

A royal commission into Australia's response to the pandemic?*

Scott Prasser

Former senior researcher and policy adviser, federal and state governments.

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Abstract: This article explores the arguments for and against appointing a national inquiry in reviewing Australia's response to the recent pandemic. Although Australia had one of the lowest death rates in the world, and its economy bounced back faster than most, there were nevertheless concerns about several aspects of Australia's response to the pandemic. Could the number of deaths have been reduced? Were federal-state relations mishandled? Was there adequate parliamentary oversight? Did governments spend too much and were civil liberties curtailed too severely? Consequently, there have been calls for some sort of independent review, mostly in the form of a royal commission, into Australia's response to the pandemic. That countries such as the United Kingdom and New Zealand have appointed such inquiries into their pandemic response makes this an especially pertinent issue. Indeed, the final report of the Senate COVID-19 Committee released on the eve of the 2022 federal election, recommended the establishment of a royal commission. To date, none have been appointed. A range of different options are explored, and attention is given to the particular challenges in appointing a national royal commission in a federal system like Australia's.

INTRODUCTION

There have been many calls from a wide variety of different sources for some sort of independent inquiry, mostly in the form of a national royal commission, to review

Australia's response to the recent pandemic. These calls range from editorials¹, professors of law², former prime ministers³, retired Liberal and Labor premiers,⁴ commentators⁵, think tanks⁶ and some personally affected by the pandemic.⁷ Importantly, and significantly, even the Senate parliamentary committee inquiry formed at the beginning of the pandemic⁸ recommended in its final report that a 'Royal Commission be established to examine Australia's response to the COVID-19 pandemic to inform preparedness for future COVID-19 and future pandemics'.⁹

Certainly, although Australia had one of the lowest death rates in the world, and its economy bounced back faster than most after the pandemic, which even the aforementioned Senate Committee admitted,¹⁰ there were concerns about Australia's responses to the pandemic including: the rollout of the vaccines; advice by State chief health officers; contradictory policy responses across the States; media misreporting; the constitutionality and impacts of State border closures; effects of lockdowns; the suspension of parliamentary sittings; loss of civil liberties; excessive use of police force; impacts of enforced schools closures; and the role of the National Cabinet.

This article seeks to assess whether a national royal commission type public inquiry would be suitable to conduct such an investigation given the complexities of the COVID-19 issue, and our federal system with responsibilities for managing the

¹ Editorial, 'Inquiry needed into wrongs and rights of COVID response'. *Sydney Morning Herald*, 22 April 2022.

² George Williams, 'COVID-19 mistakes? ... we made a few so let's take a look'. *The Australian*, 21 March 2022.

³ See Denis Shanahan, 'Tony Abbott calls for COVID-19 inquiry to prepare us for next pandemic'. *The Australian*, 13 August 2021.

⁴ See comments by Jeff Kennett and Peter Beattie in Shane Wright and Katina Curtis, 'People had tried to minimise the errors': Leaders call for royal commission into nation's covid response'. *The Australian*, 20 December 2020.

⁵ Peta Credlin, 'Why no inquiry into managing COVID?'. *The Australian*, 16 September 2021.

⁶ See Institute of Public Affairs, 'Draft terms of Reference for a Royal Commission into the COVID-19 Response'. 26 September 2022; Monica Wilkie, *Victims of Failure-how the COVID-19 policy response let down Australians*. Sydney: Centre for Independent Studies, December 2020.

⁷ Mary Ward and Lucy Carroll, 'Grieving parents call for inquiry into handling of vaccine rollout'. *Sydney Morning Herald*, 19 May 2022.

⁸ The Senate Covid-19 inquiry was appointed in April 2020, produced several interim reports and presented its final report in April 2022 on the eve of the May federal election and then disbanded.

⁹ Senate COVID-19 Committee, *Final Report*. Canberra: Commonwealth Parliament, 2022, Recommendation 17, p. xii.

¹⁰ Senate COVID-19, *Final Report*, para 1.3, p. 1.

pandemic spread across different levels of government and nine different jurisdictions. Whether it would even be feasible to be formed given those federal and constitutional issues and the challenges in setting its terms of reference, appointing suitable members, and developing effective processes, is a related issue. Why the present Commonwealth Government has desisted to date from appointing such a royal commission is another issue. After all, it is just as instructive to explore why a government does not appoint an inquiry, as to why it does. Governments often seek to keep issues off the agenda, what is called ‘non-decision-making’ or ‘deliberate decisions not to act’.¹¹

What makes the failure to appoint an inquiry odd is that the aforementioned Senate Committee that recommended a royal commission so boldly on the eve of the 2022 federal election, was chaired by Labor front-bencher, Katy Gallagher, now Minister for Finance and Albanese in opposition¹² and later in government, supported an inquiry.¹³ It certainly cannot be because of the new government’s reluctance to evoke the royal commission instrument as it soon appointed a royal commission into one its predecessor’s defunct programs.¹⁴ Failure to appoint a royal commission also flies in the face of historic practice when governments after some calamitous event often appoint a royal commission to discover the facts, allocate responsibility and develop lessons for the future.¹⁵ Indeed, as then Justice Holmes, who chaired the 2011 Queensland Flood Commission of Inquiry¹⁶ observed concerning the demand for a review following disasters:

¹¹ Peter Bachrach and Morton S. Baratz, ‘Decisions and Non-Decisions: An Analytical Framework’. *American Political Science Review* 57(3) 1963, pp. 632-42.

