

Community & Public Sector Union

Stephen Jones • National Secretary

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Commissioner, Professor Les McCrimmon
Australian Law Reform Commission
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Dear Professor McCrimmon

Australian Law Reform Commission
Submission to the Review of Royal Commissions Act 1902

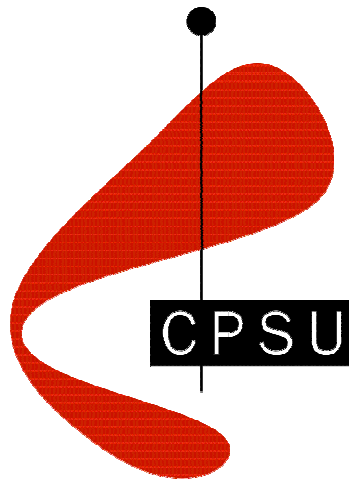
Please find attached a submission from the Community and Public Sector Union (PSU Group) to the Review of *Royal Commissions Act 1902*.

The contact person for this submission is Ms Melissa Donnelly, Senior Legal Officer, CPSU ph 02 8204 6971.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stephen Jones', written in a cursive style.

Stephen Jones
CPSU National Secretary



**CPSU (PSU Group)
Submission to:**

**Australian Law Reform
Commission**

**Review of *Royal
Commissions Act 1902***

May 2009

Introduction

1. The PSU Group of the Community and Public Sector Union (“CPSU”) represents workers in the Australian Public Service (“APS”), Commonwealth Government statutory agencies, the ACT Public Service, the Northern Territory Public Service, Telstra, the telecommunications sector, call centres, employment services and broadcasting including ABC and SBS.
2. As the major union representing employees in the Commonwealth Government, Northern Territory and ACT Governments, the CPSU is concerned about how Royal Commission proceedings are conducted, the rights afforded to participants in that process and how Royal Commissions enhance open and transparent government in Australia.

General comments

3. Given the nature of the work done by CPSU members, the CPSU and its members have a fundamental interest in improving openness and transparent governance in Australia. This is a key objective of the CPSU’s ‘*Agenda for Change*’, which was developed after extensive consultations with members¹.
4. Royal Commissions have an important role to play in promoting open and transparent governance structures. These Commissions are often used by Government to inquire into matters of significance, when it is believed that the Government itself lacks the independence or expertise to conduct the inquiry. Recent inquiries such as those concerning Australian Wheat Board and Equine Influenza (“EI”) demonstrate the role of Royal Commissions in investigating alleged corruption and maladministration. In providing a mechanism for such inquiries, partially removed from executive government, Royal Commissions enhance Australian democracy.
5. One of the more controversial aspects of the recent Clarke Inquiry into the detention of Mohamed Haneef was that the Inquiry was not a Royal Commission. This controversy demonstrates the high esteem in which Royal Commissions are held. It also demonstrates that the effectiveness of an inquiry is intrinsically linked to the powers on which the inquiry can rely.
6. Royal Commissions are also important in our democracy because they are public. They provide an opportunity for citizens to see the way in which these issues are being considered and engage with issues of importance. This factor is presumably very important in the current Royal Commission into the Victorian Bushfires.
7. The independence of Royal Commissions also plays a significant role in fostering open and transparent government. The fact that they are

¹ CPSU ‘Delivering on our Agenda for Change’, October 2008.

conducted one step removed from the executive arm of government means their outcomes are more likely to be accepted by the public, than the apparent self-interest of a Government inquiring into matters for itself.

