Royal Commissions Amendment Bill 2013

Mary Anne Neilsen and Kirsty Magarey
Law and Bills Digest Section

Contents

Purpose of the Bill.................................................................2
Background .................................................................................2
    Royal Commission into Institutional Responses to Child Sexual Abuse .................................................2
    Royal Commissions and the Royal Commissions Act 1902 (Cth) ..............................................................4
Committee consideration ....................................................................8
Position of major interest groups ...................................................9
Financial implications........................................................................10
Statement of Compatibility with Human Rights ................................10
Key issues and provisions................................................................10
    Schedule 1—Amendments to the Royal Commissions Act 1902 ........................................................10
        ‘Authorised member hearings’ ...........................................................................................................10
        New Part 4—Private sessions for the Child Sexual Abuse Royal Commission ...............................12
Concluding comments ....................................................................15
Royal Commissions Amendment Bill 2013

Date introduced: 13 February 2013

House: House of Representatives

Portfolio: Prime Minister

Commencement: On the day of Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The Royal Commissions Amendment Bill 2013 (the Bill) proposes amendments to the Royal Commissions Act 1902 (Royal Commissions Act) for two main purposes:

• to enable the Chair of a multi-member Royal Commission to authorise one or more members to hold a hearing to take evidence in what are referred to as ‘authorised member hearings’. These amendments would have application to Royal Commissions generally, including the current Royal Commission into Institutional Responses to Child Sexual Abuse and

• to introduce and specify regulation of ‘private sessions’ for the Royal Commission into Institutional Responses to Child Sexual Abuse to facilitate the Commission’s receipt of information from persons directly or indirectly affected by child sexual abuse in a manner less formal than a hearing. These amendments would apply only to this Royal Commission.

Background

Royal Commission into Institutional Responses to Child Sexual Abuse

The issue of child abuse has been the subject of public discussion both in Australia and overseas for a number of years with a number of community groups and institutions increasingly coming under the spotlight for their responses to past and present abuses of children in their care.1

In response to growing levels of concern, on 12 November 2012, the Prime Minister, Ms Julia Gillard, announced the Government’s intention to establish a Royal Commission specifically examining


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

On Friday 11 January 2013, on advice from the Prime Minister, the Governor General, Her Excellency Ms Quentin Bryce, issued Letters Patent to appoint a six-member Royal Commission to investigate ‘Institutional Responses to Child Sexual Abuse’. 3

The Letters Patent also define the scope and terms of reference for the Royal Commission. In her press release the Prime Minister summarised the terms of reference, stating:

The Royal Commission will inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse and related matters.

It will investigate where systems have failed to protect children, and make recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Commissioners can look at any private, public or non-government organisation that is, or was in the past, involved with children, including government agencies, schools, sporting clubs, orphanages, foster care, and religious organisations.

This includes where they consider an organisation caring for a child is responsible for the abuse or for not responding appropriately, regardless of where or when the abuse took place.

The Commission will not specifically examine child sexual abuse outside organisations, such as in the family. However, any recommendations made by the Commissioners are likely to improve the response to child sexual abuse wherever it happens. 4

The Honourable Justice Peter McClellan has been appointed Chair of the Commission. 5 In a detailed media statement issued on 16 January 2013, his Honour acknowledged the task before the Commission to be complex and large, noting in this regard the appointment of six Commissioners

---


3. As an aside, the Royal Commission website states that New South Wales and Queensland have issued letters patent to complement the Commonwealth letters patent and that the other states are also expected to do the same. According to the website, this prevents any gaps in the powers of the Commission to conduct its inquiry around the country. See: Royal Commission into Institutional Responses to Child Sexual Abuse website, 13 February 2013, viewed 20 February 2013, http://www.childabuseroyalcommission.gov.au/Newsroom/Pages/Quarter%201/13February2013CEOReportofOperations.aspx


5. The other five Commissioners are: Mr Robert Atkinson AO APM, the former Queensland Police Commissioner, Honourable Justice Jennifer Coate, Family Court Judge and former Victorian Coroner, Mr Robert Fitzgerald AM, Productivity Commissioner, Professor Helen Milroy, Consultant Child and Adolescent Psychiatrist and Mr Andrew Murray, former Senator for Western Australia.
and also flagging the need for the amendments in this Bill allowing ‘authorized member hearings’. Referring to these amendments, Justice McClellan stated:

