185 (Rape) or 186 (Abduction) (*Evidence Act* s 194K(1)(b)); *Criminal Code* s 170A (Persistent family violence) where the accused person is alleged to have committed a sexual offence in relation to their spouse or partner (*Evidence Act* s 194K(1)(ba)); and *Police Offences Act 1935* (Tas) s 35(3) (Assault with indecent intent) (*Evidence Act* s 194K(1)(c)).

[478] New South Wales Law Reform Commission (NSWLRC), *Open Justice: Court and tribunal information: access, disclosure and publication* (Report 149, May 2022) Executive Summary [0.98]. Also see discussion in *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) pt 1.

7.2 Current position in Tasmania

Protection for sexual assault complainants

7.2.1 The *Evidence Act* s 194K provides that where certain sexual offences under the *Criminal Code Act 1924* (Tas) (referred to as the *Criminal Code*) are alleged to have been committed, a person must not publish identifying information, or cause identifying information to be published in respect of the alleged victim or any witnesses (or intended witnesses) in any court proceedings.[479] The section applies whether or not criminal proceedings in respect of the relevant crime or offence are, or have been, finally determined or otherwise disposed of.[480] It is an offence to publish this information.[481] However, a defence of consent exists in some circumstances. Under the *Evidence Act* s 194K(3), it is a defence in proceedings for an offence against s 194K(1) if:

- the defendant establishes that a victim-survivor has consented to the publication of identifying information in respect to them;
- the publication does not identify, or is not likely to lead to the identification of, any other victim-survivor (unless they have also provided their consent), or witness or intended witness; and
- the information was published only after the criminal proceedings have been finally determined or otherwise disposed of.

7.2.2 In Tasmania, there are specific requirements in relation to the nature of consent that must be provided to give rise to the defence. These safeguards are considered important to provide adequate protection to victim-survivors, in the absence of a court authorising the publication.[482] The requirements are that:

- the victim-survivor must be at least 18 years old at the time of providing their consent and at the time the identifying information was published;
- the consent must be freely given and in writing;
- the victim-survivor must understand that they may be identified as a result of the publication; and
- the victim-survivor must not have been coerced into consenting.[483]

7.2.3 This defence was introduced in 2020 to provide victim-survivors with a choice about whether to talk about their experience, and to have some control over the information that was published. Appropriate safeguards are contained in the legislation to enable a victim-survivor to share their story if they chose to, without having to obtain a court order.[484]

7.2.4 Under the *Evidence Act* s 194K(5), the court also has power to make an order to permit publication of identifying material. A court may make such an order in respect to any complainant, any witness or any intended witness. The court must be satisfied that all relevant persons have been consulted in respect of the order and understand the consequences of the order being made; where a

[479] Note that if incest is alleged to have been committed under s 133 of the *Criminal Code*, a person is also prohibited from publishing any identifying information in respect of the defendant: *Evidence Act 2001* (Tas) s 194K(1)(a)(ii).
[480] *Evidence Act 2001* (Tas) s 194K(2).
[481] *Evidence Act 2001* (Tas) s 194K(8): a person who contravenes the section commits a contempt of court.
[482] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) pt 4 [4.3.19].
[483] *Evidence Act 2001* (Tas) s 194K(4).
[484] It is noted that the purpose of the Evidence Amendment Bill 2020 was to modernise s 194K to 'enable victims of sexual offences to be able to share their story' (Tasmania, *Parliamentary Debates*, House of Assembly 24 March 2020, 7 (Elise Archer)).

person is deceased, the next of kin or legal representative of the deceased has been consulted and given a reasonable opportunity to inform the court of the deceased person's wishes (if known); and it is in the public interest to do make the order.[485] There is no age limit prescribed for a complainant in s 194K(5) for a court order . There is very limited case authority that has considered the interpretation or application of s 194K.

Age of consent for allowing publication

7.2.5 As identified above, under the *Evidence Act* s 194K, a person who is under the age of 18 cannot provide consent to the publication of identifying information. However, a person under the age of 18 can apply to the court for an order in respect of publishing identifying information under s 194K(5) (see [7.2.4]). In addition, an adult can consent to the publication of information about a sexual offence that occurred when they were a child, if after reaching adulthood they wish to self-identify.

Suppression orders and other restrictions on publication

7.2.6 As set out in Table 7.1, there are other powers that exist in Tasmania that limit the publication of certain evidence or details, either at the discretion of the court or by virtue of the legislative restriction. The Supreme Court also has the power to use its inherent jurisdiction to make a suppression order,[486] and the Magistrates Court has an implied power to make a suppression order.[487] These powers do not have a legislative basis. The scope of the common law powers to make suppression orders and the need for a broader statutory basis for such orders has been the subject of case law and academic commentary.[488] A review of these powers, and suppression orders more broadly, is beyond the scope of this Research Paper, which focuses on the scope of the *Evidence Act* s 194K, and the extent to which it achieves its objective of allowing victim-survivors to consent to the publication of identifying material.[489]

Table 7.1: Other Tasmanian provisions relating to restrictions on reporting

Legislation	Details
Bail Act 1994 (Tas) s 4D	The court may prohibit reporting of all or part of bail proceedings in relation to terrorism-linked persons.
Evidence Act 2001 (Tas) s 194J	If a court is of the opinion that the printing or publication of any evidence or argument, or particulars of any evidence or argument, in a

485 *Evidence Act 2001* (Tas) s 194K(5).

486 See Pearce J in *Tasmania v G and T* [2014] TASSC 71 [6]–[7] citing Underwood J (as he then was) in *R v Ian Roder Matterson Ex Parte Christine Debra Moles [No 2]* [1993] TASSC 75 and French CJ in *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 [26].

487 Lower courts lack the 'inherent jurisdiction' of higher courts, but have analogous implied powers: see Brown M in *XY (a pseudonym) v Sergeant Hamish Woodgate* [2024] TASMC 08 [5] citing: Dawson J in *Grassby v The Queen* (1989) HCA 45; 168 CLR 1 [21], [26]; Underwood J (as he then was) in *Visser v Hodgetts* [2002] TASSC 44 [11]–[21]; and Pearce J in *Tasmania v G and T* [2014] TASSC 71 [6] citing French CJ in *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 [261]. See Supreme Court website and Magistrates Court website for details of suppression orders made: <https://www.supremecourt.tas.gov.au/the-court/media/suppression-orders/>; <https://www.magistratescourt.tas.gov.au/going_to_court/journalists/suppression-order>

488 See, for example, *Hogin v Hinch* [2011] HCA 4; (2011) 243 CLR 506; A Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice (2006) 27 *Adelaide Law Review* 279; *Stemming the Unstoppable Tide?* (n 476); the Standing Committee of Attorneys-General also have set out a model law ('Court Suppression and Non-publication Orders Bill 2010').

489 It is noted that, in the TLRI's 2013 Report, the TLRI suggested that 'a separate statute be enacted to govern the publication of information relating to crimes in sexual offences case without making a final recommendation in this regard': *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [4.2.20].

Legislation	**Details**
	case before it may prejudice, or is likely to prejudice, the fair trial of the case, the court may forbid the printing or publication of the evidence, argument or particulars.
Evidence Act 2001 (Tas) s 194L	The court may forbid the publication of any evidence or argument, or any particulars of any evidence or argument, in any civil case before it that involves an allegation of any kind of sexual assault if it is of the opinion that the printing or publication of the evidence, argument or particulars may cause a witness to be degraded, distressed or humiliated.
Evidence Act 2001 (Tas) s 194M	In relation to certain crimes and offences, evidence of sexual reputation is not to be given, and evidence of sexual experience can only be adduced or elicited with leave of the magistrate or judge.
Evidence Act 2001 (Tas) s 195	Prohibited questions are not to be published without the permission of the court.
Youth Justice Act 1997 (Tas) ss 31, 108	There are restrictions on reporting information that identifies, or may lead to the identification of, a youth who is the subject of, or a witness to, proceedings except where permission of the court has been granted (and also limited information sharing provisions).
Family Violence Act 2004 (Tas) s 32	Restriction on publication of any material relating to proceedings under the Act where it is desirable in the interests of the administration of justice.
Coroners Act 1995 (Tas) s 57	Power of coroner to request report of an inquest or a report of any part of the proceedings if likely to prejudice the fair trial of a person, or contrary to the administration or justice, national security or personal security, or would involve the disclosure of sensitive personal matters, including in specific cases the name of the deceased.
Criminal Code (Tas) s 397AF	Restriction on publication or identification of acquitted person who is being retried or tried for an administration of justice crime or subject to a police investigation for such matters, without order of court.
Juries Act 2003 (Tas) s 57	Restriction on publication of information that identifies or is capable of identifying a person attending for jury service.
Justices Act 1959 (Tas) s 106K	Discretion to prohibit the publication of the name of a party or witness in an application for a restraint order.
Police Powers (Public Safety) Act 2005 (Tas) s 30	Power for Supreme Court to suppress publication of the whole or any part of the proceedings or evidence as it considers necessary in relation to applications or orders authorising exercise of powers under the Act (related to terrorism).
Public Health Act 1997 (Tas) s 62	Power for court to make an order restricting publication if in the best interests of a party or a witness in any proceedings relating to a notifiable disease.
Terrorism (Preventative Detention) Act 2005 (Tas) s 50	Power for Supreme Court to suppress publication of whole or any part of the proceedings or evidence as it considers necessary in connection with applications for the making, varying or revocation of preventative detention orders or prohibited contact orders.

7.3 Other jurisdictions

Protection for sexual offence complainants

7.3.1 Similar legislation provides for the suppression of the identity of sexual offence complainants, or the non-publication of any information that may lead to the identification of sexual offence complainants in all Australian states and territories,[490] as set out in Table 7.2 However, Tasmania is the only jurisdiction to provide an express statutory prohibition on publishing identifying information in respect of any witness, or intended witness, in prescribed sexual offence proceedings.