8. The ALRC Issues Paper raises a number of questions about the role and use of forms of public inquiry, other than Royal Commissions. We believe that Royal Commissions have an important role to play in our governance structures, and would not like to see that role downgraded by the increasing use of inquiries with quasi-Royal Commission powers. It is appropriate that other forms of public inquiry are used in certain circumstances, but where issues of some significance need to be investigated and coercive powers are deemed necessary it should be under the auspices of, and therefore with the protection of, the *Royal Commissions Act*.
9. Royal Commissions often require Government employees to appear as witnesses; for example a number of our members were involved in the recent EI Inquiry. Public servants appearing in such proceedings would be giving evidence of activities they have engaged in and duties they have undertaken in the course of their employment. The CPSU believes it is fundamentally important that public servants, and others, appearing as witnesses in proceedings are advised about the process and the likely ramifications of their appearance, provided with legal representation that is not conflicting or compromised, afforded natural justice and properly protected.
10. Other forms of public inquiries vary greatly; some operate as pseudo-Royal Commissions, others operate as an administrative investigation with limited transparency. Whilst the appropriate forum for an investigation inevitably depends on the nature of the inquiry, the CPSU believes that public accountability and transparency must be paramount in all forms of public inquiries. Inquiries that are conducted with few public hearings and limited publicly available information raise issues of transparency and accountability. The credibility of any findings of such an inquiry is often compromised, fairly or unfairly, by the way in which it was conducted. In these matters, the perception of bias is just as detrimental as actual bias.
11. The Beale Inquiry into Quarantine and Biosecurity is an example where the transcript of the actual hearings was not made available to the CPSU and CPSU members. There was no publicly available information about who had appeared, and was scheduled to appear, before the Inquiry and what evidence they had put forward. This resulted in uncertainty about the focus of the Inquiry, and concern about the weight being given to the evidence of the 6 CPSU members who appeared. The secret nature of the Inquiry also and gave members no opportunity to subsequently correct any errors in the record (unlike witnesses in Parliamentary inquiries who can correct errors and who also have the added protection afforded by parliamentary privilege).

Specific questions

5–5 Should the Australian Government be required by statute within a specific time frame to:

- (a) table in parliament reports provided to it by Royal Commissions and other public inquiries;
- (b) respond, in parliament (for example, by ministerial statement) or otherwise, to recommendations made by Royal Commissions and other public inquiries; and
- (c) publish information about implementation of recommendations made by Royal Commissions and other public inquiries?

12. We note that the current legislation does not require the Government to table Royal Commission reports, formally respond to their recommendations or publish information about the implementation of any recommendations. Whilst Governments have generally done some or all of these things, it would be preferable that such reporting requirements were contained in the legislation.

13. In deciding to hold a Royal Commission inquiry, the Government has obviously determined that the particular issue is of such significance that the expense and time involved in Royal Commission proceedings are justified. It should follow, therefore, that it is incumbent on the Government to properly publish and respond to its findings.

14. There should be a specified period in which the Royal Commission's report is to be tabled in Parliament. The Commonwealth Government should also be required to respond to the findings of the Royal Commission within a specified period.

15. Royal Commissions have often inquired into matters that are highly controversial, such as the AWB Inquiry. If the Government can hide behind the auspices of a Royal Commission inquiry without ever having to deal with the substantive issues and recommendations coming out of that inquiry in a meaningful way, Royal Commissions will be a potential tool for eroding openness and transparency in government, rather than enhancing it.

5–6 Should a government department or some other permanent body be required to coordinate the government's response to, and monitor the implementation of, recommendations made by Royal Commissions and other public inquiries?

16. In instances, where recommendations go to the operations of a Commonwealth department itself, such as the EI Inquiry, the recommendations often go to systemic issues within that individual agency. It would not be useful if the creation of a coordinating department or body allowed the substantive department to relinquish its responsibilities to introduce or take responsibility for any systemic change in that agency. That is, it would be counter-productive if the use of a

coordinating department or body meant other agencies did not have to take responsibility for problems within that agency or that the coordinating department merely impeded the implementation of recommendations within other agencies by creating another level of oversight. It is also likely that implementation by the relevant agency of the specific recommendations of a Royal Commission serves to enhance that agency's processes and procedures more generally.

17. In our view, the utility of such a coordinating department or body would depend on the specific inquiry being considered by the Royal Commission.

18. We also note that the value and viability of recommendations coming out of Royal Commissions or public inquiries depends on the Government's willingness to appropriately resource and fund the implementation of those recommendations. In our view, whilst AQIS and DAFF have taken appropriate action in trying to implement the changes arising from the Callinan and Beale inquiries, the ability to properly do this has been hampered by inadequate funding.

6-3 Where a Royal Commission or other public inquiry is established, should any, or all, of the following be funded by the Australian Government:

- (a) legal costs and allowances for counsel and solicitors assisting an inquiry;
- (b) legal representation of witnesses; and
- (c) non-legal expenses of witnesses?

19. The CPSU has been involved in providing support and assistance to its members in the public service when they are required to appear before a Royal Commission or other public inquiry. The CPSU believes that it is appropriate that the Government meets the legal and non-legal expenses incurred by witnesses required to appear before these inquiries.