Each of us has different backgrounds, professional experience, qualifications and expertise. We live in different regions of Australia. To assist the Commission in its work we understand that the government proposes to amend the Royal Commissions Act to provide that the Commissioners need not all sit when conducting a formal hearing. If that legislative change is made the Commission will utilise this capacity in an endeavour to gain a complete understanding of the problems in various parts of Australia in the most efficient manner possible. Even with this legislative change our task is complex and will take significant time.\(^6\)

In the same media statement, Justice McClellan also noted that the Commissioners are aware of the sensitivity of the issues to be examined and acknowledged that many individuals who may have been affected by their experiences of child sexual abuse would be apprehensive about the public exposure of those experiences. Interestingly, while noting the need for suitable procedures to deal with these sensitivities, His Honour did not suggest there was a need for legislative amendments. Rather he said:

For that reason the Commission will put in place procedures, including various means by which a person may give their account which will ensure that the interests of individuals are protected and at the same time ensure that the process is fair to other individuals and institutions. This may mean that proceedings will take place in private, real names may not be used and it may be necessary to place other constraints on the reporting of individual matters. However, where possible the Commission will proceed in public. Public knowledge of what may have occurred and an understanding of the institutional responses both in the past and those proposed in the future is a fundamental objective of the Commission.\(^7\)

Royal Commissions and the Royal Commissions Act 1902 (Cth)

The following outline of the Royal Commissions Act may be useful background in understanding the amendments proposed in the Bill.

Establishment

Commonwealth Royal Commissions are usually established under the Royal Commissions Act.\(^8\) While at common law, the Crown has the power to appoint a person to conduct inquiries and make a report, such a person would have no coercive powers.\(^9\) For this reason, Commonwealth Royal Commissions are established by statute endowing them with coercive powers—for instance the power to summon witnesses and compel evidence. The Royal Commissions Act authorises the

---

\(^6\) P McClellan, Media statement from Justice Peter McClellan AM – Chair of the Royal Commission into Institutional Responses to Child Sexual Abuse, 16 January 2013, viewed 15 February 2013, [http://www.childabuseroyalcommission.gov.au/Newsroom/Pages/Quarter%201/Media-Statement-from-Justice-Peter-McClellan.aspx](http://www.childabuseroyalcommission.gov.au/Newsroom/Pages/Quarter%201/Media-Statement-from-Justice-Peter-McClellan.aspx)

\(^7\) Ibid.

\(^8\) It is also possible for the Commonwealth Parliament to pass legislation establishing a specific Royal Commission, for example the Royal Commission on Espionage set up in 1954.

Governor-General to issue Letters Patent establishing a Royal Commission, appointing Commissioners and describing the terms of reference. While it is independent of the Executive Government a Royal Commission is regarded as an instrument of the Executive Government and reports to it.

Royal Commissions do not lay charges but their recommendations or findings may include matters that lead to subsequent prosecutions, and in the course of the Commission’s work, their suspicions or concerns regarding possibly illegal conduct can be referred to law enforcement authorities.\textsuperscript{10}

**Subject matter of inquiries**

The subject matter of a Royal Commission’s inquiry will be set out in its terms of reference and determined by the Executive Government. Section 1A of the Royal Commissions Act provides that the subject matter of a Royal Commission’s inquiry and report can be ‘upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose of the Commonwealth’. It has been held that the word ‘matter’ in the provision has a wide operation and that, within constitutional limits, a general description of the subject of the inquiry will suffice.\textsuperscript{11}

Another important limitation on the subject matter of Royal Commission inquiries is that they cannot, in general, inquire into allegations of a person’s criminal behaviour if a criminal prosecution against the person has commenced—if to do so would amount to a contempt of court.\textsuperscript{12}

**Powers**

The Royal Commissions Act also sets out the powers and procedures of Royal Commissions. For instance under the Act a Royal Commission is empowered to:

- summons witnesses and take evidence (section 2)
- require a person appearing at a hearing to produce documents and things (section 2)
- apply to a judge for a warrant to search premises, vehicles et cetera. (section 4)
- compel witnesses to give evidence, including self-incriminating evidence (sections 6 and 6A)
- issue an arrest warrant if a witness fails to appear (section 6B) and
- deal with contempt (section 6O).

