

## People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017

<b>Purpose</b>	Seeks to establish a Commission of Inquiry to inquire into unethical, unlawful and improper conduct in the banking, financial services and related sectors
<b>Sponsor</b>	Mr Bob Katter MP
<b>Introduced</b>	House of Representatives, 27 March 2017
<b>Rights</b>	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Requirement to provide evidence that may incriminate an individual

1.278 The People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017 (the bill) seeks to establish a Commission of Inquiry (Commission) into the banking, financial services, and related sectors. The bill would invest the commission with the full powers of a royal commission, as set out in the *Royal Commissions Act 1902* (RC Act).<sup>1</sup>

1.279 Section 6A of the RC Act provides that a person appearing as a witness for a commission is not excused from answering a question on the ground that the answer might tend to incriminate that person. Section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions.

### *Compatibility of the measure with the right not to incriminate oneself*

1.280 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.281 Article 14 and the right to a fair trial, and more particularly the right not to incriminate oneself, are directly relevant where a person is required to give information to a commission of inquiry which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Adopting the powers of a royal commission, which include a power to require a witness to answer questions even if it may incriminate themselves, engages and limits the right not to incriminate oneself.

<sup>1</sup> See proposed section 11.

1.282 The right not to incriminate oneself may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. The statement of compatibility does not address the limitation on the right not to incriminate oneself, save for reference to Part 4 of the bill, which allows some protections for disclosure by whistleblowers.

1.283 The committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.<sup>2</sup> The statement of compatibility does not acknowledge the committee's previous concerns with the respect to the powers of royal commissions and the right not to incriminate oneself.

1.284 Additionally, while section 6A of the RC Act provides a use immunity for witnesses compelled to answer questions, and section 14 of the bill would provide use immunity for disclosure by whistleblowers, the bill does not appear to provide a derivative use immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information, (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.<sup>3</sup> The inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself.

### ***Compatibility of the measure with the right to privacy***

1.285 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

1.286 By applying the offence in the RC Act for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.287 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.288 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and

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2 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 14-18; and *Thirty-Eight Report of the 44th Parliament* (3 May 2016) 21-26.

3 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

### **Contempt of Commission**

1.289 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.<sup>4</sup>

1.290 Section 6O of the RC Act provides that a person commits an offence if they:

- intentionally insult or disturb a royal commission;
- interrupt the proceedings of a royal commission;
- use any insulting language towards a royal commission;
- by writing or speech use words false and defamatory of a royal commission; or
- are in any manner guilty of any intentional contempt of a royal commission.

1.291 The penalty for the offence is two hundred dollars or imprisonment for three months.

### ***Compatibility of the measure with the right to freedom of expression and the right to freedom of assembly***

1.292 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.293 As applied by the bill, the prohibition of any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly.

1.294 It is not clear whether the restriction imposed may have the effect of criminalising legitimate expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of or objection to the Commission and its activities.

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4 See proposed section 11.

## Issue of arrest warrants by the Commission

1.295 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.<sup>5</sup>

1.296 Section 6B of the RC Act provides that if a person served with a summons to attend before a royal commission as a witness fails to attend in accordance with the summons, a President, Chair or Commissioner may issue a warrant to arrest the person. This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member.

### ***Compatibility of the measure with the right to liberty***

1.297 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.298 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty. The statement of compatibility does not provide an assessment of how this measure engages and may limit human rights. In this respect it is noted that the committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.<sup>6</sup> The statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures.

### **Committee comment**

**1.299 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.**

**1.300 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

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<sup>5</sup> See proposed section 11.

<sup>6</sup> This committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) para 11.48 and Recommendation 11-3.