20. Frequently, Royal Commissions and other public inquiries require Commonwealth Government employees to appear as witnesses. These witnesses appear in their capacity as employees of an Australian Government agency or statutory authority. They are usually required to give evidence of activities or duties they undertook, or undertake, in the usual course of their job. It should follow, therefore, that the legal and other expenses incurred by such witnesses are paid.

Independent Legal Advice

21. In certain circumstances, the individual interests of a particular employee and the employing agency may differ. For example if there was a review into some kind of public maladministration and an issue in contest was whether the maladministration related to the failure of certain individual officers or a systemic failure within the Government agency, then the interests of individual officers and the employing agency may reasonably differ. Similarly, there may be conflict between the evidence of individual officers of the same agency, so that representation of those officers by the same legal team would constitute a conflict of interest.

22. In the Immigration investigations by the Ombudsman, although they were given legal representation, the one law firm represented all employees. When the employees gave conflicting evidence which was not central to the matter, it was not interrogated, sometimes to the detriment of one employee over the other. For example if one staff member said "I gave you that information" and another said "No you didn't" this was not necessarily interrogated as the person whose reputation was being damaged was not given the opportunity to fully question their colleague and provide relevant evidence. Independent legal advice may have provided more balance to the process.

Advice for Employees in the Case of Subsequent Misconduct Charges

23. Whilst there is a general prohibition against the use of a witness' evidence against that witness in civil or criminal proceedings, there is no similar prohibition in relation to disciplinary proceedings. Furthermore the evidence of other witnesses can form the basis for disciplinary proceedings.

24. Adverse evidence or findings against a public servant can have real and identifiable consequences for their employment. The evidence obtained by and findings of Royal Commissions can and have given rise to Code of Conduct proceedings against individual officers. Under the terms of the *Public Service Act*, possible sanctions for a breach of the Code of Conduct include fines, deduction in classification, deduction in salary and dismissal.

25. Other public inquiries would have the same potential consequences for APS employees. For example, the Ombudsman investigations into Immigration lead to a number of Code of Conduct investigations against individual employees. Similarly, the Callinan Inquiry into EI was conducted as an open court. The Callinan hearing transcripts were subsequently used for code of conduct proceedings which took some months following the Inquiry to investigate and resulted in some APS employees incurring costs in defending these allegations. They were not able to recover this money despite being found not to have breached the Code and in fact, most being found to have been acting with due care and diligence at all times.

26. The only standing document that deals with the rights of employees in these circumstances is the *Legal Services Directions 2005*. Appendix E of those Directions provide that the Commonwealth will fund legal representation and assistance in proceedings, including inquiries, in certain circumstances. Section 16 of the Appendix provides that approval will be given for legal representation to individual employees when it is in the interests of the Commonwealth. The interests of the Commonwealth and an individual officer may reasonably differ in any inquiry. Where the agency determines it is not in the Commonwealth's interests to fund representation for an individual employee, the Directions provide that an agency does not have to. These Directions, therefore, provide little certainty to employees called to appear before public inquiries.

27. Given that there is so much potentially at stake for these people, it is reasonable and responsible that the Government should meet legal and non-legal expenses incurred by public servants appearing as witnesses in any form of Inquiry, including the provision of independent legal representation if requested.

6–5 What assistance is required by those called to appear before Royal Commissions or other public inquiries? For example, should legal or other assistance be provided? Should such assistance be contracted on an ad hoc basis or provided by a government department or some other permanent body?

28. There is often uncertainty about what the proceedings involve and how an individual's interests may be affected by those proceedings. This has impeded individual's abilities to make informed decisions about their best representation.

29. For example, members who have been involved in previous inquiries have advised us whilst they were offered their own representation they did not elect to take up that option because they did not understand what would be involved in the proceedings and if they were offered the choice again they would probably make a different decision. Royal Commissions, and other forms of public inquiries, involve formal, legal proceedings, with which most APS employees would have had no previous involvement.

30. Employees involved in these proceedings should be provided with very clear information about what is likely to be involved in these proceedings, including the scope of the proceedings, and any potential consequences for them as individual employees, if the report makes adverse findings against them as individuals. Such information could be provided centrally and should assist employees in making appropriate decisions. Where there is any doubt as to whether an individual's interests might differ from those of their employer or other witnesses, individual employees should be strongly advised to obtain their own legal representation.