A Royal Commission in Australia has unique powers of investigation which in some ways are more extensive than a court’s.\textsuperscript{13} It has been noted that maybe because such Commissions are not

\textsuperscript{10}. Section 6P of the Royal Commissions Act.
\textsuperscript{11}. Ibid., paragraph 3.8.
\textsuperscript{12}. Subsection 6A(3) of the Royal Commissions Act.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
established to determine individual guilt their powers can be less fettered than a court’s. Thus under the Royal Commissions Act a natural person is not excused from giving evidence on the grounds of self-incrimination (section 6A), although evidence given to a Royal Commission is not admissible in evidence against the person in civil or criminal proceedings in any Australian court (section 6DD). Similarly legal professional privilege is more curtailed than in a court of law (section 6AA).

The powers of a Royal Commission have been described as coercive with sanctions imposed inducing witnesses to cooperate. Those sanctions may be punishable either as contempt of the Commission or alternatively as specific legislative offences. Where a person is summonsed to appear as a witness and fails to appear without reasonable excuse, the penalty is $1000 or six months imprisonment (section 3). The same penalties apply if a witness fails to produce a document or thing when under summons to do so or refuses to be sworn or answer questions.\(^\text{14}\)

It is an indictable offence to knowingly give false or misleading evidence to a Royal Commission. The maximum penalties are five years imprisonment or a fine of $20 000 (section 6H).

**Private or public hearings**

Royal Commissions have the discretion to sit in private or public.\(^\text{15}\) Royal Commission hearings often sit in public, although there is no legal requirement that they do so. It has been suggested that Royal Commissioners are frequently reluctant to use private hearings, as they diminish the capacity of Commissions to acquire information from the public, undermine public confidence in Commissions, and reduce the ‘cleansing effect’ of hearings.\(^\text{16}\) These concerns were encapsulated by Mason J when he observed that an order that a Commission proceed in private:

> seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report.\(^\text{17}\)

That said, Royal Commissions are also generally aware of the damage that may be caused to reputations if hearings are held in public and, according to Donaghue, this awareness has contributed to major Royal Commissions into crime conducting a significant proportion of their hearings in private.\(^\text{18}\)

Witnesses also have the right to request private hearings in certain circumstances, namely when the evidence relates to the profits or financial position of any person, and the taking of that evidence in public would be unfairly prejudicial to the interests of that person. In these cases the Commission may, if it thinks proper, take that evidence in private (subsection 6D(2)).

\(^{14}\) As noted in K Magarey, ‘Priests, penitents, confidentiality and child sexual abuse’, op. cit., these penalties can, at the discretion of the Commission, be reapplied until compliance is achieved.

\(^{15}\) Subsection 6D(5) of the Royal Commissions Act.


\(^{18}\) Ibid.
The Royal Commissions Act also empowers the relevant commissioners to direct that evidence shall not be published except in such manner and to such persons as the Commission specifies (subsection 6D(3)). Publication in contravention of such a direction is an offence (subsection 6D(4)).

**Immunities**

Royal Commissioners have the same protections and immunities as High Court judges in the exercise of their duties. Similar protections are given to lawyers who assist Royal Commissions. Witnesses are given the same protection as witnesses in High Court cases (although they are also subject to the penalties provided in the Royal Commissions Act and subject to the ‘same liabilities in any civil or criminal proceeding, as a witness in any case tried by the High Court’ (section 7).

**Processes and evidence**

The Royal Commissions Act enables a person to be legally represented if the Commission allows it. A person’s legal representative can examine and cross-examine witnesses ‘on any matter which the Commission deems relevant to the inquiry’ (section 6FA).

At hearings, Commissioners may require witnesses to take an oath or make an affirmation (subsection 2(3)). Witnesses must then answer questions that are relevant to the investigation.

In relation to procedures, a Royal Commission is not bound by the rules of evidence and may adopt an inquisitorial approach. Commissions are at liberty to admit hearsay evidence and are not bound by the best evidence rule. However, Royal Commissions are obliged to act with procedural fairness. This includes observing:

> ... the rules of natural justice which require an unbiased Commission and an opportunity for any person named at an inquiry to be heard on any allegation of wrongdoing.  

**Reform of the Royal Commissions Act**

As further background to the Bill, it is useful to note that the powers and procedures of Royal Commissions have been the subject of an extensive inquiry by the Australian Law Reform Commission (ALRC) which culminated in the report *Making Inquiries: a New Statutory Framework.* The report concluded a new legislative framework was needed. The Government is yet to respond to the ALRC’s recommendations.