¹² As stated in address to National Press Club, 25 January 2022 reported in Phillip Coorey, ‘Any pandemic probe must also look at the states’. *Australian Financial Review*, 28 January 2022.

¹³ See Phillip Coorey, ‘Any pandemic probe must also look at the states’. *Australian Financial Review*, 28 January 2022 and Albanese quoted in ‘Australian virus response was ‘overreach’ *The West Australian*, 20 October 2022.

¹⁴ *Royal Commission into Robodebt Scheme* was appointed in August 2022.

¹⁵ See Michael Eburn and Stephen Dovers, ‘Learning Lessons from Disasters: Alternatives to Royal Commissions and Other Quasi-Judicial Inquiries’. *Australian Journal of Public Administration* 74(4) 2015, pp. 495-508, which provides a detailed list of the number and type of inquiries into disasters; the most recent example was the Commonwealth-State *Royal Commission into National Natural Disaster Arrangements* appointed by the Morrison Government in 2020.

¹⁶ The Hon Catherine Holmes, now retired from the Queensland Supreme Court, chairs the *Royal Commission into the Robodebt Scheme* appointed by the Albanese Government in 2022.

... contemporary society does not countenance a fatalistic approach to such inevitabilities, even if their occurrence is unpredictable. There is an expectation that government will act to protect its citizens from disaster, and that all available science should be applied so that nature and extent of risk is known, and appropriate action taken to ameliorate it.¹⁷

Adding to the mystery, has been the uncharacteristic and inexplicable failure of the current federal Opposition to call for an inquiry or royal commission into the pandemic. Is the Opposition concerned that any inquiry might reveal too much about its time in office, or does it not trust the present government to appoint one that would be fair and independent?

WHAT ARE ROYAL COMMISSIONS?

Given the calls for a royal commission, it is important to understand what they are.

Royal commissions are a particular form of public inquiry. These are ad hoc, temporary bodies appointed by executive government with members from outside of government or parliament, with open processes and which report publicly. Australian royal commissions, unlike their United Kingdom (UK) counterparts, have since federation been established under specific legislation, the *Royal Commissions Act 1902* and have extensive coercive powers of investigation concerning witnesses and procurement of documents. Royal commissions only make recommendations, not enforceable decisions like courts, and whether chaired by a sitting or former judge, they are not in our system of government with its separation of powers a ‘judicial inquiry’ – the judiciary does not appoint public inquiries, only executive government does. As royal commissions are ‘bespoke’ instruments appointed only at the discretion of executive government they are individually tailored to meet the issue being reviewed. In Australia, they are not triggered automatically by some constitutional or legislative requirements or are part of any integrated and structured policy process as in Nordic

¹⁷ Catherine Holmes, (Chair), Queensland Flood Commission of Inquiry, *Final Report*. Brisbane: Queensland Government, 2012, p. 38.

countries.¹⁸ Nor are they appointed by parliament or need parliamentary approval.¹⁹ Parliament is only involved in passing the legislation that gives royal commissions their powers of investigation.²⁰ Federally, they are not even required to table their reports in parliament unlike some permanent advisory bodies such as the Productivity Commission.

Because of their statutory powers of investigation, the controversial and important nature of the issues they review, royal commissions are seen as the apex of public inquiries and thus attract extensive media and public attention.²¹ They also attract more resources than other permanent advisory-investigatory bodies like the Ombudsman or anti-corruption bodies and or any parliamentary committee.²² Governments rarely refuse a royal commission's request for additional terms of reference, more resources, or more time.²³ Although governments decide when to establish a royal commission, and decide its terms of reference, membership and reporting date, they are not without risks. Some royal commissions have interpreted their terms of reference broadly, probed into unexpected areas and produced reports fatal to the appointing government. They can also produce poor quality reports, take too long, cost too much and thus fail in terms of both policy and political objectives.²⁴

¹⁸ Kira Pronin, 'Commissions of inquiry in the Nordic countries', in Scott Prasser, (ed), *New directions in royal commissions and public inquiries: Do we need them?*. Redland Bay: Connor Court Publishing, 2023, pp. 367-86.

¹⁹ In 2020 a petition calling for a royal commission into the media, started by former Labor prime minister Kevin Rudd, that garnered 500,000 signatures, was rejected by the Morrison Government on the grounds that 'Royal commissions are initiated by the Governor-General on the advice of the Government of the day' – see Paul Fletcher, Minister for Communications, Letter to Mr Ken O'Dowd MP, 30 January 2021.