Table 7.2: Legislation restricting publication of identifying particulars equivalent to the *Evidence Act 2001* (Tas) s 194K

Name of Act	Nature of provision	Section
Evidence (Miscellaneous Provisions) Act 1991 (ACT)	A person must not publish, in relation to a sexual offence proceeding, identifying information relating to the complainant.[491] It is a defence if the person establishes that the complainant consented to the publication before the publication happened.[492] Note that there is no requirement that a person be 18 years or older, nor is a 'person' defined in the Act.[493]	Section 74
	If a court considers that the publication of evidence given in a proceeding is likely to prejudice the administration of justice, or it is in the interests of the administration of justice to prohibit the names of a party to the proceeding, or a witness or intended witness in the proceeding, the court may make a non-publication order.	Section 111
Crimes Act 1900 (NSW)	A person must not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant,[494] whether or not the proceedings have been finally disposed of.[495] The section does not apply to a publication made with the consent of the complainant (who must be over the age of 14 years at the time of publication)[496] or a publication made after the complainant's death.[497]	Section 578A
Children (Criminal Proceedings) Act 1987 (NSW)	The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if the proceedings relate to the person and the person was a child when the relevant offence was committed, or the person is a witness in the proceedings	Sections 15A, 15D

[490] See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74(2); *Crimes Act 1900* (NSW) s 578A(4)(b); *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(b); *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 10(2); *Evidence Act 1929* (SA) s 71A(4); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BB); *Evidence Act 1906* (WA) s 36C(6). In the NT there is an exception, provided there are no pending court proceedings: *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(2)(b).
[491] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74(1).
[492] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74(2).
[493] See also *Criminal Code 2002* (ACT) s 712A: a person commits an offence if they publish information that identifies a person under 18 years who is or was the subject of a Childrens Court proceeding (unless the person provides their consent to publication as an adult). This provision does not apply to a child complainant, only a child offender. There is no available case law that considers the consent to publication provided by a person under 18 years.
[494] *Crimes Act 1900* (NSW) s 578A(2).
[495] *Crimes Act 1900* (NSW) s 578A(3).
[496] *Crimes Act 1900* (NSW) s 578A(4)(b).
[497] *Crimes Act 1900* (NSW) s 578A(4)(f).

Name of Act	**Nature of provision**	**Section**
	and was a child when the relevant offence was committed, or the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or the person is otherwise involved in the proceedings and was a child when involved, or the person is a sibling of a victim of the relevant offence, and the person and the victim were both children when the offence was committed.[498] An exception exists where the person provides their consent (in the case of a person who is 16 years or older at the time of the publication,[499] provided the child's consent is given in the presence of an Australian legal practitioner)[500] or with the consent of the court concerned (in the case of a person who is under the age of 16 years).[501] A court is not to give consent except with the concurrence of the child, or (if the child is incapable of giving concurrence) unless the court is of the opinion that it is in the public interest that consent be given.[502]	
Criminal Procedure Act 1986 (NSW)	A court may make an order directing that the identity of a sexual offence witness is not to be publicly disclosed.[503] A sexual offence witness is defined as any witness in the proceedings (other than the complainant) against whom a prescribed sexual act is alleged to have been committed by the accused person[504] (that is a witness who is also victim-survivor of the accused).	Section 294D
Court Suppression and Non-publication Orders Act 2010 (NSW)	Any time during proceedings or after proceedings have concluded, a court has the power to make a suppression order or a non-publication order relating to any party to, or a witness in, proceedings, or any person who is related to or otherwise associated with any party to, or witness in, the proceedings before the court[505] including to avoid causing undue distress or embarrassment to a party to, or witness in, criminal proceedings involving an offence of a sexual nature.[506]	Sections 7, 8
Criminal Law (Sexual Offences) Act 1978 (Qld)	Any report made or published revealing a complainant's identity is prohibited, unless a court makes an order to the contrary.[507]	Section 6
	If a defendant is charged with a prescribed sexual offence,[508] an 'eligible person' (meaning the complainant, the defendant or the	Sections 7, 7B

498 *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(1).
499 *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(a).
500 *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(3).
501 *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(b). The NSW Children's Court have referred to the confusion between the conflicting provisions of the *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(b) and the *Crimes Act 1900* (NSW) s 578A(4)(b), regarding the right of a 14- or 15-year-old complainant in prescribed sexual offence proceedings to consent to the publication of their identity see: Children's Court of NSW, Submission to NSWLRC, *Open Justice: Court and tribunal information: access, disclosure and publication* (9 March 2021) 3.
502 *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(2).
503 *Criminal Procedure Act 1986* (NSW) s 294D(4). Note that if the court makes such an order, the sexual offence witness is taken to be a complainant for the purposes of s 578A of the *Crimes Act 1900* (NSW) and that section will apply.
504 *Criminal Procedure Act 1986* (NSW) s 294D(2).
505 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.
506 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).
507 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6(1).
508 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 7(1).

Name of Act	Nature of provision	Section
	prosecution[509]) may apply to a Magistrates Court for a non-publication order for identifying matter relating to the defendant, before the defendant is committed for trial or sentence.[510] The court may make a non-publication order if satisfied that the order is necessary to prevent prejudice to the proper administration of justice, or to prevent undue hardship or distress to a complainant or witness, or to protect the safety of any person.[511]	
	A person who, by statement or representation made or published otherwise than in a report, reveals information identifying a complainant commits an offence (unless made or published for an authorised purpose).[512] It is a defence for a person to prove that, before the relevant statement or representation was made or published, the complainant authorised the making or the publishing of the statement or representation, and the complainant was at least 18 years old and had capacity to give the authorisation.[513]	Section 10
Evidence Act 1929 (SA)	A person must not publish any statement or representation by which the identity of an alleged victim of a sexual offence is revealed or might reasonably be inferred, unless the judge authorises, or the alleged victim consents to, the publication (but no such authorisation or consent can be given where the alleged victim is under 18 years).	Section 71A
	A court may make a suppression order to prevent prejudice to the proper administration of justice or to prevent undue hardship to an alleged victim of crime; or to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings; or to a child.[514]	Section 69A
Judicial Proceedings Reports Act 1958 (Vic)	A person who publishes or causes to be published any matter that contains particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect to the alleged offence has commenced, is being conducted, or has been finally determined.[515] Exceptions include where a victim publishes the identifying particulars themselves,[516] or where a victim is deceased[517] (provided the publication does not lead to the identification of another victim who does not give their permission to publish). It is a defence if the person can prove, on the balance of probabilities, that the victim had given permission to publish, and the publication was in accordance with the limits, if any, set by the victim (provided the publication does not lead to the identification of another victim who does not give their permission to publish)[518]. In the case of a	Section 4

[509] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 3 (meaning of 'eligible person').
[510] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 7(2).
[511] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 7B.
[512] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 10(1).
[513] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 10(2).
[514] *Evidence Act 1929* (SA) s 69A(1).
[515] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A). Note that a complaint about the alleged offence must have been made to Police: s 4(1B).
[516] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BA).
[517] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BAB).
[518] *Judicial Proceedings Reports Act 1958* (Vic) ss 4(1BB), 4(1BC).

Name of Act	Nature of provision	Section
	child (a person under 18 years)[519], the permission must be accompanied by a supporting statement by a 'relevant person' (including a medical practitioner or registered psychologist)[520] confirming the child's capacity to give permission.[521]	
Open Courts Act 2013 (Vic) [522]	A court can make a suppression order, including if it is reasonably necessary: to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means; to protect the safety of any person; or to avoid undue distress of embarrassment to a complainant or witness in any criminal proceedings involving a sexual offence or a family violence offence, or a child who is a witness in any criminal proceedings.[523]	Section 18
Evidence Act 1906 (WA)	After a person is accused of a sexual offence, no identifying matter shall be published in a written publication available to the public, or be broadcast.[524] It is a defence if the complainant authorised, in writing, the publication or broadcasting of the matter, prior to the publication or broadcasting, was at least 18 years old at the time and had capacity to provide the relevant authorisation. The onus of proof lies on the publisher or broadcaster.[525]	Section 36C
Sexual Offences (Evidence and Procedure) Act 1983 (NT)	It is an offence if a person intentionally publishes, or makes a statement or representation and is reckless as to whether the publication or making of the statement or representation results in, the disclosure of identifying details of the complainant.[526] It is a defence if no proceeding in relation to the sexual offence that was alleged to have been committed is pending in a court when the statement of representation is published, and each complainant (as relevant) provided their prior written consent, and was an adult with capacity to consent when providing that consent.[527]	Section 6

Age of consent for allowing publication

7.3.2 As noted in Table 7.2, the Australian Capital Territory (ACT), New South Wales and Victoria allow for a complainant under 18 years to consent to publication of identifying material. In the ACT, it is a defence if the person who publishes a complainant's name, or protected identity information about the complainant, or a reference or allusion that discloses the complainant's identity (or from which the complainant' identify might reasonably be determined) establishes that the complainant consented to

[519] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1).
[520] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1).
[521] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BC)(c).
[522] The *Open Courts Act 2013* (Vic) amended and consolidated provisions for suppression orders and closed court orders applicable to the Supreme Court, County Court, Magistrates' Court, Coroners Court, Victorian Civil and Administrative Tribunal, and other prescribed courts and tribunals.
[523] *Open Courts Act 2013* (Vic) ss 18(1)(a), 18(1)(c)–(e).
[524] *Evidence Act 1906* (WA) s 36C(1).
[525] *Evidence Act 1906* (WA) s 36C(6).
[526] *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(1).
[527] *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6(2). Note also that s 7 creates an offence if a person intentionally publishes or makes a statement or representation that discloses particulars likely to lead to the identification of the defendant, before the defendant is committed for trial or sentence.

the publication before the publication occurred. It is not necessary that the complainant be at least 18 years old at the time of providing their consent.[528]

7.3.3 In Victoria, a person is able to publish any matters that contain particulars likely to identify themselves (provided the publication is not likely to lead to the identification of another victim-survivor who does not give permission to publish).[529] There is no age restriction specified for a person to be able to identify themselves. There are, however, age-specific provisions in relation to providing a defence to publication by another person with the consent of the victim-survivor. In the case that the publication is about a victim-survivor who gave permission to publish the particulars and was a child (that is, aged under 18) at the time the permission was given, the permission to publish must be accompanied by a supporting statement from the child's psychologist or medical practitioner, confirming the child's capacity to consent.[530]

7.3.4 In New South Wales, the child must be at least 14 years old in order to provide consent, pursuant to the *Crimes Act 1900* (NSW). There are no additional requirements or safeguards set out in s 578A of that Act. However, pursuant to the *Children (Criminal Proceedings) Act 1987* (NSW) there is a prohibition on publishing or broadcasting the name of a person: who was a child when the offence to which the proceedings relates was committed; who is a witness and was a child when the offence to which the proceedings relates was committed; who is a person mentioned in the proceedings in relation to something that occurred when the person was a child; who is a person who is otherwise involved in the proceedings and was a child when so involved; or who was a brother or sister of a victim-survivor of an offence and both that person and the victim-survivor were children when the offence was committed.[531] A child aged 16 years and above can consent to the publication or broadcast of their name if that consent is given in the presence of an Australian lawyer.[532] A court can consent to the publication or broadcast of the name of a child aged under 16 years if it is with the concurrence of the child or (if the child is incapable of giving concurrence) unless the court is of the opinion that it is in the public interest that consent be given.[533] Section 578A(4)(c) of the *Crimes Act 1900* (NSW) recognises publication authorised by a court under s 15D of the *Children (Criminal Proceedings) Act* (NSW) in respect of a complainant who is aged under 16 years at the time of publication.