There have been critiques of the arrangements for Royal Commissions, including that they can function as a ‘star chamber’, whereby a Commissioner can be an ‘informant, prosecutor and...”

---


judge'. 22 The Law Council’s submission to the ALRC inquiry on Royal Commissions made a large number of suggestions for reform (as did the ALRC), and commented that, while coercive information gathering powers are needed to perform the important and legitimate function of public scrutiny of government action, these powers must be seen as exceptional, particularly when used in executive rather than judicial processes, given their intrusive impact on individual rights. 23

More recently, in its submission on the Government’s consultation paper on the proposed child sexual abuse Royal Commission, the Law Council of Australia again raised questions about the problems with the Royal Commissions Act. Amongst other things, the Law Council recommended that the procedural fairness requirements recommended in the ALRC report 24 be adopted in the process of the current Royal Commission. The Law Council supported the ALRC’s recommendation for legislation to ensure that Royal Commissions:

> should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given. 25

The Law Council argued that in relation to the current Royal Commission, the ALRC’s recommendation would:

> [...] achieve an appropriate balance between the powers of the Royal Commission and the rights of individuals interested in or affected by it. The limited protections in the Act and under the common law are inadequate to afford sufficient protection to people involved in or with the Royal Commission. 26

The current Bill does not represent a response the Law Council’s and ALRC’s concerns. For more information on how the Royal Commissions Act currently functions with respect to the ‘confidential professional relationships privilege’ and confessional privilege and the uncertainties of interpretation, the reader is referred the Parliamentary Library’s Flagpost: K Magarey, ‘Priests, penitents, confidentiality and child sexual abuse’. 27

**Committee consideration**

At the time of writing this Digest, the Bill had not been referred to a Committee for inquiry.

---

26. Ibid., paragraph 71.
27. K Magarey, op. cit.
Position of major interest groups

The Bill is quite technical and there has not been much public reaction. For instance the Roman Catholic Church, despite welcoming the establishment of the Commission\(^28\), has not responded to the Bill specifically.

**Law Council of Australia**

The Law Council of Australia’s position on the proposal for a Royal Commission into Institutional Reponses to Child Sexual Abuse has been noted above. More recently it has been reported that the Law Council of Australia also has concerns with the current Bill and that it has urged the Government not to pass the Bill until questions over procedural fairness are resolved.\(^29\)

According to a media report in the *Australian* on 19 February 2013, the Law Council has raised concerns about whether private hearings for victims of sexual abuse would impinge on a person's right to respond to any adverse findings, and whether information from private hearings would be passed on to authorities. The President of the Law Council, Joe Catanzariti is reported as saying that he believed holding private sessions for victims was necessary to allow people to tell their stories but it raised a lot of questions. This included whether information provided at the sessions would be passed on to other bodies such as the Attorney-General, the Director of Public Prosecutions or police commissioners around the country. ‘Will the relevant witnesses’ consent be sought before such information is communicated?’ he asked. ‘If information can be passed on in this way, their confidence in the privacy of the sessions may be undermined.’\(^30\)

Mr Catanzariti said people who had allegations made against them in private hearings could also be affected:

> Will individuals ... named in this information, for example as alleged perpetrators or as failing to prevent child sex abuse, be notified before the information is communicated? The Law Council considers that such questions need to be addressed before these amendments are passed.\(^31\)

Mr Catanzariti said that in addition to victims, ‘people who are likely to be the subject of adverse findings are also particularly vulnerable, given the degree of public interest’.\(^32\)

In response to the Law Council’s concerns, the *Australian* article reported that a spokesman for the Attorney-General stated that these involve procedural aspects which will be a matter for the Royal Commission to determine. While aspects of the Law Council’s concerns remain unaddressed there are elements of the need for confidentiality which are addressed in the Bill. The Commission is


\(^30\) Ibid.

\(^31\) Ibid.

\(^32\) Ibid.

*Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.*
empowered to pass on information gathered in private sessions to the appropriate authorities if the Commission believes it indicates criminal activity has or is taking place, but there are also strict protections offered to the confidential evidence. These protections preclude the use of this evidence in a number of circumstances and require the Royal Commission to de-identify the information if it is included in a report or recommendation. These issues are discussed further below.

Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact on government revenue.33

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at page 2 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Statement made reference to Article 14 of the ICCPR, which deals with the rights to a fair trial, and concluded the right was not engaged because the Commission will not be conducting a trial. Issues remain, however, regarding the use of information from private sessions as a basis to pass on information to a law enforcement authority (see discussion below). The issue of the National Archive’s open access to information generated by the Royal Commission may also raise issues of privacy. The Parliamentary Joint Committee on Human Rights is expected to report on the Bill on 13 March 2013.

Key issues and provisions

Schedule 1—Amendments to the Royal Commissions Act 1902

‘Authorised member hearings’

Section 2 of the Royal Commissions Act gives a Royal Commission the power to summon witnesses and take evidence at a hearing. Hearings are required to be conducted by the Commission as a whole or by a ‘quorum’ of the Commission.34 Item 8 of Schedule 1 of the Bill inserts proposed subsection 2(1A) and provides that for multi-member Commissions the President or Chair may authorise one or more members to hold a hearing. The President or Chair may also hold a hearing,


34. See the definition of ‘Commission and Royal Commission’ in subsection 1B(1). Quorum is not defined in the Act and we are left with the plain English meaning, which is unfortunately indeterminate. A quorum is the minimum number of members with which a deliberative body may operate, and this can vary according to the rules of the body.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
either by themselves or with other members. Such a hearing is defined as an ‘authorised member hearing’ (inserted by item 4 of Schedule 1 into subsection 1B(1)). The presiding member at an authorised member hearing will be the President or Chair or the member who is authorised by the President or Chair (proposed subsection 2(1B)). An authorised member hearing will have similar powers to a full Commission but with some limitations.

Item 5 of Schedule 1 of the Bill is a consequential amendment flowing from item 8 and inserts a new definition of ‘Commission and Royal Commission’ into subsection 1B(1). Currently a ‘Commission and Royal Commission’ means any Commission of inquiry issued by the Governor-General by Letters Patent in accordance with the Royal Commissions Act or any other power and includes the members of the Commissioner or a quorum thereof, or the sole Commissioner sitting for the purposes of the inquiry (subsection 1B(1)). Item 5 substitutes a new definition which adds to the existing definition with the effect that the members of the Commission holding an ‘authorised member hearing’ are also taken to be persons sitting for the purposes of the inquiry of the Commission as a whole.

Items 11, 16, 21, 25 and 32 of Schedule 1 of the Bill are further amendments related to authorised member hearings—the purpose of these amendments being to clarify the powers and functions of such hearings. As mentioned above, the powers are often replicated in the case of an authorised member hearing, but not all powers are bestowed intact. The more significant of these arrangements are described below.

Under subsection 2(3) of the Royal Commissions Act, a member of the Commission or a person who is an authorised person in relation to the Commission may administer an oath or affirmation to a person appearing at a hearing. Subsection 2(4) sets out who is an authorised person. Item 11 substitutes a new subsection 2(4). Its effect is to add that in the case of an authorised member hearing, the authorised person is the member of the Commission presiding at the hearing.

Section 6B sets out the procedure for the issue of a warrant for the arrest of a witness who fails to attend the Commission as a witness. Subsection 6B(2) provides for the person to be brought before the Commission and for their detention in custody until released by order of the President or Chair. Item 21 amends subsection 6B(2), clarifying that a person apprehended under this section could not be brought before an authorised member hearing.

Item 32 amends section 6P and is a similar amendment to item 21. It clarifies that where a Commission decides to communicate information or provide evidence to certain office holders (such as Commonwealth or state Attorneys-General, the Director of Public Prosecutions, or a Police Commissioner) this can only be done by the Commission as a whole or a quorum of its members and not by an authorised member hearing.

Item 16 is a similar amendment in relation to the issuing of search warrants under section 4. It provides that members of an authorised member hearing are not able to authorise the issuing of such warrants.

35. The Explanatory Memorandum explains that presiding members have particular powers, such as requiring a person appearing at a hearing to produce documents, p. 6.
New Part 4—Private sessions for the Child Sexual Abuse Royal Commission

Item 30 of Schedule 1 of the Bill inserts a **new Part 4** into the Royal Commissions Act. The new Part is entitled ‘Private sessions for the Child Sexual Abuse Royal Commission’ and consists of **proposed sections 60A to 60F**. Note that as the Bill uses the term ‘Child Sexual Abuse Royal Commission’ to mean the *Royal Commission into Institutional Responses to Child Sexual Abuse (proposed section 60A)*, the Bills Digest also uses that title in describing the relevant provisions.  