²⁰ Nicholas Aroney, 'The constitutional first principles of royal commissions', in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential*. Ballarat: Connor Court Publishing, 2014, pp. 23-42.

²¹ Christian Kerr, 'Royal commissions and the press – seagulls at the lawyers' picnic', in Prasser and Tracey, *Royal Commissions and Public Inquiries*. pp. 281-94.

²² For the costs of recent Commonwealth royal commissions see, Prasser, *Royal Commissions and Public Inquiries in Australia*. pp. 109-111.

²³ The 1983 Commonwealth *Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam* (Royal Commission into Agent Orange) was denied extra resources by the Hawke Government which its chair, Justice PG Evatt, saw as interference in his inquiry (see *Courier-Mail* 14 July 1984).

²⁴ Prasser, *Royal Commissions and Public Inquiries*. pp. 129-38.

OVERSEAS DEVELOPMENTS

If the current Commonwealth Government has been reluctant to appoint a royal commission into the pandemic, overseas it has been different.

The United Kingdom (UK) finally initiated its *COVID-19 Inquiry* in June 2022, a year after being promised by the Johnson Conservative Government following political pressure from families adversely affected, the cross-benches, the media, and parliamentary committee assessments. This was despite a range of House of Commons (HC) and House of Lords (HL) committees into different aspects of the pandemic. The HC Public Administration and Constitutional Affairs Committee, although acknowledging that parliamentary committees could possibly be an alternative to a formal public inquiry nevertheless concluded that:

*... an independent public inquiry is the best means to consider the Government's response to the COVID-19 pandemic ... the prospective inquiry into COVID-19 response will be of such a scale that an independent public inquiry should be established.*²⁵

That the UK had a far less successful outcome from the pandemic in terms of deaths than Australia and other countries (but below the OECD average) was a further contributing factor. The UK *Covid-19 Inquiry* was appointed under the *Inquiries Act 2005* with considerable powers of investigation and is being chaired by a former senior judge, now a member of the House of Lords.²⁶ It has a large supporting staff and broad terms of reference that include: identifying the government's mistakes; whether more lives could have been saved; and to compare the UK's response to overseas efforts; and to report on 'lessons to be learned'.

Sweden was more proactive. A commission of inquiry (Swedish *COVID-19 Commission* or *Corona Commission*) was appointed in June 2020 at the beginning of the pandemic with full bipartisan support, to report on the nation's response as the pandemic progressed. Presided over by a supreme court judge, supported by seven

²⁵ House of Commons Public Administration and Constitutional Affairs Committee, *A Public Inquiry into the Government's response to the COVID-19 pandemic*. Fifth Report of Session 2019-21, London: House of Commons, September 2020, p. 6.

²⁶ Baroness Heather Hallett was a judge of the Court of Appeal and in 2019 was appointed to the House of Lords where she sits as a cross-bencher (ie non-party affiliated).

commissioners with expertise across health, public policy, ethics, and representatives from local government and business, it produced several interim reports during the pandemic. Its final report, although largely endorsing Sweden's distinctive response to the pandemic,²⁷ nevertheless highlighted serious flaws in terms of leadership and the slow initial responses to the pandemic.

In December 2022, the then Ardern Labour Government in New Zealand (NZ) announced a royal commission into the pandemic. Although NZ, like Australia, had performed well during the pandemic, and it had a parliamentary committee overseeing the government's pandemic responses (Epidemic Response Committee), it has succumbed to pressure and appointed a royal commission. The official documentation accompanying the royal commission's announcement explained its appointment was because there 'had been criticisms of NZ's preparedness to deal with COVID-19, of the organisation of its response, and of particular health measures and their impact on people's lives'.²⁸ That the Ardern Government was suffering declining popularity might also explain the appointment. The full title of the inquiry – the *Royal Commission of Inquiry into Lessons Learned from New Zealand's Response to COVID-19 That Should be Applied in Preparation for a Future Pandemic*, best explains its aims. Established under the new *Inquiries Act 2013*,²⁹ the royal commission has coercive powers of investigation and as Ardern said, the 'royal commission ... is the highest form of public inquiry'³⁰ in New Zealand, reserved only for matters of great gravity and breadth. Interestingly, New Zealand appointed a royal commission (Influenza Epidemic Commission) following the 1919 Spanish Flu pandemic, but Australia did not.

²⁷ This involved almost no lockdowns, limited restrictions, few school closures and reliance on promoting 'herd immunity'. See Johan Anderberg, *The Herd: How Sweden chose its own path through the worst pandemic in 100 years*. Melbourne: Scribe, 2022.

²⁸ Parliamentary Counsel Office, *Royal Commission of Inquiry (COVID-19 Lessons) Order 2022*. Wellington: NZ Government, 2022, p. 3.