7.3.5 The *Children (Criminal Proceedings) Act 1987* (NSW) applies to any court that exercises criminal jurisdiction and any criminal proceedings before any such court.[534] This means that the prohibition in the *Children (Criminal Proceedings) Act 1987* (NSW) s 15A and the consent exception in s 15D apply to any court hearing criminal proceedings in which a child is involved (whether as a complainant, witness or defendant). These provisions also apply to adults if they were a child when the relevant criminal offence was committed or when they were involved in the proceedings.[535]

Suppression orders and restrictions on publications

7.3.6 As outlined in Table 7.2, in addition to mandatory protections for sexual assault complainants, the ACT, South Australia, New South Wales, Queensland and Victoria have legislative mechanisms for

[528] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74.
[529] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BA).
[530] *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BC).
[531] *Children (Criminal Proceedings) Act 1987* (NSW) s 15A. Note s 15C provides an exception for a person convicted of a serious children's indictable offence if the publication or broadcasting is authorised by a court at the time of sentencing (whether or not the person consents or concurs).
[532] *Children (Criminal Proceedings) Act 1987* (NSW) ss 15D(1)(b), 15D(3).
[533] *Children (Criminal Proceedings) Act 1987* (NSW) ss 15D(1)(a), 15D(2).
[534] *Children (Criminal Proceedings) Act 1987* (NSW) s 4. However, note that the Local Court cannot hear and determine proceedings for which the Children's Court has jurisdiction: *Children (Criminal Proceedings) Act 1987* (NSW) s 7.
[535] Note that *Young Offenders Act 1997* (NSW) s 65 also provides a prohibition on the publication and broadcasting of the name or any information tending to identify a child offender, unless the child is over 16 years and has provided their consent.

a court to make a suppression order, or a non-publication order, in respect of a witness. These provisions operate at the discretion of the court. In the ACT, South Australia and New South Wales, the provisions apply to all proceedings, whereas in Queensland, the provision relates to proceedings dealing with sexual offences. In Victoria, the provision relates to complainants and witnesses in any criminal proceedings involving a sexual offence or family violence offence, and in relation to child witnesses in any criminal proceedings.[536]

7.3.7 In the ACT, if a court considers that the publication of evidence given in a proceeding is likely to prejudice the administration of justice, or it is in the interests of the administration of justice to prohibit the names of a party to the proceeding, or a witness or intended witness in the proceeding, the court may make a non-publication order.[537] In South Australia, a court has the power to make a suppression order to prevent undue hardship to an alleged victim of crime, or to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings.[538]

7.3.8 In NSW, the enactment of the *Court Suppression and Non-publication Orders Act 2010* (NSW) represented a major development in this area.[539] The legislation does not affect existing legislation, which prohibits, restricts or grants a court powers to prohibit or restrict the publication or disclosure of information in specific proceedings, including sexual offence proceedings. Pursuant to ss 7 and 8(d) of the Act, at any time during proceedings or after proceedings have concluded, a court has the power to make a suppression order or a non-publication order relating to any party to or a witness in proceedings, (or any person who is related to or otherwise associated with any party to or witness in the proceedings) before the court, including to avoid causing undue distress or embarrassment to a party to, or witness in criminal proceedings involving an offence of a sexual nature.[540] In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.[541]

7.3.9 In Queensland, an 'eligible person' (including the prosecution) may apply to the Magistrates Court for an order prohibiting publication of identifying details relating to the defendant, before the defendant is committed for trial or sentence.[542] The Court may make this non-publication order if satisfied that the order is necessary to prevent undue hardship or distress to a witness.[543]

7.3.10 In 2013, Victoria enacted the *Open Courts Act 2013* (Vic), providing that a court can make a suppression order including, if it is reasonably necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means, to protect the safety of any person, or to avoid undue distress of embarrassment to a complainant

[536] For a summary of the approach in other jurisdictions, see *Stemming the Unstoppable Tide?* (n 476) ch 3.
[537] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 111.
[538] *Evidence Act 1929* (SA) s 69A(1).
[539] The legislation was introduced following recommendations by the NSW Law Reform Commission (NSWLRC) in their report, *Contempt by Publication* (Report No 100, 2003) and a meeting of the Standing Committee of Attorneys-General in March 2008, with a view to possibly harmonise the use of suppression orders across all Australian jurisdictions. NSW was the first jurisdiction in Australia to adopt the model provisions (*Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [2.3.12], referring to Peter Johnson's article).
[540] A court may make an order on one or more of the following grounds: the order is necessary to prevent prejudice to the proper administration of justice; to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national and international security; to protect the safety of any person; to avoid causing undue distress or embarrassment to a party or to a witness in criminal proceedings involving an offence of a sexual nature; or it is otherwise necessary in the public interest for the order to be made, and that public interest significantly outweighs the public interest in open justice. Note that a court may only make a suppression order or non-publication order on the grounds that the order is necessary to avoid causing undue distress or embarrassment to a defendant in criminal proceedings involving an offence of a sexual nature only if there are exceptional circumstances: *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(3).
[541] *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.
[542] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 7(2).
[543] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 7B.

or witness in any criminal proceedings involving a sexual offence or a family violence offence, or to child who is a witness in any criminal proceedings.[544]

7.4 TLRI 2013 Report: the background and scope of information prohibited by s 194K

7.4.1 In 2013, the TLRI discussed the background and operation of the *Evidence Act* s 194K. The TLRI observed that it was a provision designed to address concerns in relation to the underreporting of sexual assault and the 'stigma of sexual assault [that] contributes to the marked desire of many victims to remain anonymous or at least to keep knowledge of the assault from family and acquaintances'.[545] It created an exception to the principles of open justice and sought to balance that public interest with the privacy interests of individuals, such as alleged victims, to provide 'protection from avoidable harm or distress' arising from the court process.[546]

7.4.2 The TLRI also examined the operation of the *Evidence Act* s 194K and identified several interpretative difficulties with the wording of the legislation (as it then existed). These included uncertainty as to the type of information which attracted the prohibition on publication and whether it is restricted to matters relating to the complainant,[547] and the class of people who are able to identify the complainant, based on the published information.[548] The TLRI identified potential ambiguity about whether the phrase 'and any other reference or allusion' in s 194K(9) should be read in conjunction with the words 'name, address', being restricted to matters which directly relate to the complainant,[549] or whether the phrase contemplates that details other than those directly related to the complainant may also be prohibited by s 194K (for example, if the name of the complainant's husband was published and the offence was one of rape in marriage).[550] The TLRI made recommendations to resolve this ambiguity.[551]

7.4.3 Further, at the time of the 2013 report, it was not possible in Tasmania for a victim-survivor to consent to the publication of identifying information about themselves. The TLRI recognised the need for victim-survivors to be able to consent to publication of information in relation to their experience

[544] *Open Courts Act 2013* (Vic) ss 18(1)(a), 18(1)(c)–(e)
[545] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [1.1.1].
[546] Ibid [2.2.1].
[547] Ibid [3.3.1].
[548] The was seen in a case concerning the prostitution of a 12-year-old girl by her mother and her mother's friend. Proceedings were commenced against the girl's mother and the friend, and whilst the girl and her mother were not directly identified, the friend's name was reported in the media. The Director of Public Prosecutions at the time, Mr Tim Ellis SC, concluded that there had been no breach of s 194K. Mr Craig Mackie (who was the court-appointed Children's Representative in the Child Safety proceedings relating to the girl at the time) referred his concerns about the operation of s 194K to the TLRI. The reference was supported by the then Commissioner for Children, Mr Paul Mason: *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [1.1.1]–[1.1.2].
[549] This was the point made by the Director of Public Prosecutions (at the time) in his submission to *Protecting the Anonymity of Victims of Sexual Crimes*.
[550] As determined by the Victorian Supreme Court in *Bailey v Hinch* [1989] VR 78, referred to in *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [24]–[25]. In the Second Reading Speech on the Evidence Amendment Bill 2002 (Tas) the Attorney-General at the time explained that there is no blanket prohibition on naming an accused in sexual offences, but that publication of the accused's name could be prohibited if it was likely to identify the complainant (Tasmania, *Parliamentary Debates,* House of Assembly, 22 October 2002, 29-87 (Judy Jackson)). The intent and purpose of s 194K seems to be that details other than those directly related to the complainant are prohibited by s 194K, if publication is likely to lead to the complainant being identified: see *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [4.2.3].
[551] See *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) Recommendation 1.

as an expression of autonomy and supported in the public interest.[552] However, at that time, the TLRI considered that a court order should be required even if a complainant consented.

7.4.4 It is also noted that, as the legislation existed at the time, the prohibition extended to witnesses or intended witnesses. However, given the focus of the reference, the TLRI's review did not specifically consider the application of s 194K to 'any witnesses or intended witnesses in those proceedings' noting:

> The prohibition also applies to information likely to identify other witnesses in sexual offences cases, with the exception of the defendant. Although in some instances the observations and recommendations made may apply equally to other witnesses in sexual offences trials, the principal focus of this report is on the victims of sexual crimes.[553]

7.4.5 Amendments have since been made to the *Evidence Act* s 194K such that it now provides a defence to the publication of identifying information about a complainant if they have consented (in accordance with the requirements in that section) and that the publication of the complainant's identity does not identify another person referred to in the provision (other than a defendant),[554] unless that person is also a complainant and has also consented in accordance with the section.