31. Whilst the Government does generally offer to fund legal advice and representation for witnesses involved in a Royal Commission, there is no standing requirement that the Government do so. In other types of public inquiries, the provision of representation and advice has differed. In some circumstances, the union has had to negotiate for members to be provided with a right to independent legal advice and representation. Where witnesses to any Inquiry or Royal Commission are giving evidence about matters that occurred in the course of their duties there should be a requirement that they be afforded independent legal assistance. This would minimise uncertainty and ensure that participants are afforded appropriate advice and representation in all instances.

32. For the reasons set out above, the CPSU believes that legal advice and representation should be afforded to witnesses required to appear before a Royal Commission or other inquiry. Given the potential for the interests

of a public servant witness and their employing agency to differ, the provision of independent legal advice and, where desired, representation is vital in ensuring the interests of individual witnesses are protected. Consideration of the independence of the legal representation afforded to individual witnesses is relevant in assessing the way in which it should be provided.

7. Powers

7-1 Do Royal Commissions and other public inquiries require coercive powers? If so, should these powers depend on the nature of the inquiry?

33. Given the significance of Royal Commissions it is appropriate that they have the power to compel the production of documents and the attendance of witnesses. For other public inquiries, that are less formal in nature, it is not necessarily appropriate or desirable that they are given the same coercive powers. Obviously the granting of coercive powers is very significant and restricts the rights of witnesses and others. In our view, it would be inappropriate for such powers to be attributed to other forms of public inquiry in any wholesale manner.

7-2 Should the Australian Government, when establishing a Royal Commission or other public inquiry, be able to select which coercive powers the inquiry may exercise?

34. It is appropriate that the legislation sets out a range of powers that are available to a Royal Commission in any given inquiry, including coercive powers. It should then be up to the Commissioner to determine when, how and if at all the powers granted by the statute are to be used.

35. It would not be ideal for the Government to determine what powers should be available for every specific inquiry. This would mean that the powers available to one Royal Commission may differ to another. This creates problems in how the findings of a Royal Commission are perceived. If a Royal Commission inquiry is hampered because certain powers were not given to it, the findings of that Commission should not be given the same standing as another Royal Commission which was fully empowered to investigate the issues. It is simply a matter of not comparing like with like. The problem would be that such a nuance would be overlooked in most instances and the findings of Royal Commissions, even if impotent, would be given the same status and accepted by the public on the same basis as other Royal Commission findings, where the Commissioner was not similarly impeded.

36. This proposal also runs the risk of politicising Royal Commissions. A Government may yield to public pressure to hold a Royal Commission into a particularly controversial issue, but then refuse to grant it the requisite powers to properly conduct the inquiry. The potential for this to occur weakens the legitimacy and standing of Royal Commissions.

7-4 Should Royal Commissions or other public inquiries have the power to direct a person to provide a written statement?

37. Where coercive powers are available, those powers should also include the power to direct a person to provide a written statement. This is a sensible proposal which is likely to save time and money in the conduct of Royal Commission proceedings.

8. Witnesses

8-1 How effective in practice are the current powers available to a Royal Commissioner to determine how a witness may be examined and cross-examined? What changes, if any, are required? Should public inquiries other than Royal Commissions have similar powers?

38. The Commissioner has broad powers to determine how a witness may be examined and cross-examined. The legislation should specifically require that the Commissioner exercise his or her powers regarding the examination and cross-examination of witnesses in a way that affords those witnesses natural justice. These issues were the subject of some controversy in the Cole Royal Commission into the Building and Construction Industry.

39. Cross-examination must occur in a balanced way. This should allow parties represented in the proceedings to refute allegations against made against them in a timely way, but similarly not impede the timely and efficient conduct of proceedings.

40. Members who have appeared as witnesses in Royal Commission proceedings have advised us that they were subject to unnecessarily lengthy cross-examination by parties granted leave to appear in the proceedings. Counsel representing each party asked a number of questions in the same or substantially similar form to those that had gone before. It is appropriate that Royal Commissions avoid the delay and expense of unnecessary cross-examination.

41. In our view, where the party's interests are affected by evidence, there should be a right to cross-examine. Where a party's interest are not affected by the evidence, the Commissioner should refrain from allowing cross-examination by that party's representatives.

8-2 Should a party to a Royal Commission or other public inquiry have the right to cross-examine a witness who is giving evidence adverse to that party's interests? If so, should there be any limitations on that right?