**Proposed subsection 60B(1)** permits the Chair of the Child Sexual Abuse Royal Commission to authorise a member of the Commission to hold a private session in order to obtain information relating to the inquiry. A private session will be able to be held by the Chair or one or two Commissioners only (**proposed subsection 60B(2)**). The conduct of such a session will be at the discretion of those Commissioners having regard to any directions made by the Chair and subject to the Letters Patent establishing the Commission and to the privacy obligations set out in **new section 60D** (**proposed section 60B(1)**).

**Proposed section 60C** sets out the status of a private session. Importantly it stipulates that a person who appears at a private section is not a witness and does not give evidence to the Royal Commission (**proposed subsection 60C(1)**). Furthermore, a private session is not a hearing (**proposed subsection 60C(2)**).

**Proposed subsection 60C(3)** specifies that certain powers available to the Royal Commission will apply to information or documents received in a private session. These include powers under the following sections of the Royal Commissions Act:

- section 6F: the power of a Commission in relation to the use of documents and other things
- section 6P: the power of a Commission to communicate information to certain office-holders and
- section 9: the custody and use of records of a Royal Commission.

The Law Council, as discussed above, has raised concerns regarding the application of section 6P to information gathered by means of a private hearing. As untested evidence communicated in strict privacy, they question the proprieties of it being used as a basis for passing on information to law enforcement authorities. The Law Council also raises questions about the rights of witnesses in private session hearings to determine if and when evidence may be passed to law enforcement authorities under section 6P. There may be a variety of reasons why victims of child sexual abuse do not wish to bring matters before police and the legislation leaves unanswered the question as to whether these reasons will be respected by the Commission. If witnesses’ consent is not sought then their confidence in the privacy of the sessions may be undermined.

---

36. The Bill refers to both ‘the Commission’ and ‘the Child Sexual Abuse Royal Commission’ without a clear pattern. In section 60C, unlike the surrounding sections, the first reference is to ‘the Commission’, an undefined term, and subsequent references are to ‘the Child Sexual Abuse Royal Commission’ — the defined term.

37. Described below.
Proposed subsection 60C(4) deals with storage of documents or matter as required under the Archives Act 1983 (Archives Act). Subsection 22(4) of the Archives Act provides that where a direction is given by a Royal Commission prohibiting publication of a document or matter, the direction will not apply when the documents are in the ‘open access period’ (normally 21 years after creation) unless an exemption applies.\(^{38}\) The exemptions to the Archives’ open access rule cover disclosures which would involve the ‘unreasonable’ disclosure of the personal affairs of any person including a deceased person.\(^{39}\) Another exemption to the open access rule covers ‘information or matter the disclosure of which under this Act would constitute a breach of confidence’.\(^{40}\) Proposed subsection 60C(4) applies the general rules regarding Royal Commission documents to information obtained at a private session. The effect is that a record created during a private session of the Child Sexual Abuse Royal Commission will be in the open access period 21 years after its creation unless an exemption applies.

Related to this new subsection 60C(4) is section 9 of the Royal Commissions Act which sets out the rules for the custody and use of records of Royal Commissions. Relevantly, proposed subsection 60D(4) provides that the Archives Act will apply as if there is a direction to prohibit publication but as the Explanatory Memorandum recognises this will not displace the open access period which will commence after 21 years.\(^{41}\)

Proposed subsection 60C(5) stipulates that certain offences that apply in the case of persons giving evidence at a hearing will also apply in the case of persons appearing at a private session. These offences are:

- the giving of false or misleading evidence (sections 6H)
- the bribery of a witness (section 6I)
- the practice of fraud on a witness (section 6J)
- preventing a witness from attending (section 6L)

\(^{38}\) The Archives Act does, however, offer another hurdle to open access to such documents. Under subsection 22(3) of the Archives Act the relevant Minister (the Minister responsible for the Royal Commissions Act) may determine the extent of the National Archives of Australia’s (NAA’s) custody of such documents. Subsection 22(3) provides: ‘records referred to in subsection (2) shall be kept in such custody as the responsible Minister directs and the Archives is not entitled to the care of any such records except in accordance with such a direction.’

\(^{39}\) Paragraph 33(1)(g).