7.5 Victorian Law Reform Commission Report (2020)

7.5.1 In 2018, the Victorian Law Reform Commission (VLRC) was asked to review and report on the law relating to contempt of court, to consider possible reforms to the *Judicial Proceedings Reports Act 1958* (Vic) and to review the legal framework relating to prohibitions against publication and the making of other suppression and non-publication orders ('VLRC Report').[555] Specifically, the VLRC was asked to consider whether the *Judicial Proceedings Reports Act 1958* (Vic) should be repealed, and whether prohibitions against the publication of certain information, such as identifying information about victim-survivors in sexual assault matters, should instead be enacted into the *Open Courts Act 2013* (Vic).[556] The review considered how the law should enable a victim-survivor to share their story, should they choose to do, and in what circumstances a victim-survivor should be able to consent to publication.[557]

7.5.2 As part of their recommendations, the VLRC considered that the prohibition in s 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) (which relates to the non-publication of any particulars likely to lead to the identification of a sexual offence complainant or victim-survivor) should be retained but re-enacted in the *Open Courts Act 2013* (Vic). Further, the VLRC recommended that this prohibition should be subject to a new defence of consent to publication (provided that the victim consents in writing, is an adult, and is not otherwise incapable of giving informed consent) or, if the court authorises the publication on its own motion or on application.[558] The VLRC considered that, whereas adults should be able to consent to publication, in cases where the victim is a child, the court should have the power to authorise the publication of identifying particulars (on application or on its own motion).[559]It was also noted that the defence should not apply where the publication of the identifying particulars of a consenting victim is likely to lead to the identification of a non-consenting victim.[560]

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[552] Ibid [4.3.19]. In the 2013 Report, the TLRI's view was that a court order should be required even if a complainant consented due to the possibility of other complainants being affected by publication.
[553] Taken from *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) Executive Summary.
[554] Except in the case of alleged incest: *Evidence Act 2001* (Tas) s 194K(1)(a).
[555] Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020).
[556] Ibid Terms of reference.
[557] Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 144, Questions 40, 41.
[558] *Contempt of Court* (n 555) Recommendations 99, 103 (summary of recommendations).
[559] Ibid Recommendation 105.
[560] Ibid Recommendation 104.

7.5.3 In respect to the ability of victim-survivors to share their story, the responses received by the VLRC provided a range of views. Submissions recognised the importance of allowing people to speak out, with some submissions noting that the offence of publishing identifying details could apply to victim-survivors who choose to identify themselves in online forums, even if the group is closed,[561] and that people often did not consider these laws when deciding what to share online.[562] Other stakeholders were of the view that the media could exploit the trauma of a person's lived experience, and that there needed to be better supports available for victim-survivors in dealing with the media.[563]

7.5.4 In respect to whether the courts should oversee a complainant's consent to publication, many victim-survivors emphasised that involving the courts in the consent process would 'further undermine the autonomy and agency of victims'[564] who have already been through a criminal court process, or signal that 'victims should be ashamed and required supervision to understand the gravity of being identified.'[565] Some stakeholders considered advice, information and counselling as a more appropriate way of supporting victim-survivors to choose whether they wish to provide their informed consent,[566] and self-identify.[567] Others were supportive of the court having some role, particularly where the interests of others needed to be protected, and to ensure informed consent. The Victorian Victim Support Agency and Child Witness Service noted that a victim-survivor cannot reverse a decision to provide consent, and the criminal process could sometimes overwhelm survivors.[568] The Director of Public Prosecutions and the Supreme Court supported the court supervising consent to ensure it is informed.[569] All stakeholders favoured court supervision where there were multiple victims.[570] Most stakeholders said that children should be able to consent but needed more protection than adults to ensure they understood the consequences.[571]

7.5.5 The VLRC concluded that consent of an adult victim should be sufficient as a defence,[572] and noted that the legislation already manages the issue of multiple victims.[573] The VLRC considered that there is a need to respect the autonomy of child complainants (aged under 18 years), while recognising that they may not fully comprehend the long-term effects of identifying as a victim of a sexual offence. Additionally, it emphasised the need to balance this with the risk of parental or other pressures. The VLRC concluded that in these cases, a court should determine the issue of publication, and that the court should have power to authorise publication of identifying particulars on application or on its own motion.[574] The VLRC did not comment on a minimum age for making such an application.

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[561] Ibid [12.95], referring to Submission 13 from Shine Lawyers.
[562] *Contempt of Court* (n 555) [12.95], referring to Consultations 14 (Victim Survivors' Advisory Council youth representative), 16 (Victims of Crime Consultative Committee victims' representatives).
[563] *Contempt of Court* (n 555) [12.95], referring to Submissions 24 (Victim Survivors' Advisory Council), 1 (Representatives of victims of crime support organisations).
[564] *Contempt of Court* (n 555) [12.100], referring to Submission 24 (Victim Survivors' Advisory Council); Consultations 1 (Representatives of victims of crime support organisations), 3 (Representatives of victim survivors of family and sexual violence), 23 (Survivors of sexual abuse advocacy groups).
[565] *Contempt of Court* (n 555) [12.101], referring to Consultation 23 (Survivors of sexual abuse advocacy groups).
[566] *Contempt of Court* (n 555) [12.101], referring to Consultations 16 (Victims of Crime Consultative Committee victims' representatives), 23 (Survivors of sexual abuse advocacy groups), 25 (Magistrates' Court of Victoria).
[567] *Contempt of Court* (n 555) [12.116] referring to Consultation 3 (Representatives of victim survivors of family and sexual violence).
[568] *Contempt of Court* (n 555) [12.104].
[569] Ibid [12.107]–[12.108].
[570] Ibid [12.109].
[571] Ibid [12.110], referring to Submissions 13 (Shine Lawyers), 20 (Criminal Bar Association); Consultations 3 (Representatives of victim survivors of family and sexual violence), 14 (Victim Survivors' Advisory Council youth representative), 16 (Victims of Crime Consultative Committee victims' representatives), 23 (Survivors of sexual abuse advocacy groups).
[572] *Contempt of Court* (n 555) [12.117].
[573] Ibid [12.122].
[574] Ibid [12.123].

7.6 Legislative amendment in Victoria

7.6.1 Following the VLRC Report, legislative amendments introduced by the *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) allowed for self-publication by victim-survivors and publication by third parties with the consent of the victim-survivor.

7.6.2 The amending Act clarified when a third party may publish information that identifies a victim-survivor. It provided for a victim-survivor to provide their consent, in writing, including any limits or conditions imposed by the victim-survivor in proving their consent.[575] It was noted that these reforms would enable victim-survivors and others to publish without the need for judicial oversight, respecting the autonomy of victim-survivors to share their story, and avoiding the potential trauma and distress involved in a further court-based process (consistent with the VLRC's general recommendations in respect to adult victim-survivors).[576]

7.6.3 In respect to child victim-survivors, the Government acknowledged that the amendments were different to the model recommended by the VLRC. It was noted that victim-survivors and advocates expressed a range of views on this issue during consultation, particularly in respect to older children. Some submissions supported the extension of the consent defence to children and highlighted a preference to avoid the potential distress and trauma associated with a court process, and 'the impact that a court process could have in silencing the voices of child victim-survivors, preventing their experiences from being better understood'.[577] Other submissions considered judicial oversight to be an important safeguard for those children who may feel pressure from others, or who may not fully understand the implications of having their identify published.[578] The amendments sought to balance the different views by allowing victim-survivors aged under 18 to make decisions for themselves, but with appropriate safeguards in place to reflect the potential vulnerability of younger children.[579] The safeguard adopted was not judicial oversight but the support of a doctor or psychologist, whose written assessment is to be provided alongside the young person's written consent.[580]

7.7 New South Wales Law Reform Commission Report (2022)

7.7.1 In 2019, the NSW Attorney-General asked the NSW Law Reform Commission (NSWLRC) to review the legislative framework that governs exclusion and closed court orders, non-publication statutory provisions or orders, as well as access to records on the court file.[581] This review was broader than an examination of the protections that exist for sexual assault complainants set out in the *Crimes Act 1900* (NSW) s 578A. However, this issue was addressed as part of their report. The NSWLRC considered the issue of whether legislation should ever automatically prohibit publication or disclosure of certain information, and concluded that, in certain contexts (including prescribed sexual offence proceedings), statutory prohibitions should be retained. As noted in Table 7.2, the *Crimes Act 1900* (NSW) s 578A prohibits a person from publishing any 'matter' which identifies, or is likely to identify, a complainant in a proceeding for a prescribed sexual offence. In contrast to the Tasmanian position, this protection does not extend specifically to the identity of witnesses or intended witnesses, and would

[575] Now reflected in *Judicial Proceedings Reports Act 1958* (Vic) ss 4(1BB), 4(1BC).
[576] Victoria, *Parliamentary Debates*, Legislative Council, 29 October 2020, 3651 (Jaala Pulford).
[577] Victoria, *Parliamentary Debates*, Legislative Council, 29 October 2020, 3651–3652 (Jaala Pulford).
[578] Victoria, *Parliamentary Debates*, Legislative Council, 29 October 2020, 3652 (Jaala Pulford).
[579] Victoria, *Parliamentary Debates*, Legislative Council, 29 October 2020, 3652 (Jaala Pulford).
[580] Now reflected in *Judicial Proceedings Reports Act 1958* (Vic) ss 4(1BC)(c), 4 (1BD). It was noted that these provisions are similar to recent amendments to the *Births, Deaths and Marriages Registration Act 1996* (Vic) that apply to the process of altering records of sex on a child's birth certification: Victoria, *Parliamentary Debates*, Legislative Council, 29 October 2020, 3652 (Jaala Pulford).
[581] New South Wales Law Reform Commission (NSWLRC) *Open Justice: Court and tribunal information: access disclosure and publication* (Report 149, May 2022) ('*Open Justice: Court and tribunal information: access disclosure and publication*').

only apply to witnesses if publication of information about the witnesses was a 'matter' that identified or was likely to identify a complainant.

7.7.2 As with Tasmania, New South Wales also allows for a complainant to consent to publication of their identity. Under the *Crimes Act 1900* (NSW) s 578A(4), there are exceptions where the prohibition on publication of any matter likely to lead to the identification of sexual assault complainants does not apply.[582] Under s 578A(4)(b) of the Act, an exemption includes where publication of the identity of a complainant is made with the consent of the complainant, provided they are aged 14 years or over. Further, an exemption is created under s 578B(c) of the Act if a publication is authorised by a court pursuant to s 15D of the *Children (Criminal Proceedings) Act 1987* (NSW) in respect to a complainant who is aged under 16 years at the time of publication.