²⁹ This new legislation was the result of the 2008 New Zealand Law Commission's review of the *Commissions of Inquiry Act 1908* – see NZLC, *A New Inquiries Act*. Report 102, Wellington: New Zealand Government, 2008. For a variety of reasons, it took a further five years before new legislation was enacted.

³⁰ Jacinda Ardern, Media Statement, 5 December 2022.

WHAT ABOUT AUSTRALIA?

All that Australia has had to date to review Australia's national response to the pandemic was the Senate COVID-19 Committee. Its focus was mainly on the Commonwealth's actions. There were several federal and state parliamentary committee inquiries assessing aspects of the pandemic from their specific roles covering issues like the economic package, human rights and delegated legislation, rather than providing any comprehensive national overview of government responses to the pandemic.³¹ The Senate COVID-19 Committee dominated by the Opposition, Green and Independent senators, and reporting in the lead up to the 2022 May federal election, hardly constituted an independent or expert review. It was critical of almost all aspects of the Morrison Government's response to the pandemic. It was in short, a political and partisan exercise. It reflected all too well recent assessments that federal parliamentary committees have become increasingly partisan and fractious often failing to reach a consensus.³² That the Senate Committee itself recommended, as noted, a royal commission for further assessment of the pandemic perhaps indicated its acceptance of the limitations of parliamentary committees to perform such broad-ranging tasks, or was this too, just a politically motivated recommendation?

Of course, some commentators have concluded,³³ that an 'independent review' into Australia's pandemic response has already been held in the form of the self-proclaimed, *Independent review into Australia's response to COVID-19* chaired by Peter Shergold, former head of the Prime Minister's Department and funded by three philanthropic groups.³⁴ Although its report was critical of different federal and State government responses and produced useful insights, it hardly constituted an 'independent review'. Its processes were not public, submissions were confidential, no evidence was taken on oath, it had no powers to procure information from across the

³¹ Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees'. *Alternative Law Journal*, 45(3) 2020, pp. 180-7; Peter Wilkins, David Gilchrist. John Phillimore, 'Independent review of emergency economic stimulus measures: Global Financial Crisis and COVID-19'. *Australian Journal of Public Administration*, 80(1) 2021, pp. 12-28.

³² John Halligan, 'Conflict and Consensus in Committees of the Australian Parliament'. *Parliamentary Affairs*, 69 2016, pp. 230-48; There was a dissenting report from Coalition members of the Senate COVID-19 Committee.

³³ Jennifer Hewett, 'Australia COVID: An independent review reveals how governments got the pandemic so wrong'. *Australian Financial Review*, 20 October 2022.

³⁴ The Munderoo Foundation; the John and Miriam Wylie Foundation; and the Paul Ramsay Foundation.

jurisdictions, and its membership was not seen as expert especially in relation to the key area of health. Also, as a privately initiated body it lacked any official status.³⁵ Because of these flaws it was easy for governments to ignore its report. Victorian Premier Daniel Andrews dismissed the report as ‘written by a bunch of academics’.³⁶ Nor has it become part of the usual intergovernmental processes of decision making or necessitated a formal government response(s) to its recommendations.

CRITERIA FOR AN EFFECTIVE REVIEW

The issue then, is what form should a review of Australia’s response to the pandemic, who would appoint it and how, given the breadth and complexity of the issues and the challenges of the federal system, would it work.

Criteria for an effective review should include: formal appointment by government giving it official status; wide terms of reference to cover federal and state government actions; non-partisan, independent, and expert membership from across several disciplines;³⁷ appropriate statutory powers to call witnesses and procure information from all jurisdictions; adequate resourcing and timeframes; open public processes; release of final report and evidence collected; and recommendations that are not only ‘doable’ – constitutionally, politically, and administratively – but focus on what might be learnt for the future rather than only seeking to allocate blame – a common criticism of post-disaster inquiries.³⁸

³⁵ Scott Prasser, ‘A ‘privatised’ review of the COVID pandemic is not the answer’. *Canberra Times*, 8 April 2022; Jack Waterford, ‘Fault lines Peter Shergold review: Opinions of the great and good have no special weight’. *Canberra Times*, 21 October 2022.

³⁶ See Mitch Clarke, ‘Why Dan hasn’t read the damning COVID report’. *Herald Sun*, 20 October 2022.

³⁷ Alfred Moore, Michael K. McKenzie, ‘Policy-making during crises: how diversity and disagreement can help manage the politics of expert advice’. *British Medical Journal* 321 October 2020. Accessed at: <http://www.bmj.com/>.

³⁸ Allan Holmes, ‘A reflection on the Bushfire Royal Commission: Blame, Accountability and Responsibility’. *Australian Journal of Public Administration* 69(4) 2010, pp. 387-91.