\(^{40}\) Paragraph 33(1)(d). The term 'breach of confidence' is not defined in the Archives Act. In intellectual property breach of confidence is ‘An equitable action lying against a person who receives information in confidence and then uses or discloses it contrary to the purpose for which it was communicated. The information must not be in the public domain; must have been communicated to the person who is disclosing it in circumstances that imply confidence; and must be misused.’ \textit{Australian Broadcasting Corp v Lenah Game Meats Pty Ltd} (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63. The term is also used in the Freedom of Information Act 1982, section 45, and it has been commented that the prohibition on a breach of confidence means “an understanding that information is being supplied in confidence ought to be respected”, \textit{Re Joint Coal Board v Robert Cameron} [1989] FCA 437; 24 FCR 204. An issue that is not immediately apparent is by whom, and according to what process, the claim to exemption from the open access period is to be made.

\(^{41}\) Explanatory Memorandum, p. 10.
• causing injury to a witness (section 6M) and
• the dismissal by an employer of a witness (section 6N). 42

**Proposed subsection 60C(6)** provides that the offence ‘contempt of Royal Commission’ (section 6O) will also apply in relation to private sessions.

**Proposed section 60D** relates to privacy. Private sessions must be held in private and only authorised persons 43 may be present. Significantly the Explanatory Memorandum states that it is important that these sessions be in private not just to enable people to tell their stories but also because information will not be taken on oath or affirmation and will not be tested in cross examination. 44

It will be an offence to use or disclose information obtained at a private session except where:

• it is for the purposes of performing functions or exercising powers in relation to the Child Sexual Abuse Royal Commission
• it is used in a report of the Commission according to the restrictions of **new subsection 60D(3)** (described below) or
• it is disclosed to public officials according to the requirements of section 9 of the Act (which deals with the custody and use of records of a Royal Commission).

The maximum penalty for an offence under this section is 20 penalty units 45 and/or 12 months imprisonment.

**Proposed subsection 60D(3)** provides that information relating to a natural person obtained in a private session may only be included in a report or recommendation of the Commission if it has also been given as evidence at a hearing of the Commission, or produced in a document according to a notice under section 2, or if the information has been de-identified. It is of note that this limitation on publication applies only to information that relates to a natural person.

---

42. The list does not include section 6K. Section 6K of the Royal Commissions Act covers ‘destroying documents or things.’ This section is not easily imported since it covers documents whose production has been required by the Royal Commission. The Royal Commission cannot compel either attendance or the production of documents at private hearings and thus the section cannot be appropriately applied. In a sense this is unfortunate, since one of the recurring themes of the Commission may be appropriate record keeping, and since it will be dealing with historical occurrences the relevant documents and their preservation could be of significance. While section 6K will continue to apply to other documentation required by the Commission it seems unfortunate that material intended for private hearings cannot be protected legislatively. An alternative might be to insert an appropriately adapted provision instead of applying the pre-existing arrangements.

43. An authorised person is not defined beyond the stipulation that their status is conferred by a Commissioner. The Explanatory Memorandum states that a Commissioner will, for example be able to authorise support persons to accompany a person giving information (see p. 9).

44. Explanatory Memorandum, p. 9.

45. Section 4AA of the Crimes Act 1914 provides that a penalty unit is equivalent to $170. This means that the maximum penalty amounts to $3400.
Proposed section 6OE provides that evidence given in a private session will not be admissible in evidence against the person in civil or criminal proceedings in any Australian court. This provision gives the same protection to persons appearing at a private session as is given under section 6DD to witnesses appearing before a hearing of a Royal Commission. The Explanatory Memorandum states that the new provision would protect a person from charges of defamation and also would mean that if a person gave information at a private session in breach of a confidentiality term in a settlement agreement, that statement or disclosure could not be used in evidence against the person in a proceeding for breach of the agreement. The protection would also apply to a person who is authorised to attend with a person who is giving information.46

Proposed subsection 6OF(1) provides that persons appearing at a private session are to be given the same protection as witnesses in High Court cases, although they are also subject to the penalties provided in the Royal Commissions Act and subject to the ‘same liabilities in any civil or criminal proceeding, as a witness in any case tried by the High Court’. This section essentially duplicates subsection 7(2) of the Act and has the effect of giving a person who appears at a private session the same protection as a witness appearing before a hearing of the Royal Commission. A legal practitioner who appears on behalf of a person at a private session would also have the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court (proposed subsection 6OF(2)). This essentially duplicates the protections in existing subsection 7(3).