42. For the reasons set out above, and in the interests of natural justice, a party whose interests are adversely affected by a witness' evidence should have the opportunity to cross-examine that witness. To ensure that

proceedings are not unduly delayed, the Commissioner should have to make a finding that the party's interests were adversely affected and the cross-examination can only go to that evidence deemed to be detrimental to the party.

43. In the interests of fairness, this should occur as promptly as possible so the injured party has an opportunity to correct the public record. If the party is not afforded this right and afforded it in a timely manner, their interests will be harmed by the public reporting of allegations made against them without any fair opportunity to respond.

8-3 What types of information, if any, should a witness have the right to refuse to disclose to a Royal Commission or other public inquiry?

44. The current legislative exceptions focus on commercial interests, but fail to take account of circumstances in which information may be prevented from disclosure by other statutes.
45. Witnesses should have the right to refuse to disclose information which they are bound to keep secret by virtue of other legislation. If the Government wishes otherwise, it would need to amend secrecy provisions to ensure that information that is otherwise covered by those provisions can be released in the course of Royal Commission proceedings.

8-4 Should a witness before a Royal Commission or other public inquiry have the right to request that their evidence be taken in private? If so, in what circumstances?

46. There are circumstances where it would be appropriate that evidence may be taken in private and this opportunity may influence the level of information willingly provided by the witness. For example, with in the EI Inquiry CPSU members sought the permission of the Department to appear, their evidence was tempered by the fact that there was no clear position on whether the information was protected for privacy reasons, code of conduct or defamation.
47. It should therefore be open to a Commissioner to accept evidence in private, however in deciding whether to accept evidence in private the Commissioner should be required by the statute to balance the interests of claim to privacy with the interests of the public in having an open, public inquiry.
48. If it is the case that the Royal Commissions were able to require the giving of evidence that would otherwise fall within the scope of secrecy provisions, it would be necessary for the Royal Commission to take such evidence in private.

8–5 Should the defence of ‘reasonable excuse’ in the *Royal Commissions Act* be replaced with a list of specific circumstances in which a witness may refuse to attend a hearing or to produce a document or other thing? Should there be a similar list for other public inquiries?

49. The current formulation of ‘reasonable excuse’ is confusing. The Issues Paper itself identifies a number of privileges in respect of which it is unclear whether they constitute a ‘reasonable excuse’ for the purposes of the *Royal Commissions Act*². A comprehensive list of the circumstances where the defence is available would provide far greater certainty to witnesses and their legal counsel.

50. In our view, there should be a similar list for other public inquiries.

8–6 Should the powers in the *Royal Commissions Act* or in legislation establishing other public inquiries override secrecy provisions in federal legislation? If so, should this be stipulated in the *Royal Commissions Act* (or legislation establishing other public inquiries) or in the legislation containing the secrecy provision?

51. In our view it is not currently clear whether the secrecy provisions that exist in federal legislation or the requirement to give evidence under the *Royal Commissions Act* takes precedence. Whichever takes precedence, the situation must be clarified in the legislation.

52. In the absence of a clear legislative intent to override the secrecy provisions, a witness should have the right not to disclose confidential information. To force a witness to disclose confidential information, without clear legislation that allows for it, would open the public servant up to disciplinary proceedings and potentially criminal prosecution.

8–7 (a) Is the abrogation of the privilege against self-incrimination under the *Royal Commissions Act* appropriate? Are there any circumstances in which it should be preserved?

(b) In the absence of the privilege against self-incrimination, should any protections apply, for example:

- (i) the existing use immunity applying to criminal and civil proceedings;
- (ii) the strengthening of existing protections to include a derivative use immunity; or
- (iii) a use immunity or derivative use immunity applying only to criminal proceedings?

53. The abrogation of the privilege against self-incrimination has a long history in Royal Commissions. We note that the position in the federal legislation is consistent with that in the comparable State legislation and in other federal legislation with coercive investigative powers, such as the *Auditor-General’s Act*.

² ALRC Issues Paper p126

54. Whilst it is likely that the abrogation of the self-incrimination privilege will remain, we believe the existing provisions dealing with immunity should be reviewed to ensure that they are serving their intended purpose. In this context, derivative use immunity should be considered.

55. We believe it is appropriate that the immunity continue to apply in respect of both criminal and civil proceedings.

8–8 Should the privilege against self-incrimination be abrogated in other public inquiries? If so, what protections, if any, should apply to the use of such information?