SELECTING THE RIGHT INSTRUMENT

What then is the right instrument to meet these criteria? Others have also considered this issue in relation to other disasters and crises.³⁹ Some alternatives include:

Federal government departments

Some have suggested that key Commonwealth departments such as health or central agencies like the Prime Minister's Department could conduct a review. Notwithstanding their considerable expertise and knowledge, their direct involvement in providing advice, and in developing and implementing policies during the pandemic means they could not be seen as independent. Moreover, the public service and its over-compliance to government demands was seen as part of the problem during the pandemic and these days is perceived to be increasingly politicised.⁴⁰

Another federal parliamentary committee

Nor would a further Commonwealth parliamentary committee inquiry work. Although such committees are public and have powers of investigation, their members are after all politicians and partisan who would play the party game. This was all too evident, as discussed, with the Senate COVID Inquiry. There would also be issues in gaining co-operation from State parliaments and governments, and such committees have limited resources.

State parliamentary committees

State parliaments had numerous committees to review their respective governments' responses to the pandemic. Some were specially created to report on their government's response to the pandemic on an ongoing basis. Others examined the pandemic from their roles covering human rights, health, and public accountability issues. Some were affected by partisan politics. The Victorian Parliament's Pandemic Declaration Accountability and Oversight Committee that reviewed the Health

³⁹ Eburn and Dovers, 'Learning from Disasters', pp. 504-5.

⁴⁰ Danielle Wood, Kate Griffiths, and Anika Stobert, *New politics: A better process for public appointments*. Melbourne: Grattan Institute, 2022; In 2022 the Victorian Ombudsman initiated an inquiry into politicisation of the public service.

Minister's pandemic orders, was seen by the Opposition as too easily acquiescing to executive government decisions and not being evidence-based.⁴¹

State(s) royal commissions or inquiries

Of course, each State could appoint its own royal commission or public inquiry. This is not without merit but any such inquiry would be confined to the State's own jurisdiction and unable to review national issues. Of course, the States could come together and form their own national royal commission without Canberra. This would be unprecedented, but more pertinently, it would be unable to review the Commonwealth's economic, social welfare, immigration policy issues and international agreements and actions. To date, no State has announced any overarching royal commission or inquiry, though there were several commissions of inquiry during the pandemic into certain aspects of government administration.⁴² A recent development was Western Australia's appointment in January 2023 of a three person 'independent' inquiry into to 'review the State's COVID-19 pandemic management and response',⁴³ This inquiry lacked any powers of investigation, and its expertise and independence may be questioned.⁴⁴

Commonwealth Auditor-General

The Commonwealth Auditor-General is another suggestion some have proposed should be utilised more fully instead of royal commissions.⁴⁵ After all, the Auditor-General is an independent, statutory based officer, highly regarded, and experienced body in reviewing projects and reports to Parliament. It was also monitoring

⁴¹ See Minority Report, Pandemic Declaration Accountability and Oversight Committee, Review of the Pandemic (Quarantine, Isolation and Testing) Orders, Melbourne: Victorian Parliament, July 2022, pp. 82ff.

⁴² In Victoria there was the *COVID-19 Hotel Quarantine Inquiry* (2020), and NSW appointed the *Special Commission of Inquiry into the Ruby Princess* (2020) each of which reviewed quarantine issues.

⁴³ Mark McGown and Amber-Jade Sanderson, Media Statement, 'Independent experts appointed to review Western Australia's COVID-10 management and response', 23 January 2023.

⁴⁴ Its members included a former Liberal health minister, a professor who was head of the State's Arts Department and another who was a member of the Australian Competition and Consumer Commission – none had health qualifications.

⁴⁵ John Phillimore and Peter Wilkins, 'Can – and should – royal commissions provide policy advice?' in Prasser, *New directions in royal commissions*, pp. 277-92.

Commonwealth funding arrangements and approval processes during the pandemic.⁴⁶ However, its jurisdiction and resources are limited, and it lacks the prestige of a royal commission.

Commonwealth Ombudsman

There is also the Commonwealth Ombudsman. The office is established by statute and the ombudsman is appointed for a fixed term and can only be removed by Parliament. It has the powers of a royal commission and some governments have referred issues of probity and integrity to be reviewed by the ombudsman. Nevertheless, its focus is primarily on administrative conduct and procedures and its limited resources and experience makes it unsuitable to review a complex issue like the pandemic. Similarly, anti-corruption commissions now found in all Australian jurisdictions, would also be inappropriate given their narrow focus on integrity and corruption issues, the many controversies concerning their operations, their limited resources and parliamentary oversight of their operations.⁴⁷

Productivity Commission

Another alternative is the current Commonwealth Productivity Commission (PC). The PC and its antecedents⁴⁸ has a long history of producing quality reports on an increasingly wide variety of public policy issues. It is legislatively backed, can enforce attendance at hearings, take evidence under oath, and procure information. It has public hearings, produces draft reports, and releases its findings which must be tabled in parliament. It is legislatively required to act in the public interest and 'to provide a variety of viewpoints and options'.⁴⁹ It also has a permanent and competent staff and

⁴⁶ For a summary see Australian National Audit Office, *Responding to disaster and pandemic issues*, paper presented to ASOSAI Symposium, Thailand, 8 September 2021, Canberra: Commonwealth Government, 2021.