7.7.3 The consent exemptions (or 'mechanisms for lifting the statutory prohibition' as described in the NSWLRC review) were considered as part of the review. Noting that there were conflicting provisions across different Acts in NSW, the NSWLRC recommended that three new limitations be placed on a standard mechanism for a person to consent to lifting a statutory prohibition:

(1) the person protected by the prohibition would not be able to consent to publication of their identity if this may identify any other person protected by the prohibition who has not given consent to publication of their identity;

(2) the person protected by the prohibition would not be able to consent to the publication while proceedings are ongoing (only a court would be able to grant leave to lift the prohibition at that stage); and

(3) the age for consent would be raised to 16 or older, and could only to be made following the provision of legal advice.[583]

7.7.4 In relation to the age of consent, the NSWLRC outlined a standard mechanism for consent based on s 15D of the *Children (Criminal Proceedings) Act 1987* (NSW). It recommended that children aged 16 or 17 years should continue to be able to provide their consent to publication, but that this should only be after receiving advice from an Australian legal practitioner about the implications of consenting (rather than just consenting in the presence of a legal practitioner).[584] This recommendation differed from the age for consent set out in the *Crimes Act 1900* (NSW) s 578(4), which is 14, and also differed from *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(a), which provides that the publishing or broadcasting of the name of a child under the age of 16 years may occur with the consent of the court concerned. The NSWRLC observed that:

> Children under the age of 16 are less likely to understand the long-term implications and may be more easily influenced. As such, oversight from a court is necessary to ensure their best interests can be considered and their views are taken into account. Children between the ages of 16 and 18 are likely to have greater comprehension of the risks involved in revealing their identity and to understand legal advice.[585]

7.7.5 Further, as part of its review, the NSWLRC considered whether it was appropriate to allow the court to grant leave to lift the prohibition when a person is under the age of 16, given its recommendation that the age for consent be raised from 14 to 16. The NSWLRC's draft proposal was that a court should be able to grant leave for a prohibition to be lifted where the person who is protected is aged under 16.

[582] Unlike Tasmania, the exceptions are circumstances where the provisions do not apply as opposed to being a defence to a prohibited publication.
[583] *Open Justice: Court and tribunal information: access disclosure and publication* (n 581) [8.52], [8.54].
[584] This was consistent with the provision contained in the *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1). The NSWLRC was told that 'this rarely occurs in practice': NSWLRC, *Open Justice: Court and tribunal information: access disclosure and publication* (Consultation Paper 22, 2020) [7.24].
[585] NSWLRC *Open Justice: Court and tribunal information: access disclosure and publication* (Draft Proposals June 2021) [5.41].

However, in light of feedback received by the NSWLRC about 'young people's "youth, immaturity and lack of appreciation of consequences"' and 'the consequences of lifting a prohibition [being] more significant in the age of social media, as information cannot be recalled once published',[586] it changed its view, and recommended that there be no mechanism to lift the prohibition when a person is aged under 16 at the time of publication.[587] The NSWLRC also observed that there was 'the risk that any purported application in relation to a child under 16 for leave to lift the prohibition may be unduly influenced by an adult'.[588]

7.7.6 The recommendation of the NSWLRC to increase the age at which consent can be given has not been reflected in the *Crimes Act 1900* (NSW) s 578A (which still refers to 14 or over at the time of publication) or the *Children (Criminal Proceedings) Act 1987* (NSW) s 15D(1)(a) (which still refers consent by a person under the age of 16 years at the time of publication). There is also no protective mechanism of the requirement for legal advice to be provided about the implications of consenting to young persons aged under 18.

7.7.7 Under the NSW provision, there was no protection afforded—under the *Crimes Act 1900* (NSW) s 578A specifically—to witnesses in sexual offences cases (as opposed to protection of a complainant that may involve prohibiting the publication of a witness's details if that is 'a matter likely to lead to the identification of the complainant'). In its review, the NSWLRC considered whether there should be a statutory prohibition in relation to the publication of matters that would or would likely lead to the identification of a witness. Under the *Criminal Procedure Act 1986* (NSW) s 294D(4), a court may make an order directing that the identity of a sexual offence witness is not to be publicly disclosed. A sexual offence witness is defined as 'any witness in the proceedings (other than the complainant) against whom a prescribed sexual act is alleged to have been committed by the accused person' (that is a witness who is also victim-survivor of the accused). This is not a blanket prohibition but a discretion of the court. After consideration, the NSWLRC expressed the view that a blanket protection should not apply to all sexual offence witnesses, and that it was more appropriate that the decision be made in relation to the facts of the case, rather than 'imposing a general exception to open justice in respect of all sexual offence witnesses'.[589]

7.7.8 In relation to protection of witnesses, the NSWLRC also considered extending the court's powers to provide a general discretion to make a non-publication or non-disclosure order. This discretion would apply where necessary to avoid causing undue distress or embarrassment to a party or a witness (not including a defendant) in proceedings that involve, or relate to, a prescribed sexual offence or domestic violence offence, or to a child who is a witness in any legal proceeding.[590] This was supported by the NSWLRC, who stated that such a provision would enable the court to make an order in appropriate cases in relation to parties and witnesses in prescribed sexual offence proceedings, in line with protections afforded to complainants and tendency witnesses (sexual offence witnesses).[591] While accepting that other victims and complainants may experience distress or embarrassment, the NSWLRC did not consider any further extension (beyond adult witnesses for sexual offence or domestic violence offence matters, and child witnesses in any legal proceedings) was appropriate:

> [W]e do not recommend including a specific ground for making orders where it is necessary to protect victims or witnesses from distress, embarrassment or hardship, beyond those relating to parties and witnesses in proceedings relating to a sexual offence or domestic violence offence, and a child involved in legal proceedings (recommendation 6.4(d)–(f)). Participating in criminal

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[586] *Open Justice: Court and tribunal information: access disclosure and publication* (n 581) [8.59].
[587] Ibid [8.57].
[588] Ibid [8.60]
[589] Ibid [10.73].
[590] See ibid ch 6.
[591] Ibid [6.96].

> or civil proceedings as a victim or witness is frequently stressful, but it is insufficient to justify a specific exception to open justice.[592]

7.8 Child Abuse Commission of Inquiry (2023)

7.8.1 In its Final Report, the Child Abuse Commission of Inquiry indicated that it had experienced challenges in respect to the *Evidence Act* s 194K and the information that could be published in its final report. In conducting its inquiry, the Commission's approach was:

> to appropriately empower and protect victim-survivors; this included respecting their preferences for how their information would be shared and used. As part of our engagement with victim-survivors, if we proposed to identify them in our hearings or our report, and section 194K might apply, we asked for their consent.[593]

7.8.2 However, the Commission's experience in conducting the inquiry was that the provisions of s 194K sometimes operated in 'unusual ways',[594] primarily because s 194K does not allow the publication of identifying information in respect to witnesses (or potential witnesses) in the relevant criminal proceedings without a court order. This applies even if the victim-survivor has consented to the publication and would apply even if the witness had also consented (unless the witness was also a 'person in respect of whom the crime is alleged to have been committed', in which case consent could be given by that witness).

7.8.3 An example given in its Final Report was that the Commission was able to publish the evidence and information that victim-survivors gave about the abuse perpetrated by James Griffin, but not the evidence and information given to the Commission by potential witnesses in criminal proceedings against Mr Griffin (noting that Griffin died shortly after being charged with a number of sexual offences, involving repeated sexual abuse of a child), even where the evidence from those potential witnesses was given to the Commission with the victim-survivor's express knowledge and support.[595] While the Commission recognised that an application could be made to the Supreme Court by a witness or intended witness for an order allowing identifying information to be published, the Commission expressed the view that the process involved with making such an application was costly, time-consuming and potentially traumatic for multiple parties.[596]

7.8.4 Further, the Commission identified uncertainty about the scope of the terms 'witness or intended witness' given that they are not defined in the *Evidence Act*.[597] The Commission also noted that s 194K(1) was expressed to apply regardless of whether criminal proceedings are, or have been, finally determined or otherwise disposed of. This meant that the section continued to apply to any witnesses and intended witnesses in relation to the proceedings. Accordingly, in the case that raised difficulties for the Commission, as the defendant had died only months after being charged, it was difficult for the Commission to identify with any certainty the witnesses and intended witnesses in those

[592] Ibid [6.116]. It was noted that a suppression or non-publication order could be made on other grounds such as the administration of justice or the safety of a person: [6.117].
[593] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23, 322.
[594] Ibid vol 1, Executive Summary 26.
[595] Ibid vol 1 26.
[596] Ibid vol 8 ch 23, 323.
[597] Ibid vol 8 ch 23, 322, but note the definition of 'witness' in the *Evidence Act 2001* (Tas) s 3 and intended witness is defined in the *Criminal Procedure (Attendance of Witnesses) Act 1996* (Tas) s 3.

proceedings.[598] The Commission also considered the term 'any proceedings in any court' to be uncertain in this respect.[599]

7.8.5 An additional issue raised by the Commission in relation to the consent provisions in the *Evidence Act* s 194K was that other Australian jurisdictions allow younger victim-survivors, with appropriate capacity, to consent to the publication of identifying information. In contrast, in Tasmania, consent can only be given by a person who is 18 years or older.

7.8.6 In its Final Report, the Commission indicated that it had ultimately adopted a cautious approach to s 194K, by ensuring that consent was obtained in accordance with the section and that the Commission did not publish any identifying information where consent could not be obtained or where there was a risk that a witness or intended witness could be identified. The Commission liaised with the Director of Public Prosecutions where necessary to ensure compliance.[600] However, it noted that the practical limitations created did have an implication for the ability to conduct public hearings and also to include certain information in their Final Report. In its view, this had the effect of ultimately working against, not in line with, the intended purpose of the section (being to empower victim-survivors with the ability to share their experience and to choose whether they are identified).[601] The Commission also considered that it would have been possible to identify professional witnesses without necessarily identifying a victim-survivor, but again, a court order would need to be obtained.[602] This was seen by the Commission to be onerous.[603]

7.8.7 In response to the difficulties encountered, two solutions were suggested by the Commission to deal with the challenges:

(1) section 194K be redrafted to address the issues experienced in the conduct of the inquiry, taking into account relevant drafting differences in other jurisdictions; or

(2) regulations be enacted for any future commissions of inquiry, resulting in s 194K being disapplied for the purpose of the relevant inquiry.[604]

7.9 South Australian Law Reform Institute Report (2024)

7.9.1 In 2024, the South Australian Law Reform Institute (SALRI) published its report on suppression orders in South Australia.[605] This was a report that considered the operation of suppression orders broadly, but also considered the operation of s 71A of the *Evidence Act 1929* (SA) and the role of consent by a victim-survivor. As noted in Table 7.2, this section provides automatic suppression of the identity of a victim of a sexual offence, unless authorised by a judge or by consent of the victim. However, consent is not able to be given where the victim-survivor is aged under 18.