Concluding comments

The enormity and complexity of the task facing the Royal Commission into Institutional Responses to Child Sexual Abuse is well acknowledged. Many of the more significant issues are beyond the scope of this Digest as the Bill deals only with a small part of the procedural issues facing the Commission. And yet it is not an insignificant Bill and it does raise questions that Parliament might wish to consider.

The amendments relating to ‘authorised member hearings’ seem a logical response to managing the enormous workload facing the six-member Commission. As the Law Council has observed, multiple Commissioners are preferable not only in relation to the scope and duration of the Royal Commission’s work, but more importantly to ‘ensure a more comprehensive view of recommendations to be made’.47

The amendments allowing private sessions to facilitate evidence in a less formal setting do, however, raise some issues. The Minister’s second reading speech states that the amendments are a response to the need to having hearing processes sensitive to the needs of victims of child sexual abuse so that they feel supported in preparing and giving evidence. Thus, the introduction of the private session mechanism would allow victims to voluntarily give information in private with appropriate support people present, without the need for oath or affirmation and without cross examination.

46. Explanatory Memorandum, p. 10.
47. Law Council of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, op. cit., paragraph 39.
However as the background section of this Digest notes, Royal Commissions already have a general discretion to determine whether to conduct their hearings in public or private and the Royal Commissions Act does not preclude the taking of evidence otherwise than on oath or by affirmation, nor the ability to de-identify personal information where necessary and control its dissemination.

The Government’s explanatory materials do not appear to explain why the amendments setting up a private session mechanism are necessary and how they might differ from what is already available to the Royal Commission. Interestingly the Chair of the Commission, Justice McClellan recognised the need for private sessions but seemed to suggest that these could be arranged through processes already available to the Commission. 48

Perhaps because of the inquisitorial nature of Royal Commissions more generally and perceptions of ‘star chamber’ type behaviour, the amendments are seen as a way of reassuring often severely traumatised victims of child sexual abuse that they can tell their stories in a supportive environment. Perhaps it is a way of enabling victims to discuss matters in confidentiality agreements without fear of further legal action?

Furthermore, there may well be benefits in codifying the arrangements for private sessions. For example explicit provisions allowing for the presence of ‘authorised persons’, clarifying coverage of private session material under the Archives Act, clarifying which obligations and penalties will apply to private sessions— these and other provisions may give the Commission helpful directions in what will undoubtedly be a difficult task ahead. On the other hand codification could impose a rigidity that hampers the Commissioner’s discretion to address further complex questions as they might arise during the coming years of this Royal Commission.

A final point regarding these amendments relates to issues of procedural fairness, a concern raised by the Law Council of Australia. As noted above, both the Law Council and the ALRC have supported reform of the Royal Commissions Act to ensure a more appropriate balance between the powers of the Royal Commission and the rights of individuals affected by it. The Law Council has reportedly raised more specific concerns about the Bill and in particular whether private hearings for victims of sexual abuse would impinge on a person’s rights to respond to any adverse findings and whether information from those hearings would be passed on to authorities. 49 Victims’ rights to privacy could also be impacted if the Commission decides to pass on their evidence to law enforcement authorities without seeking their permission.

The private session mechanism as described in the Bill confirms that these sessions are not to be hearings, nor are the statements taken to be regarded as evidence. The information will not be taken on oath or affirmation and will not be tested in cross examination. And yet the amendments also allow that information obtained from such sessions regarding alleged unlawful behaviour may be passed on to law enforcement bodies. Such information, providing it does not reveal personal information, may also be used by the Commission in its reports and recommendations.

48. P McClellan, op. cit.
The Commission is faced with the difficult task of balancing traditional legal approaches to evidentiary questions and the role of ensuring appropriate counselling norms are observed. The two roles may sometimes be in some tension but the need to find appropriate resolutions will be paramount because as the Minister’s second reading speech says:

The government cannot undo the past. It cannot take away the pain. But we can listen and we can bear witness.

The Bill raises general questions of how to do this and how to safeguard important individual protections. As the Law Council has noted, the Commission has a complex task of protecting the particular vulnerability of both victims and those who may be the subject of adverse findings, given the degree of public interest and highly sensitive subject matter of the Royal Commission.\(^5\) The website for the Royal Commission would appear to support this view. It states that a current priority for the Commissioners is to establish procedures to ensure that this complex and sensitive inquiry is conducted thoroughly and with procedural fairness.\(^6\)

\(^5\) Ibid., paragraph 62.

\textbf{Warning}: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Royal Commissions Amendment Bill 2013

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.