> Many of the offences for which indemnity was granted would otherwise never have been discovered, let alone prosecuted. It is fanciful to pretend that those indemnified would otherwise have all been sentenced to lengthy prison terms. Parker, for example, would probably still be an Assistant Commissioner, quite possibly in line for appointment as Queensland's next Commissioner of Police.[159]

Fitzgerald therefore chose to focus upon removing corrupt individuals from public office, in order to reduce the potential for corrupt activity in the future. This suggests that commissions may be used deliberately to damage reputations,[160] thereby punishing criminals who would otherwise go entirely unpunished for their crimes.[161] Costigan expressly argued that this should be done, as if the only appropriate way to deal with criminal activity was through the normal criminal justice system then:

> [M]any citizens would fall victim to unscrupulous yet clever criminals against whom the evidence may never be amassed which allows their trial and conviction. The opportunity afforded by the conduct of a Royal Commission where the clever and evasive criminal may be brought to account in public, or have his schemes exposed and his criminality made public, often is the only protection available to the honest citizen.[162]

Obviously commissions that operate in this way can potentially cause great unfairness, including irreparable damage to the reputations of the individuals that they investigate. It is therefore particularly important for these commissions to conduct themselves in a way that is procedurally fair, so that the risk of unjustified damage to reputations is minimised: see Chapters 7 and 8. It should be noted, however, that there is often criticism of commissions that operate exclusively in private, as they are said to be secretive and unaccountable.[163] There is therefore no consensus about whether public or private hearings are preferable, even amongst advocates for the rights of individuals under investigation.

THE LEGALITY OF COMMISSIONS INTO CRIMINAL ACTIVITY

[1.16] It has been argued at various times over the past several hundred years that commissions that investigate crime are illegal.[164] The essence of the argument is that commissions violate the separation of powers doctrine, because

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158 Fitzgerald Inquiry, *Report* (1989) at A218.
159 Ibid at 13.
160 They may do this without any risk of defamation proceedings, given provisions such as RCA s 7; NCAA s 36; CJCA s 101(2).
161 Findlay, Odgers and Yeo, pp 84–6.
162 Costigan Commission, *Report* (1984) Vol 2 at 163–4.
163 See, eg, Roser, note 2 above.
164 *Case of Commission of Inquiry* (1608) 77 ER 1312 (the report of this case, printed posthumously in *Coke's Reports*, has been criticised: *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 95–7). See also Blackstone, *Commentaries on the Laws of England* (1765–1769) Bk 1, s 1 at [7], [8].

'the process of inquiry and accusation by which men are put upon trial is fixed and regulated by law'.[165] In other words, it is argued that the executive cannot circumvent the courts by establishing commissions that exercise what is, in reality, a parallel jurisdiction to that exercised by the courts. The High Court has considered and emphatically rejected this argument on three occasions.[166] The legality of commissions into criminal activity in Australia is therefore now not open to question,[167] notwithstanding criticisms of the decisions of the High Court[168] and the fact that the New Zealand Court of Appeal has held that such commissions are illegal.[169] The relevant arguments are outlined below only briefly.

Part of the difficulty in analysing the various arguments in this area turns on the fact that it is frequently unclear what is meant by the assertion that commissions are 'illegal' or 'unlawful'. As Sir Harrison Moore noted:

> If we say that these inquiries are unlawful, do we imply that those making the inquiry have committed some punishable offence, or that the commission or other instrument may be annulled by appropriate process; or do we *merely* mean that the commission is without power of compulsion, and no more than an indifferent nullity. Some of the obscurity of the subject appears to belong to a want of precision in terms.[170]

It is therefore necessary to distinguish between the proposition that the *appointment* of a commission to inquire into criminal activity is invalid, and the proposition that any attempt by the executive to *confer coercive power* upon a commission without statutory authority is invalid. There is no doubt that the executive is unable to confer coercive power upon commissions: see **[2.2]**. As a consequence, if the argument that commissions into criminal activity are illegal is to have any force, it must be on the basis that the power of the executive does not extend to the *appointment* of such a commission. Where a commission is created by legislation, this argument clearly could not apply, with the result that there has never been any suggestion that statutory standing commissions are illegal.