⁴⁷ Helen Reed, 'The Permanent Commissions of Inquiry – A Comparison with Ad Hoc Commissions – Part I and Part II'. *Australian Journal of Administrative Law* 2 1995, pp. 69-90 and pp. 156-68; In Queensland during 2021-2, a controversy concerning the Crime and Corruption Commission (CCC) and reports by the Parliamentary Crime and Corruption Committee led to the CCC's Chair standing down and a commission of inquiry appointed to review its operations.

⁴⁸ These include the Tariff Board (1921-1973) which under the Whitlam Labor Government became the Industries Assistance Commission, later the Industry Commission and now the Productivity Commission.

⁴⁹ *Productivity Commission Act 1998* (Cth) s8(3).

can recruit Associate Commissioners with the relevant expertise for particular reviews.⁵⁰ Although it usually takes references from the federal government, the PC can, as its legislation states, ‘undertake on its own initiative, research about ... industry, ... and productivity’ and thus it could initiate a research based review of government responses to the pandemic. The drawback is that such research reviews do not have public hearings, lack powers to procure information, and cannot make recommendations. Moreover, the PC would be unwise to launch even a research type review unless supported by the new Albanese Government given recent attacks from Labor Party affiliated trade unions calling for its abolition.⁵¹

SO, WHAT ABOUT AN AUSTRALIAN ROYAL COMMISSION?

There remains then, the often used, and much demanded, but as yet dormant royal commission instrument. Despite some cynicism about governments’ politically expedient motives in appointing royal commissions and doubts about their impact, they are what the public demand when scandal erupts and calamitous events occur. Royal commissions are seen as independent, prestigious and powerful. Because of this the Australian Law Reform Commission in its 2009 review of the Commonwealth’s *Royal Commission Act 1902* (Cth) recommended not only continuation of the royal commission nomenclature, but also that these bodies should retain the greatest level of investigation powers to probe major issues.⁵² The New Zealand Law Commission’s review of similar legislation made the same conclusion in 2008 which is reflected in the *NZ Inquiries Act 2013*.⁵³

Certainly, both the Commonwealth and the States have a long history of appointing royal commissions into calamitous events and major areas of public policy. Since federation there have been 139 Commonwealth royal commissions. Many have been joint federal-state royal commissions enabling them to tackle national issues and to call

⁵⁰ Jenny Stewart and Scott Prasser, ‘Expert Advisory Bodies’, in Brian Head and Kate Crowley (eds), *Policy Analysis in Australia: The State of the Art*. London: Policy Press, 2015, pp. 151-66.

⁵¹ ‘Call to ditch Productivity Commission’. *Australian Financial Review*, 15 December 2022; ‘Productivity Commission plagued by policy “group think” says ACTU’. *Australian Financial Review*, 6 January 2023.

⁵² Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* Report 111, Sydney: Commonwealth Government, 2009, pp. 105-16.

⁵³ See New Zealand Law Commission, Report 102.

witnesses and garner evidence from across jurisdictions. During the last decade there has been an upsurge in Commonwealth royal commissions numbers with ten being appointed between 2013-22 – three are currently running.

Issues to be resolved

Regardless of this extensive use of royal commissions, the nature of the pandemic means many issues need to be settled before one could be appointed and its effectiveness assured.

Given that executive government alone appoints a royal commission, a key issue is whether the current new federal government wants to appoint one into the pandemic. After all, since coming to office in 2022, the Albanese Government has had several opportunities to establish such an inquiry. One, was shortly after the release of the Senate Committee COVID-19 report in April just a month before Labor gained office. Another opportunity occurred after the release of the Shergold Report in October 2022 when the Prime Minister made supportive statements for a wide-ranging inquiry, but no announcement followed.⁵⁴ Such reluctance could just be partisan concern as any such inquiry must review the States and that Labor held office across five jurisdictions during this period.⁵⁵ That one Labor state, Victoria, where there were considerable controversies over its pandemic responses, was facing an election in November 2022, may have been another factor.

Related to this would be the challenges in forming a joint federal-state royal commission – essential for any review of the nation’s response to the pandemic given the States’ pivotal constitutional, policy and administrative roles.⁵⁶ There were also many controversies concerning State lockdowns, border and school closures, suspension of civil liberties, and health injunctions all of which attracted criticisms.⁵⁷ By itself, a Commonwealth royal commission would lack the constitutional powers to

⁵⁴ See Coorey, *Australian Financial Review*, 28 January 2022 and Albanese quoted in ‘Australian virus response was ‘overreach’ *The West Australian*, 20 October 2022.

⁵⁵ The Labor States and Territories were: Queensland, Victorian and Western Australian, Northern Territory and ACT governments. Victoria had an election in November 2022.

