

## ON ROYAL COMMISSIONS

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Rather than speak about the work of the Financial Services Royal Commission, I want to say something about what seems to be the place Royal Commissions are now being given in our democracy and what that may say about the structures of government.

Some of you will have seen that, earlier this week, John Pesutto, formerly Victoria's shadow Attorney General and now a Senior Fellow at the School of Government at this University, wrote a piece published in The Age newspaper in which he said he was becoming increasingly worried about what the 'apparent proliferation of Royal Commissions is saying about our standing institutions of government'. And I should say that, when first working on this speech some weeks ago, I had thought that the central question I should pose for you tonight is the question Mr Pesutto asked. What does the use of Royal Commissions tell us about how our existing governmental structures are working?

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And the immediate answer to that question may be that it shows that those structures – legislative, executive or judicial – are not working as they should. If they were, why would we want or need so many Royal Commissions?

But to answer the question at any deeper level requires some unpacking of the issues.

To do that, I need to begin from three basic and obvious observations.

First, the legislative and the executive branches of government make all sorts of inquiries and gather all sorts of information without appointing a Royal Commission. And much of that information is assembled compulsorily. Committees of the Parliament conduct many inquiries. The executive gathers a lot of information about what is happening in society whether by census or otherwise. Compulsory gathering of information is not the sole province of Royal Commissions.

Second, appointing a Royal Commission is a political act. Government establishes the Commission and appoints the Commissioner or Commissioners. And governments often appoint a Commission in response to what the political branches see as public pressure for an open and transparent examination of some issue or issues.

Third, a Commission cannot decide any issue. It can only make recommendations. It cannot and does not decide whether offences have been committed. It cannot and does not decide whether rights have been infringed.

Fourth, if regulators and the courts are doing their jobs properly and efficiently, misconduct is identified, prosecuted and punished. If either the regulators or the courts fail in their tasks, misconduct multiplies, and justifiable grievances build up.

All this being so, why are there as many Royal Commissions as there have been in recent times? Why are there so many calls for new Royal Commissions?

Part of the answer may lie in the ways in which Commissions go about their work.

Although there is a political dimension to every Royal Commission it does not follow that the Commission will be conducted as a political exercise. On the contrary. Ordinarily, the appointed Commissioner or Commissioners will execute the tasks given by the Letters Patent assisted by counsel and solicitors of their choice working wholly independently of not only the political branches but also any government department or agency whose conduct might be in issue.

It is always a matter for the Commission to decide how it will gather the information it needs in conducting its inquiry. That said, most Commissions will conduct some public hearings. But because the Commission is to inquire and report, and it is no part of the work of the Commission to decide any issue, counsel assisting the Commission are not there to make a case. They are there to assist a process of inquiry.

The process of inquiry will often have three distinct consequences. First, for some who have been affected by conduct which is the subject of inquiry, a Royal Commission's public examination of events and their causes will provide an opportunity to be heard and give public voice to issues which they may think have not been properly understood or appreciated. For them, there will be a sense of vindication from the very fact of being heard.

Second, it will often be the case that a Commission's hearings will require those who have engaged in the conduct which is the subject of inquiry to give their accounts of what happened and why. There is for them, therefore, a real measure of public accountability. But it is a very different form of accountability from what follows from the proper application of the law by regulators, appropriate prosecution of wrongdoing and adjudication by the courts.

The third kind of consequence is broader in its effect. It is a consequence which affects the wider community. A Royal

Commission will always provide a focus for debate about the issues the Commission is examining. That debate will be focused by the course of hearings but will also be focused by what appears in the reports made by the Commission

None of these observations about how Commissions work is novel or remarkable. But I make them because they bear upon the larger question of whether the use now being made of Royal Commissions tells us anything about our standing institutions of government.

The points I have made about how Royal Commissions work can be captured in a few words:

Independent;

Neutral;

Public; and

Yielding a reasoned report.

These ideas of independence, neutrality, publicity and reasoned reports may be contrasted with what some, perhaps many, would see as the characteristics of modern political practice with its emphasis on party difference, and with decision-making processes that not only are opaque but also, too often, are seen as skewed, if not captured, by the interests of those large and powerful enough to lobby governments behind closed doors.

And the ideas of independence, neutrality, publicity and provision of a reasoned report are of course characteristic of judicial processes. But, as I have explained, a Royal Commission applies these ideas in a manner and in a context that is radically different from the exercise of judicial power.

Reasoned debates about issues of policy are now rare. (Three or four word slogans have taken their place.)

Political, and other commentary focuses on what divides us rather than what unites us. (Conflict sells stories; harmony does not.) And political rhetoric now resorts to the language of war, seeking to portray opposing views as presenting existential threats to society as we now know it.

Trust in all sorts of institutions, governmental and private, has been damaged or destroyed. Our future is often framed as some return to an imaginary glorious past when the issues that now beset us had not arisen.

The contrast between these characteristics of the political process and the characteristics of the work of a Royal Commission is marked.

It may well be thought that our governmental institutions are framed on the premise that there can and will be reasoned debate

about the merits of competing policy ideas. If that is right, does the premise remain valid? We seem unable to conduct reasoned debates about policy matters. Policy ideas seem often to be framed only for partisan or sectional advantage with little articulation of how or why their implementation would contribute to the greater good.

Notice how many recent inquiries relate to difficult issues of public policy: how can we, how should we, look after the aged? How can we, how should we, respond to mental health? Some are more particular. Has the course of criminal justice been deflected by the way in which a lawyer provided information to police?

Does reference of matters of these kinds to Royal Commissions suggest that our governmental structures can deal effectively only with the immediate spot fire and cannot deal with large issues?

If that is a conclusion to be drawn, I am not sure that the solution lies in trying to have our existing structures of government replicate some of the processes of a Royal Commission. To do that would require revealing more of the inner workings of government and would require revealing how, and why, policy choices were made. Hence, it would be necessary to reconsider the relationship between the political branches of government and the public service, with a view to revealing more about advice to government.

And it would be necessary to reveal more about what the lobbyists and interest groups are telling government.

But would any of those steps help? Are they steps that are likely to provoke better debate about policy? To make information available is important but there will be informed debate only if the information is read, understood and used to make reasoned arguments. Too often, the information that is available is neither read nor understood. And even if the information has been read and understood, debate proceeds by reference only to slogans coined by partisan participants. We have seen that in this country in the debate about the Uluru Statement from the Heart. We have seen that in the United States in the debate about the Mueller report. The examples can be multiplied.

The increasingly frequent calls for Royal Commissions in this country cannot, and should not, be dismissed as some passing fad or fashion. Instead, we need to grapple closely with what these calls are telling us about the state of our democratic institutions.

Scholars in many places (including this Law School) are considering issues about democratic decay. Some see public law as an important element in slowing or preventing that decay. And I am sure that this is right. Proper development and application of public law doctrines is very important. But public law doctrines take the structures and system of government as they exist and

those doctrines seek to mark and enforce the bounds of exercise of public power within those structures. It follows, I think, that proper development and application of public law doctrines (important as that is) will not come to grips with the issues that lie beneath the rising demand for Royal Commissions.

Those issues are different. They are issues about development of policy. They are issues about public debate about policy. They are issues about public accountability when the legal system has not been engaged or has not been engaged effectively for the vindication of the law and those who have suffered a wrong. These are the kinds of issues that I think lead to the strength and frequency of public appeals for Royal Commissions. All of them are issues about the way our democracy is operating and the premises that underpin the structures of our government. I offer no answer to the issues. We would all do well to consider them in relation to all three branches of government – legislative, executive and judicial.