7.9.2 In relation to consent to publication, SALRI observed that consent needs to be informed and that this should involve victim-survivors understanding 'the risk and consequences of their identifying information being published', and free and voluntary agreement being provided.[606] It was also noted

[598] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23, 322.
[599] Ibid.
[600] Ibid 323.
[601] Ibid 322.
[602] Ibid 322–323.
[603] There were no specific examples provided by the Commission.
[604] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse* (n 3) vol 8 ch 23. 323.
[605] *Stemming the Unstoppable Tide?* (n 476).
[606] Ibid [5.3.38].

that victim-survivors should have access to a variety of non-legislative supports to ensure that any consent is informed.[607]

7.9.3 In relation to children, SALRI reported that it had been 'told in consultation that there should be consideration given to introducing some ability for child victims to consent to publication in limited circumstances'.[608] SALRI quoted the submission of Bravehearts that:

> Bravehearts strongly advocate that where the victim is under the age of 18 and they or their family wish the person charged to be identified, for example, if they wish to speak out and be identified themselves, this should be permitted by the court unless there are exceptional reasons why they should not … Bravehearts recognises that it is important to achieve a balance between protecting child victims of sexual abuse from any potential harm that may result from their identification (for example their involvement with the media) and the need to ensure victims and/or their families have the right to speak out and identify if that is their choice.[609]

7.9.4 This submission incorporates the ability of a child to consent to identification with the oversight of a court. SALRI recommended that 'consideration should be given to introducing flexibility into the victim consent framework of s 71A(4) of the *Evidence Act 1929* (SA) to allow consent, in limited circumstances, to be given in relation to victims who are children and deceased victims'.[610]

7.10 TLRI's views and recommendations

7.10.1 As noted, both the background to the *Evidence Act* s 194K and its adequacy in protecting the anonymity of complainants have previously been considered by the TLRI. In its 2013 Report, the TLRI noted that the objective of the law was to afford 'appropriate protection to victims of crimes of sexual assault'.[611]The TLRI remains of the view that the policy basis for the provision (the protection of complainants of sexual assault) continues to be fundamentally important. In its 2013 Report, the TLRI considered the position of victims who do not seek the protection of anonymity but who prefer that their voice be heard. The TLRI stated that it was 'desirable to make provision for consent by victims in light of … strong autonomy and public interest arguments identified'.[612] It was also stated that 'any mechanism for publication with consent must include relevant safeguards to provide adequate protection to victims'.[613] The TLRI stated that:

> publication should only be sanctioned where a competent adult victim has given their consent in writing, free of coercion or inducements and where there is no risk that other victims may be identified. The reference to a competent adult victim also encompasses a child victim who, after reaching adulthood, decides they wish to self-identify.[614]

7.10.2 At that time, the TLRI considered that the most appropriate way to allow a victim-survivor to self-identify while ensuring safeguards was to provide the court with a power to rule on prohibited details at the commencement of proceedings and also supervise applications for publication orders.[615] As noted, this recommendation was not adopted in the reforms made to the *Evidence Act* s 194K in 2020, and the law now provides that an adult victim-survivor can consent to publication of identifying

[607] Ibid [5.3.43].
[608] Ibid [5.3.42].
[609] Ibid.
[610] Ibid Recommendation 5, [5.3.47].
[611] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) Executive Summary v.
[612] Ibid [4.3.19].
[613] Ibid.
[614] Ibid.
[615] Ibid.

information consistent with the safeguards set out in the legislation (which do not include oversight by the court).

7.10.3 The current view of the TLRI is that the need to protect victim-survivor anonymity, as a general rule in sexual assault cases, is paramount. The TLRI supports the significance of the policy basis for the existence of s 194K as a safeguard for complainants. The TLRI also supports the ability for complainants to be able to speak out publicly about their own experience, if they wish to do so. It remains the view of the TLRI that a complainant (victim-survivor) should be able to consent to the release of identifying information on the basis that it is both in the public interest and an expression of autonomy. However, in light of changing attitudes and growing awareness of the significance of the ability for some victim-survivors to speak publicly about their experience, as well as developments since 2003, the TLRI's now supports the legislative approach that an adult victim-survivor should be able to consent to the publication of identifying information *without* a court order. The TLRI's view remains, however, that consent by one victim-survivor should not identify another complainant who seeks to remain anonymous, or otherwise impinge upon their rights.[616] This reflects the view of the NSWLRC that:

> Statutory prohibitions serve a public policy purpose that is broader than an individual's desire to speak about their experience. It would be unfair if a person, by consenting to publication of their own identity, compromised the protection afforded by the statutory prohibition to another person. This is particularly important in proceedings where the parties are related to each other.[617]

7.10.4 It is also clear to the TLRI that there are issues with the application of s 194K in relation to witnesses, particularly in circumstances where:

- a complainant has given consent to be identified but there is uncertainty in relation to identification of potential witnesses; and
- the need for a court order to be obtained to allow for the identification of witnesses or intended witnesses.

7.10.5 As recognised by the Child Abuse Commission of Inquiry, difficulties arose because it was not possible to clearly identify who would fall within the category of 'any witness or intended witness', and/or it was deemed onerous and potentially traumatic for a court order to be sought. As noted, s 194K does not allow for consent to be used as a defence in respect to the publication of identifying information relating to a witness or intended witness, even where the witness has full support from the complainant (or complainants) who have provided their written consent. Similarly, if a witness or intended witness may be identified as part of the complainant telling their story (which is likely to occur where witnesses are members of the victim-survivor's family and friends), unless an application to the court is made, a media outlet and the victim-survivor themselves run the risk of contravening s 194K, even where the witness has provided their written consent.

7.10.6 In this regard, the TLRI notes that the basis for the safeguard (and the legislative intent of s 194K) is to protect the identity of complainants, and not 'witnesses' or 'intended witnesses' per se.[618] The TLRI acknowledges that there are differences between Tasmania and larger jurisdictions (for example Victoria and New South Wales) such that the possibility of identifying a victim of a sexual offence by publishing the identifying particulars of a witness may be higher in Tasmania than in other

[616] This is the view of the Commissioner for Children and Young People, *Submission: Consultation on Section 194K Evidence Act 2001* (17 May 2019) 5.
[617] *Open Justice: Court and tribunal information: access disclosure and publication* (n 581) [8.56].
[618] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) [4.2.5]–[4.2.20] and Recommendation 1. See also Tasmania, *Parliamentary Debates*, Legislative Council, 29 July 1987, 1736 (Tony Fletcher), where it was made clear that the inclusion of witnesses in the provision was to allow the identity of the complainant (rather than the witness) to be protected: 'in the type of offences with which we are dealing, if the witnesses are known then often the victim will also be known by virtue of the witnesses being identified'.

jurisdictions. However, this does not mean that witnesses and intended witnesses should necessarily be automatically afforded the protection under s 194K. In this Research Paper, the TLRI stresses that it does not seek to undermine or dilute the protection afforded to complainants. Instead, the TLRI's consideration in this Paper is focussed on the appropriateness of the automatic protection afforded to witnesses or intended witness under the *Evidence Act* s 194K, and the limitations this places on complainants who choose to tell their own story. It is the view of the TLRI that an amendment that excludes witnesses from the automatic protection would not reduce protection for complainants because the publication of details of a witness would still be prohibited if this would lead to the identification or likely identification of a victim-survivor. It follows from this, that the consent of a complainant to be identified would allow disclosure of the name of a witness or intended witness, unless disclosure of the name of a witness or intended witness would have the effect of identifying a complainant who is protected by s 194K (and does not consent to identification), or unless there was another basis on which that information was protected.

7.10.7 Further, the TLRI considers that the meaning of the words 'intended witness' are not clear, particularly when read alongside sub-s (2), which provides that 'subsection (1) applies ... whether or not criminal proceedings in respect of the relevant crime or offence are, or have been, finally determined or otherwise disposed of'. The experience of the Child Abuse Commission of Inquiry highlights this difficulty. In a broader sense, media organisations have also stated that uncertainty in relation to the scope of s 194K has created difficulties for their reporting of crimes.[619]

7.10.8 Accordingly, the TLRI's view is that the *Evidence Act* s 194K should be amended to remove the automatic protection for witnesses or intended witnesses. This reflects the intention of the provision and the approach taken in the equivalent provisions to s 194K in other jurisdictions.[620] This differs from the approach taken in the TLRI's 2013 Report, which recommended that both complainants and witnesses be granted automatic legislative protection against the publication of their name, address, image, or other information likely to identify them.[621] However, since 2013, there have been changes to the legislation that allow a complainant to consent to the disclosure of their identity, and the inclusion of witnesses in s 194K has hampered the ability for some complainants to tell their story. The TLRI agrees that, in some cases, it may be appropriate for witnesses to also be afforded protection, however this should be set out in a different provision and subject to the exercise of discretion by the court (rather than a blanket exclusion). This is discussed at [7.10.12].

7.10.9 Further, as the purpose of s 194K is to protect the identity of the complainant, it is the TLRI's view that the definition of 'identifying information' in the *Evidence Act* s 194K(9) should be amended to specify some of the matters that may be relevant to the identification of the complainant. The definition of 'identifying information' in relation to a person currently includes 'the name, address, school, place of employment and any other reference or allusion that identifies or is likely to lead to the identification of the person'. It is the TLRI's view that this provision should be amended to expressly state that 'any other reference or allusion' includes details relating to witnesses and intended witness. This addresses concerns that the identification of witnesses or intended witnesses may lead to the identification of a complainant in some cases (in circumstances where the complainant does not consent to identification). In addition, in line with Recommendation 1 of the TLRI in its 2013 Report, the TLRI's

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[619] See Australia's Right to Know (ARTK) (a coalition of media companies) submission to the Department of Justice Discussion Paper regarding s 194K of the *Evidence Act 2001* (Tas) dated 10 May 2019: 'Additionally, it is also difficult for media organisations to know who is an "intended witness", and when a person becomes an "intended witness". … The provisions leading to such significant sanctions ought to be clear and unambiguous. Section 194(1)(a)(iii) is not.' ARTK media companies submitted that 'the prohibition on identifying all witnesses and intended witnesses (other than the defendant) in sexual offence proceedings is a step too far and is vague and difficult for media publishers to interpret', arguing that s 194K(1)(a)(iii) be repealed.