⁵⁶ Nicholas Aroney and Michael Boyce, ‘The Australian Federal Response to the COVID-19 Crisis’, in Nico Steytler (ed), *Combating the COVID-19 pandemic; Federal a boon or bane?*. London: Routledge, 2021, pp. 299-316.

⁵⁷ Peter Shergold, (Chair), *Independent review into Australia’s response to COVID-19*, 20 October 2022; Gigi Foster, *Do lockdowns and border closures serve the “greater good”?*. Redland Bay: Connor Court Publishing, 2022.

investigate these State areas of responsibility. Although the States have joined many Commonwealth initiated royal commissions in the past, this time they may be less enthusiastic given the potential of such a royal commission to put their actions under the spotlight and possibly produce embarrassing findings. Constitutionally the Commonwealth cannot make the States join a royal commission. It is worth noting that several of the countries that appointed public inquiries into the pandemic – UK, NZ and Sweden – are all unitary regimes and do not have to deal with sub-national governments that hold formal constitutional powers, and real political clout.

Even if the States agreed to a joint royal commission that would just be the beginning of a host of issues to be resolved. Terms of reference would have to be agreed with eight other governments. Negotiations would be intense, slow and political. Interest groups too, would have to be consulted. All would seek terms of reference to deflect scrutiny from their roles. Another issue is whether the terms of reference should include an assessment of parliamentary oversight during the pandemic – another area much criticised.⁵⁸ Should an executive appointed inquisitorial inquiry investigate the performance of the legislature? The end result could be terms of reference so compromised that it would lead to an inquiry bypassing important issues – a ‘whitewash’ in the making.

Determining the royal commission’s chair, and if thought necessary, other members, is fundamental in ensuring a public inquiry is effective. Although current or former judges chair most Commonwealth royal commissions because of their perceived independence and the legal nature of some issues⁵⁹ they can be detrimental to tackling complex policy issues involved in the pandemic. Hogan-Doran KC summed up the issue this way:

...the skills required may cross disciplinary boundaries, and include for example to collect, analyse and evaluate scientific data. A lack of public administration and policy experts may be exacerbated by inquiry commissioners, often former judges, and lawyers tending not to have deep knowledge of policy and administration. Whether

⁵⁸ John Warhurst, ‘Parliament has been deemed surplus to requirements’. *Canberra Times*, 23 June 2020.

⁵⁹ Of the 54 Commonwealth royal commissions appointed between 1950-2022, only 10 were not chaired by a current or former member of the judiciary or were senior legal counsels.

judges of any kind are appropriate at all may be debated and practical utility (or political wisdom) of some of their recommendations may be open to question.⁶⁰

This needs careful consideration. If an inquiry is to have multiple members how should they be selected – representative of different interests and jurisdictions or expert? If ‘expert’ from what disciplines?⁶¹ Of course, if too many members are appointed, the inquiry may be unable to achieve unanimity for its recommendations resulting in minority reports which adversely affects their impact.⁶²

The royal commission’s processes would be another issue. Should it rely on the traditional approach of seeking submissions, holding public hearings, and cross-examining witnesses by Counsel Assisting in an inquisitorial manner? Such approaches have been criticised for making royal commissions appear and to operate as courts of law, undermining effective policy development, focussing too much on allocating blame, making inquiries slow, cumbersome, and costly. Or should this royal commission, like some of its predecessors, while using public hearings to inform itself of a range of views and to allow those with grievances to be heard, supplement this by a well-resourced research team to both gain and analyse the masses of complex information collected?⁶³ After all, the data concerning the pandemic would be varied, complex and extensive and royal commissions do not always handle such matters well.⁶⁴

Then there is the expected reporting timeframe for this royal commission. The average length for recent Australian royal commissions is almost 20 months, but some take four

⁶⁰ Dominique Hogan-Doran, ‘Lessons for Government from recent Royal Commissions and Public inquiries, paper presented to Law Society of New South Wales, Government Solicitors’ Conference 2019, 3 September 2019, para 50, p. 17.

⁶¹ See HC, *A Public Inquiry*, pp. 11-14 for discussions about inquiry chairs and members.

⁶² See Prasser, *Royal Commissions and Public Inquiries*, pp. 212-14.

⁶³ Such was the case of the 1981-4 Royal Commission into the Activities of the Ship Painters’ and Dockers’ Union – see Frank Costigan, ‘Organized Crime and a Free Society’. *Australian Journal of Criminology* Vol 17, March 1984, pp. 7-19; Frank Costigan, (Chair), Royal Commission into the Activities of Federated Ship Painters’ and Dockers’ Union, *Final Report Vol 2*. Canberra: Australian Government Publishing Service, 1984, p. 6, pp. 21-29,

⁶⁴ See Margaret Cook, ‘Drowning in data: The Queensland Floods Commission of Inquiry’, in Prasser, *New directions in royal commissions*. pp. 127-49; Richard Baker, ‘Assessing complex technical issues: Public inquiries or commissions’. *Political Quarterly* 59(2) 1988, pp. 178-89.

years. The NZ royal commission into the pandemic is due to report in mid-2024. Such long gestation periods can cause the public and the media to lose interest, and thus affect the implementation of recommendations. Also, the royal commission might find itself reporting to a different government by the time it reports. Releasing several interim reports, maximising modern communications, holding special workshops and conferences is how that problem might be overcome.