If a commission is not appointed pursuant to statute, the legality or otherwise of the commission is determined without reference to any statute that confers coercive powers upon it.[171] This is because any restrictions on the power of the executive to appoint a commission would operate to prevent the

165. *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 94.
166. *Clough v Leahy* (1904) 2 CLR 139; *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 101; *BLF case* (1982) 152 CLR 25 at 53, 88.
167. Sackville, note 11 above at 6; Campbell, *Contempt of Royal Commissions* (1984) p 5; Hallett, p 38. The same approach seems to have been accepted in Canada, where the decision in *Cock v AG (NZ)* (1909) 28 NZLR 405 at 420–1 has been rejected as turning upon the costs provisions of the Commissions of Inquiry Act 1908 (NZ). See *AG (Quebec) and Keable v AG (Canada)* [1979] 1 SCR 218 at 241.
168. The most detailed criticism of the first two High Court cases, which were followed in the

establishment of the commission, with the result that there would be no body to which any statutory coercive powers could attach.[172] If, on the other hand, the executive does have the power to appoint a commission, the subsequent conferral by legislation of coercive powers upon that commission cannot render the otherwise valid appointment invalid.[173] Ad hoc commissions in Australia are generally not appointed pursuant to statute, although the letters patent appointing Commonwealth and Western Australian Royal Commissions usually suggest that both the relevant Royal Commissions Act and a residual common law power are engaged when an appointment is made. It is therefore necessary to consider the extent of the executive's power to appoint commissions at common law in order to determine whether the appointment of a commission to inquire into criminal activity is valid.

The exact nature of the executive's power to appoint commissions at 'common law' is not clear. There is conflicting authority about whether this power requires, or itself constitutes, an exercise of prerogative power,[174] or whether instead it cannot be a prerogative power,[175] as establishing a commission is simply a manifestation of the fact that the Crown has the same right as every private citizen to lawfully undertake any inquiry.[176] This disagreement to a large extent turns upon a more general debate about the nature of the prerogative. Most commentators take the view that the establishment of a commission does involve an exercise of prerogative power.[177] A partial justification for this view is that the power to appoint a Royal Commissioner requires an exercise of the prerogative because it involves the delegation of a function pursuant to letters patent, even if the power of such a commissioner to inquire following appointment is no different to that of a private citizen.[178] A more complete justification was suggested by Brennan J in the *BLF* case, when he stated that

171. *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 93, 106. See also the comment made by Griffith CJ in argument in *Clough v Leahy* (1904) 2 CLR 139 at 149. The RCA s 1A and Royal Commissions Act 1968 (WA) s 5 appear to provide a statutory basis for appointment, but these provisions have been interpreted as simply giving statutory force any pre-existing common law power: *Booth v Hipgill* (1989) 85 ALR 621 at 635; *BLF* case (1982) 152 CLR 25 at 86, 156.
172. Moore, note 170 above at 516.
173. *BLF* case (1982) 152 CLR 25 at 51, 68, 88, 158; *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 99.
174. *BLF* case (1982) 152 CLR 25 at 68–9, 124; *McGuinness v AG (Vic)* (1940) 63 CLR 73 at 93–4; *Herald & Weekly Times Ltd v Woodward* [1995] 1 VR 156 at 157–8; *Wilson v Minister for Aboriginal Affairs and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 32; *Holden v Marks* (1996) 17 WAR 447 at 459.
175. The term 'prerogative powers' is sometimes used 'as an epithet to describe some special powers, greater than those possessed by individuals, which the Crown can exercise by virtue of the Royal authority'. See *Clough v Leahy* (1904) 2 CLR 139 at 156. The meaning of the term is, however, still debated.
176. *BLF* case (1982) 152 CLR 25 at 88–9, 155; *Clough v Leahy* (1904) 2 CLR 139 at 156–7; *AG (Cth) v Queensland* (1990) 25 FCR 125 at 144; *Johns & Waygood Ltd v Utah Australia Ltd* [1963] VR 70 at 73; *Ex parte Walker* (1924) 24 SR (NSW) 604 at 615.
177. T J Lockwood, 'A History of Royal Commissions' (1967) 5 *Osgoode Hall LJ* 172 at 179; E Campbell, 'Royal Commissions Act 1902–1966' in *Royal Commission on Australian Gov-*