56. The appropriateness of the abrogation and other protections depends on the kind of powers attributed to other public inquiries. Generally, it is our view that public inquiries, other than Royal Commissions, are less formal and therefore less likely to require the raft of powers conferred on Royal Commissions. Where public inquiries do require such powers, it would generally be more appropriate that they are convened as a Royal Commission, rather than some alternative form of inquiry. If other forms of public inquiry do require such powers, then it is appropriate that similar provisions regarding abrogation and similar protections regarding the use of evidence apply.

8–10 How effective in practice is the protection from legal liability conferred on Royal Commissioners, witnesses and advocates by s7 of the *Royal Commissions Act*? What, if any, changes are required? Should public inquiries other than Royal Commissions be afforded similar protections?

57. The CPSU supports legislation that affords Royal Commissioners, witnesses and advocates appropriate protections. It should also extend as necessary to employees of the Royal Commission fulfilling their employment duties.

58. Participants involved in other forms of public inquiry should be afforded similar protections.

8–11 (a) Should Royal Commissions and other public inquiries be required to:
(i) hold hearings in public; and
(ii) set out in their reports the evidence on which their decisions are based?
(b) Should these requirements be subject to specified exemptions? If so, what exemptions should apply?

59. The CPSU believes that it is important that Royal Commissions and public inquiries should have public hearings and their reports clearly identify the evidence on which findings are made. Any evidence taken in private should only be by necessity and should be the exception to the rule. The only exemptions should be where a party has a legitimate interest in maintaining privacy and, on balance, that legitimate individual interest

overrides the public interest in such matters being dealt with openly. Wherever possible, the Commissioner should merely de-identify such evidence in its report.

8–12 What rights of witnesses, in addition to those currently set out under the *Royal Commissions Act*, should be protected in proceedings of Royal Commissions and other public inquiries?

60. The rights of witnesses to procedural fairness should be enshrined in the legislation. In addition, there should be standing guidelines, binding on Commission proceedings, about how a witness' rights are to be protected in the course of a Royal Commission inquiry. The CPSU believes that the Salmon principles provide an appropriate reference point for such guidelines.
61. We would also recommend that the provision at s35A in the *Royal Commissions Act 1991* (ACT) requiring proposed adverse comments being put to individuals or entities prior to the finalisation of the report be replicated in the federal jurisdiction.
62. Another issue that has been raised by members involved in proceedings is the lack of procedural fairness in how these matters are commented on and reported. In some circumstances, Commissioners have named individual APS employees in draft and/or final reports. Further to this, senior members of the APS and/or the relevant Minister may make public statements that Code of Conduct proceedings will be initiated against certain officers.
63. In the case of the EI Inquiry, statements of this nature were made. These statements are made in the public arena and prior to any proper Code of Conduct investigation. Subsequent to such statements made during and after the EI Inquiry, employees subject to those Code of Conduct proceedings were absolved of responsibility. Furthermore, in some cases the staff investigated were found to have acted 'with due care and diligence' at all relevant times. The reputations of those individual officers were, however, unfairly harmed by the earlier public comments. In our view, the Government should not be allowed to make public statements about the initiation of Code of Conduct proceedings. It would only be appropriate for such public comment to be made after the Code of Conduct investigation has been completed, and the individual employee has had an opportunity to answer the allegations made against him/her.

Summary of Key Points

While this submission contains a raft of recommendations and each require equal consideration by the ALRC, below is a summary of the key concerns of the CPSU and CPSU members:

- Legislation should require the Government to table Royal Commission reports, formally respond to their recommendations and publish

information about the implementation of any recommendations and include time periods for each of the steps

- Agencies must be properly funded to properly implement recommendations that arise from an Inquiry.
- The Government must meet the legal and non-legal expenses incurred by witnesses required to appear before inquiries in their capacity as employees of an Australian Government agency or statutory authority.
- Legal assistance which is separate to that provided by an agency or to other agency employees who are called as witnesses may be necessary to avoid conflict of interests arising. Consequently independent legal advice must be available to all witnesses.
- Given the potential ramifications for both the employment and reputation of public servants who are called as witnesses, it should be open to a Commissioner to accept evidence in private, however in deciding whether to accept evidence in private the Commissioner should be required by the statute to balance the interests of claim to privacy with the interests of the public in having an open, public inquiry.