[620] It is noted that this is different from the approach taken in the *Youth Justice Act 1997* (Tas) ss 31, 108, where the restriction on reporting applies to the identification of a youth who is the subject of or a witness in the proceedings (Youth Justice Division) and to proceedings against youths in the Supreme Court or court of summary jurisdiction.

[621] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) Recommendation 1.

view is also that the amendment should prohibit the publication of details relating to the defendant where this is likely to identify the complainant.[622] Accordingly, the TLRI's view is that 'identifying information' in s 194K(9) should be amended to expressly recognise that 'other reference or allusion that identifies or is likely to lead to the identification of the person' may include details of the *defendant* or any other witness or intended witness.[623] This approach avoids the operation of s 194K in relation to witnesses (as discussed), while maintaining the important statutory protections afforded to complainants and victim-survivors of sexual crimes in cases where identification of a witness or intended witness would lead to the identification of the complainant. It also reflects the current approach where the identity of a defendant is not published where this would lead to the identification of a complainant.

7.10.10 As noted, legislative provisions that prohibit the publication of information that identifies or is likely to lead to the identification of witnesses or intended witnesses (other than the complainant/victim-survivor) do not represent a recognised exception to the principle of open justice in other jurisdictions.[624] No other jurisdiction in Australia expressly provides for an automatic statutory prohibition of identifying information about a witness or intended witness in prescribed sexual offences. As recognised by the NSWLRC, the protection of witnesses from harm, as well as undue distress and embarrassment in sexual offence matters are appropriate matters for a court to have regard to when exercising its discretion to make a non-publication or suppression order.[625] However, this is a separate discretion and not one where an automatic prohibition can be justified on the same basis as the protection of a complainant.

7.10.11 Based on the Terms of Reference and the TLRI's views in relation to the scope of the *Evidence Act* s 194K, the TLRI considers that it is appropriate to consider the protections for witnesses who are victim-survivors of sexual assault (but who are not complainants protected within the scope of s 194K). For these witnesses, the TLRI's view is that legislative amendment should be made to provide the court with a discretion to make an order that the identity of a witness who is also victim-survivor of the accused (a 'tendency witness') is not to be publicly disclosed. This reflects the approach in New South Wales and the *Criminal Procedure Act 1986* (NSW) s 294D(4) provides a useful model.[626] It also addresses comments in the 2013 TLRI Report that, while the focus of the Report was on victims of sexual crimes, 'in some instances the observations and recommendations made may apply equally to other witnesses in sexual offence trials'.[627] Tendency witnesses (that is, victim-survivors of the accused) would be such a class of witness.

7.10.12 As noted, the restriction in s 194K is one of a number of mechanisms that exist for courts to impose restrictions on reporting and make suppression orders.[628] In particular, as noted, there is a legislative mechanism in some jurisdictions that provides a court the discretion to make a suppression order in relation to some witnesses. A review of suppression orders more broadly is beyond the scope of this Research Paper, which focuses on the scope of the *Evidence Act* s 194K, and the extent to which it achieves its objective of allowing victim-survivors to consent to publication of identifying material. However, the TLRI suggests (based on the approach of the NSWLRC) that consideration be given to the introduction of a broader statutory discretion allowing a court to make a non-publication or non-disclosure order where this is necessary to avoid causing undue distress or embarrassment to a party or a witness (not including a defendant) in any proceeding that involves, or relates to, a sexual offence or domestic violence offence, or to a child who is a witness in any legal proceeding.[629] If adopted, such a

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[622] Ibid.
[623] Note definition of 'witness' in the *Evidence Act 2001* (Tas).
[624] *Open Justice: Court and tribunal information: access disclosure and publication* (n 581).
[625] See [7.7]
[626] See [7.7.6].
[627] *Protecting the Anonymity of Victims of Sexual Crimes* (n 476) Executive Summary v. The Report recommended protection under legislation be extended to complainants and witnesses.
[628] See [7.2.6] and [7.3.1]–[7.3.10].
[629] It is noted that protections apply to child witnesses in proceedings again a youth for an offence in the Youth Justice Division, the Supreme Court and the Magistrates Court: *Youth Justice Act 1997* (Tas) ss 31, 108. The court

provision should apply in relation to the disclosure of information to a commission of inquiry. There remains scope to conduct a broader review of suppression orders more generally.

7.10.13 In relation to commissions of inquiry, if the subject matter of a future inquiry involves matters that might be covered by s 194K, the TLRI's view is that the commission should consider providing guidance to complainants who consent to identification. This guidance should include the limits in relation to disclosing information about another complainant, or a witness who is also a victim-survivor. It is noted that under the *Commissions of Inquiry Act*, there are numerous mechanisms for a commission to provide such guidance. For example, a commission has the power to limit or prevent the public from attending hearings and also to control public reporting of a hearing.[630] As set out in Table 2.2, a commission has wide powers to determine its own procedures in conducting its inquiry. In the context of complainants and witnesses. This means that there is scope for the commission of inquiry to limit the publication of information by a complainant who has consented to be identified under s 194K, if the commission has concerns in relation to the privacy of another person or for the other reasons set out in ss 13 and 14 of the *Commissions of Inquiry Act*.[631] It would also allow the commission to issue practice directions regarding the process for a person to give consent under s 194K for the purpose of a commission of inquiry, and any parameters that the commission may consider appropriate to impose.

7.10.14 In relation to the age of consent for publication of identifying details, the TLRI has given consideration to whether s 194K should be amended to allow a person under the age of 18 years to consent to the publication of identifying information. As noted in NSW, the age for consent for publication under the *Crimes Act 1900* (NSW) s 578A(4)(b) is 14 years old, while the *Children's (Criminal Proceedings) Act 1987* (NSW) s 15D provides that consent of a person under 16 years requires consent of the court, and consent of a person aged 16 years to 18 years must be given in the presence of a legal practitioner. In Victoria, a child (and an adult) can publish identifying information about themselves. In addition, a person under the age of 18 can consent to the publication of particulars that identify them, provided it is accompanied by a statement from an appropriate person attesting that the child understands what it means to be identified as a victim of a sexual offence and the consequences of losing their anonymity.[632] In contrast, the legislative provisions in Queensland, South Australia, Western Australia and the Northern Territory only allow adults to consent to the publication of identifying information.[633]

7.10.15 After considering the approach taken in other jurisdictions, and concerns about the reality of long-term consequences of identification in the internet era, the TLRI accepts that young victim-survivors should be able to consent to the publication of identifying information about themselves. However, the TLRI's view is that judicial oversight is still required, in order to provide necessary safeguards. This reflects the views of the Commissioner for Children, who had 'strong reservations about any reform which would allow the consent of a complainant aged less than 18 years to be sufficient in and of itself to allow the publication of identifying details'.[634] However, the Commissioner 'would … be open to a situation which would enable a mature minor to apply to the Court for leave to provide informed consent to the publication of identifying information which is otherwise prohibited'.[635] The *Convention on the Rights of the Child*, provides that children who are capable of forming their own views have the right to express those views in all matters affecting them, and shall be provided the opportunity to be heard in any proceedings affecting them, and such views are to be

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has a discretion to impose restrictions on the publication of material in proceedings under the *Family Violence Act 2004* (Tas) s 32. See further Table 7.1.

[630] See Part 6.

[631] Ibid.

[632] This provides a defence to publication.

[633] See Table 7.2.

[634] Commissioner for Children and Young People (CCYP) in response to the *Discussion Paper: Section 194K of the Evidence Act 2001* (17 May 2019) 5.

[635] Ibid.

given due weight in accordance with the child's age and level of maturity (Article 12).[636] The Convention also provides that appropriate measures should be taken to promote the physical and psychological recovery of a child victim of abuse, and that such recovery is to take place in an environment which fosters the health, self-respect and dignity of the child (Article 39).[637] An approach where the consent of a young person is taken into account by a court in making an order for the publication of information under s 194K(5) accords with these rights and standards. This approach allows the court to have regard to the circumstances in which a young person consented, and the weight that should be given to that consent, as well as the potential impact on related victims. It also acknowledges the concerns raised by the NSWLRC and the VLRC that young people may not have sufficient maturity to understand the implications of having their identity made public. This is of particular importance given the long-term consequences of the publication of personal information in the internet age, in which it is almost impossible to remove such information once it is in the public domain. The requirement for a court to make an order permitting the publication of identifying information about a victim-survivor aged under 18 also aligns with the approach taken in other Tasmanian legislation that avoids identifying young people, and only allows identification with an order of a court.[638] Accordingly, the TLRI's view is that if a young person wishes to tell their story, the appropriate course is to apply to the court for an order providing leave to publish. It is not recommended that s 194K be amended to allow the consent of a person under 18 to serve as a defence to publication without a court order.

Recommendation 9

The *Evidence Act 2001* (Tas) s 194K(1) should be amended to remove the reference to 'any witness or intended witness in those proceedings'.

Recommendation 10

The *Evidence Act 2001* (Tas) s 194K(9) should be amended to include within the definition of identifying information, information about a witness or intended witness if this would allow for identification or likely identification of another complainant protected by s 194K.

Recommendation 11

A legislative provision should be enacted to provide the court with a discretion to make an order that the identity of a witness who is also victim-survivor of the accused is not to be publicly disclosed. The *Criminal Procedure Act 1986* (NSW) s 294D(4) provides a useful model for such witnesses.

Recommendation 12

The *Evidence Act 2001* (Tas) s 194K should not be amended to provide a defence to the publication of information if consent is given by a person under 18 years without a court order to that effect.

[636] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
[637] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 39.
[638] See *Youth Justice Act 1997* (Tas) ss 31, 108.

Part 8

Other Matters

8.1 Introduction

8.1.1 Part 8 addresses other matters considered by the TLRI as part of its review of the *Commissions of Inquiry Act 1995* (Tas) (‘*Commissions of Inquiry Act*’) relating to the terminology used in the Act, and the recommendation of the Australian Law Reform Commission (ALRC) in relation to a tiered approach to public inquiries.