Because royal commissions, are often expensive, especially if involving a swathe of legal processes, they attract criticism and thus take attention away from the core focus of the royal commission. Care needs to be taken in ensuring that the resources allocated are not extravagant and are used effectively on those processes and methodologies to meet a royal commission's main aims. In New Zealand the new 2013 legislation requires royal commissions to limit their timeframes, use less adversarial processes, and to take into account their costs.

Penultimately, as mentioned, royal commissions make no binding judgements, just recommendations. Executive government alone decides to accept or reject their proposals but are influenced by factors such as the quality of the report, the rigour of its methodology, and the 'doability' of its recommendations along with public opinion and media attention.⁶⁵ Given the complexity of the issues concerning the pandemic, the conflicting 'expert' advice involved, the controversies surrounding government actions, and the powerful interests involved, care would need to be taken as to how a royal commission presented its report, framed its recommendations and explained such complex issues. This requires both a chair and staff of considerable talent with an appreciation of the wider environment in which any royal commission must work and the ephemeral nature of royal commissions, if it wants to see its recommendations implemented. Some royal commissioners have ignored these at their peril.

Finally, as a joint federal-state royal commission, no single government would be fully responsible to respond or oversee the implementation of all its recommendations. This issue was encountered with the federal-state *Royal Commission into Aboriginal Deaths in Custody* (RCADIC) (1987-91). Some 116 of its 339 recommendations (34 per cent) were for the States to implement with only 29 (8.5 per cent) being the

⁶⁵ Michael Mintrom, Deidre O'Neill, and Ruby O'Connor, 'Royal Commissions and Policy Influence'. *Australian Journal of Public Administration* 80(1) 2020, pp. 80-96.

Commonwealth's sole responsibility.⁶⁶ The remainder (194) required joint action needing considerable intergovernmental negotiation and resulting in long delays. There was confusion about who was responsible for what. State priorities did not always coincide with federal ones. Despite the establishment of extensive post inquiry mechanisms to report on implementation progress, there has been considerable debate as to what has actually been implemented, and whether the RCADIC was even worth it.⁶⁷

CONCLUSIONS

So, in summary, appointing a royal commission into the pandemic is fraught with many political, administrative and policy difficulties. Nevertheless, it is warranted as there were just too many issues which some alleged reflected an overreaction by all governments around Australia which set an unhealthy precedent for managing future policy problems including in the way debates were framed, expert advice used, parliament bypassed and criticism smothered.

This article has sought to highlight that despite the flaws of royal commissions, they remain, in our increasingly politicised government, the 'institution of last resort'. As Kenneth Hayne, who chaired the 2017 Royal Commission into Misconduct in the Banking Industry observed, the resort by governments to royal commissions, and the public's demand for their appointment on 'difficult issues of public policy' suggests that our 'legislative, executive and judicial [structures] – are not working as they should'.⁶⁸ He believed that current political and policy practice is characterised by an 'emphasis on party difference ... with decision making processes that are ...opaque ...skewed ...captured by the interests of those large and powerful enough to lobby government behind closed doors'.⁶⁹

⁶⁶ Deloitte Access, *Review of the Implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody*. prepared for Department of Prime Minister and Cabinet, Canberra: Commonwealth Government, 2018.

⁶⁷ Elena Marchetti, 'Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody'. *Macquarie Law Journal* 5, 2005, pp. 103-25.

⁶⁸ Kenneth Hayne, 'On Royal Commissions'. Address, Centre for Comparative Constitutional Studies Conference, Melbourne Law School, 26 July 2019.

⁶⁹ Hayne, 'On Royal Commissions'.

A joint federal-state royal commission into the pandemic if properly formed, with the right members and most importantly, appointed with the best of intentions by government(s) and with full bipartisan support, to really learn from the pandemic, to identify faults and to reform processes, could be effective. However, this requires alignment across many different issues in forming such a public inquiry. It is a big ask of any government. It is an even bigger ask across nine governments in a federation like Australia.

The key issue is not whether a royal commission is the most appropriate instrument to conduct such a review of the pandemic, for in the absence of any other viable alternatives, it clearly is. Neither parliamentary committee nor review by any existing government agency would do. Rather, the critical question is whether in our current political system and environment such a royal commission could be formed and be given the imprimatur to ask the right questions so the public gets answers about their concerns and for governments to take stock of how they just might do things better next time before we all forget what happened during the pandemic.