8.2 Terminology used in the Commissions of Inquiry Act 1995 (Tas)

Commission of Inquiry

8.2.1 In respect to the terminology used in the *Commissions of Inquiry Act*, the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings (‘Child Abuse Commission of Inquiry’) recommended that the legislation be reviewed as a whole, considering the use of different terms relating to information received and their possible interpretations where not defined by the Act. Where terms are not defined, the Child Abuse Commission of Inquiry identified the increased risk of legal argument and complexity. Noting that a commission of inquiry can inform itself in any way it sees fit, the Commission did not consider the use of various terms (for example, ‘information’, ‘evidence’, ‘documents’ and ‘thing’) helpful, recommending that the legislation can be simplified by using the same terminology, consistently.

Approach in Tasmania and other jurisdictions

8.2.2 In addressing this matter, Table 8.1 summarises the terminology used across several different jurisdictions.

Table 8.1: Terminology used in legislation relating to commissions of inquiry and royal commissions

Name of Act	Section	Terminology
Commissions of Inquiry Act 1995 (Tas)	22 (notices to witnesses)	‘evidence’; ‘any document or thing’; ‘any information or explanation’
	23 (notice to produce document or statement)	‘a document or statement’
	24 (power of entry, search and seizure); 26 (self-incrimination); 34 (copies of documents)	‘a document or thing’
	20(2) (rules of evidence); 21 (admissibility of evidence in other	‘evidence’

Name of Act	**Section**	**Terminology**
	proceedings); 23A (privilege); 23B (powers in relation to witnesses)	
	34A (commission may communicate information)	'information'; 'evidence'; 'document or thing'
Inquiries Act 2014 (Vic)	17 (Power to compel production of documents and other things or attendance of a witness);	'evidence'; 'document or other thing'
	22 (powers in relation to documents and other things); 28 (search warrant); 31 (return of documents and other things); 44 (disclosure or provision of information by commissioners);	'document or other thing'
	32 (legal professional privilege); 33 (self-incrimination); 34 (statutory secrecy and confidentiality provisions);	'information (including an answer) or a document or other thing'
	40 (admissibility of answers, information, documents & other things)	'answer, information, document or other thing'
	50 (offence to make false or misleading statements or produce false or misleading documents or other things)	'statement'; 'document or other thing'
Royal Commissions Act 1923 (NSW)	11 (answers and documents); 12 (inspection and copies); 17 (answers and documents); 18 (powers of commissioner); 19 (failure to attend or produce documents or other things); 23 (destroying documents or other things); 23A (delaying and obstructing commission)	'answer any question'; 'any document or other thing' s 3: 'document' includes any book, register or other record of information, however complied, recorded or stored.
Royal Commissions Act 1968 (WA)	8B (power to obtain documents & other things); 9 (power to summon witnesses & documents); 13 (contempt: failing to attend or produce documents); 15 (contempt: hindering execution of search warrants); 21 (power in relation to documents produced); 27 (destroying books or documents)	'documents, books, writings or other things specified' s 4: 'documents' includes things that are documents within the meaning of s 79B of the Evidence Act 1906)
	19A (private hearings)	'evidence'
	20 (statements made by witness not admissible in evidence against him)	'statement or disclosure'
Commissions of Inquiry Act 1950 (QLD)	5 (power to summon witness and require production of books etc); 14 (answers & documents); 14A (statements made by witness not admissible in evidence against the witness); 19 (powers as to inspection & copies of documents etc); 19A (search for and seizure of evidence); 19B (custody of books etc)	'books, documents, writings and records or property or things' s 3: 'record' is defined in the Act

Name of Act	Section	Terminology
Inquiries Act 1991 (ACT) & Royal Commissions Act 1991 (ACT)	19 & 24 respectively (privilege against self-incrimination)	‘document or other thing’; ‘answer a question’
	20 & 25 respectively (search warrants)	‘a thing of the relevant kind’
	21 & 28 respectively (power to hold)	‘evidence’; ‘matters contained in documents lodged with, or received in evidence’; ‘evidence given before, or the contents of a document lodged with or received in evidence’
	26 & 34 respectively (powers in relation to witnesses etc)	‘evidence’; ‘a stated document or other thing’
	26A & 35A respectively (proposed adverse comments)	‘submission or written statement’
Royal Commissions Act 1917 (SA)	5 (power to publish information)	‘information’
	6 (evidence may be taken in public or private)	‘evidence’
	10 (powers of commissions); 11 (powers in respect of witnesses); 11A (issuing or summons or warrant)	‘books, papers, documents or records’ (s 3 defines ‘record’)
	16 (statements made by witness not admissible in evidence against him)	‘statement or disclosure’
Royal Commissions Act 1902 (Cth)	2 (power to summon witnesses and take evidence);	‘evidence’; ‘documents, or other things’
	3 (failure of witnesses to attend, produce documents or give information or statements); 6A (self-incrimination); 6J (fraud)	‘documents, or other things’; ‘information or statement’
	4 (search warrants)	‘things of the relevant kind’
	6AA (legal professional privilege)	‘document’
	6DD (statements made by witness not admissible in evidence against the witness); 6OE (certain statements made & docs produced etc not admissible in evidence)	‘statement or disclosure’; ‘document or other thing’
	6F (powers in relation to documents & other things); 6K (destroying documents or other things)	‘documents or other things’
	6H (false or misleading evidence)	‘evidence’; ‘information or a statement’
	6OB (private sessions)	‘information’ s 1B defines ‘document’ to include any book, register or other record of information, however compiled, recorded or stored

TLRI's views and recommendations

8.2.3 The TLRI agrees with the Child Abuse Commission of Inquiry that the terminology used in the *Commissions of Inquiry Act* is not consistent across the Act. For example, s 23A provides that '[i]f a person refuses to prepare or produce a document or statement as required under ss 22 or 23 on the ground that the document or statement, or the information contained in the document or statement, is protected by privilege.' However, s 22 refers to the power of a commission to require that a person give evidence or produce to the commission 'any document or thing' in that person's possession or control. The TLRI's view is that these inconsistencies should be addressed.

8.2.4 Further, the TLRI agrees with the Child Abuse Commission of Inquiry that there is scope to provide clarity to the *Commissions of Inquiry Act* by defining key terminology. The TLRI's view is that s 3 of the Act could define 'document' to include any book, register or other record of information, however compiled, recorded or stored. This reflects the interpretation adopted by the Commonwealth and New South Wales. It also appears to be broadly consistent with the definition of 'document' found in s 3 of the *Evidence Act 2001* (Tas) as 'any record of information and includes:

> (a) anything on which there is writing; or
>
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
>
> (d) any map, plan, drawing or photograph.[639]

Recommendation 13

To ensure consistency in the terminology used in the statutory framework, the following amendments should be made to the *Commissions of Inquiry Act 1995* (Tas):

- section 21 (Admissibility of evidence in other proceedings) should be amended to include the words 'or information' after the word 'evidence';
- section 22 (Notices to witnesses) should be amended to include the words 'or information' after 'evidence' in subsections (1)(a), (2), (4) and (5). Further, s 22(5) should be amended to say 'any information or evidence' as opposed to 'any information of explanation';
- section 23A (Privilege does not apply in certain circumstances) should be amended to refer to 'document or statement or thing';
- section 23B (Powers in relation to witnesses) should be amended to include the words 'or information' after the word 'evidence';
- section 26 (Self-incrimination) should be amended to refer to 'document or statement or thing';
- section 34 (Copies of documents) should be amended to 'document or statement or thing'; and
- section 34A(3)(c) and 5(c) (Commission may communicate information) should be amended to refer to 'document or statement or thing'.

[639] *Evidence Act 2001* (Tas) s 3 (definition of 'document').

Recommendation 14

The *Commissions of Inquiry Act 1995* (Tas) s 3 should be amended to define ‘document’ to include any book, register or other record of information, however compiled, recorded or stored.

8.3 Tiered approach to powers granted to public inquiries

8.3.1 A further matter identified in the TLRI’s consideration of the scope of powers of commissions of inquiry is whether there should be a tiered approach to public inquiries. As outlined in [3.9.14], a key recommendation of the ALRC included the recommendation that there should be two tiers of public inquiry (royal commission and official inquiries). The ALRC’s recommendation was that there should be a distinction made between these two tiers in relation to the scope of the coercive powers. The ALRC’s view was that there should be a distinction between the two tiers relating to the ‘tools’ provided to the inquiry to ‘carry out its investigation without inappropriately infringing on the rights of the persons involved with, or affected by, its processes’ and the ‘coercive powers that may be exercised by each tier of inquiry’.[640] The ALRC recommended that a royal commission remain the highest form of inquiry, establishing to look into matters of substantial public importance, whereas an official inquiry would look into other matters of public importance. Unlike an official inquiry a royal commission would have a wider range of coercive powers, including search and seizure powers, and the power to override legal professional privilege and the privilege against self-incrimination.

8.3.2 As discussed at [1.2.1] above, commissions of inquiry in Tasmania are rare. The TLRI is of the view that the focus of reform should be on improving the current legislative framework to provide flexibility for the operation of commissions of inquiry into the future, rather than introducing significant and complex changes to allow for different tiers of public inquiries. Further, the ALRC’s recommendation has not been implemented in relation to the *Royal Commissions Act 1902* (Cth) and Victoria is the only other jurisdiction to implement different tiers of public inquiries.

[640] *Making Inquiries: A New Statutory Framework* (n 6) Executive Summary 31–32. See also this Research Paper Part 3.

Appendix A: The *Commissions of Inquiry Act 1995* (Tas) s 18 as at the Date of the Gilewicz Commission of Inquiry

(1) If a Commission is satisfied that–

(a) an allegation of misconduct involving a person has been or should be made in its inquiry; and

(b) that person should be required, or is likely to be required, to give evidence in the inquiry in relation to the allegation–

the Commission must give that person notice of–

(c) the allegation; and

(d) the substance of the evidence supporting the allegation.

(2) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.

(3) A person who receives notice of an allegation of misconduct may respond to that allegation by doing all or any of the following:

(a) making oral or written submissions to the Commission;

(b) giving evidence to the Commission to contradict or explain the allegation or evidence, including the giving of oral evidence under examination by the person's counsel;

(c) cross-examining the person making the statement constituting the allegation or evidence;

(d) calling witnesses on matters relevant to the allegation or evidence.

(4) For the purposes of subsection (3)–

(a) the Commission must allow the person a reasonable period in which to prepare the response; and

(b) the person may be represented by counsel as of right.

(5) In determining what constitutes a reasonable period for the purposes of subsections (2) and (4)(a), the Commission may have regard to such matters as it considers relevant in the circumstances.

(6) A Commission must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section.