

EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister to the Prime Minister

Royal Commissions Act 1902

Royal Commissions Amendment (Custody of Records) Regulations 2019

Outline

The *Royal Commissions Act 1902* (the Act) provides for the establishment and operation of Royal Commissions. The Act also confers certain powers on Royal Commissions to obtain information.

Section 17 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 9 of the Act provides for the custody and use of records of Royal Commissions. Subsection 9(2) allows for regulations that may provide for the custody, use or transfer of, or access to, Royal Commission records.

By Letters Patent dated 11 January 2013 (as amended by Letters Patent dated 13 November 2014), the Hon Justice Peter McClellan AM, Mr Robert Atkinson, the Hon Justice Jennifer Coate, Mr Robert Fitzgerald AM, Dr Helen Milroy and Mr Andrew Murray were appointed under the Act to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters (Child Sexual Abuse Royal Commission). In addition, all States issued Letters Patent, or equivalent Instruments of Appointment, to appoint the Commissioners under their laws.

By Letters Patent dated 1 August 2016 (as amended by Letters Patent dated 9 February 2017, 27 June 2017 and 7 September 2017), the Hon Margaret White AO and Mr Michael Gooda were appointed under the Act to inquire into the protection and detention of children in the Northern Territory (NT Royal Commission).

By Letters Patent dated 14 December 2017, the Hon Kenneth Madison Hayne AC QC was appointed under the Act to inquire into misconduct in the banking, superannuation and financial services industry (Banking, Superannuation and Financial Services Royal Commission).

The *Royal Commissions Amendment (Custody of Records) Regulations 2019* (the Regulations) amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to:

- the custody and use of NT Royal Commission records;
- the custody and use of Child Sexual Abuse Royal Commission records; and
- the custody and use of Banking, Superannuation and Financial Services Royal Commission records.

The Regulations also make minor amendments to the headings and structure of the Principal Regulations.

In relation to the custody and use of the records of the NT Royal Commission, the Child Sexual Abuse Royal Commission and the Banking, Superannuation and Financial Services Royal Commission, the Regulations:

- provide that the records be kept in the custody of the Secretary of the Attorney-General's Department (the custodian);
- provide that the custodian may provide access to or give a copy of a record to the person or body who provided it to the Royal Commission on request;
- provide that the custodian may provide access to or give a copy of a record of a private session of the Child Sexual Abuse Royal Commission to a person who appeared at the private session on request;
- provide that the custodian may provide access to or give a copy of an NT Royal Commission record or a Child Sexual Abuse Royal Commission record to a State or Territory government where the record was provided by an agency of that State or Territory;
- provide that the custodian may provide access to or give a copy of a record (other than records relating to a private session of the Child Sexual Abuse Royal Commission) to a Commonwealth, State or Territory law enforcement agency for a law enforcement purpose.

These mechanisms provide a simple mechanism for access to Royal Commission records and are in addition to rights of access under other legislation, such as the *Freedom of Information Act 1982*.

Consultation was undertaken with State and Territory governments, as well as Commonwealth agencies, who supported the Regulations.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced the day after registration.

Authority: Section 17 of the *Royal Commissions Act 1902*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Royal Commissions Amendment (Custody of Records) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Royal Commissions Act 1902* (the Act) provides for the establishment and operation of Royal Commissions. The Act also confers certain powers on Royal Commissions to obtain information.

Section 17 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 9 of the Act provides for the custody and use of records of Royal Commissions. Subsection 9(2) allows for regulations that may provide for the custody, use or transfer of, or access to, Royal Commission records.

The *Royal Commissions Amendment (Custody of Records) Regulations 2019* (the Regulations) amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to:

- the custody and use of NT Royal Commission records;
- the custody and use of Child Sexual Abuse Royal Commission records; and
- the custody and use of Banking, Superannuation and Financial Services Royal Commission records.

The Regulations also make minor amendments to the headings and structure of the Principal Regulations.

In relation to the custody and use of the records of the NT Royal Commission, the Child Sexual Abuse Royal Commission and the Banking, Superannuation and Financial Services Royal Commission, the Regulations:

- provide that the records be kept in the custody of the Secretary of the Attorney General's Department (the custodian);
- provide that the custodian may provide access to or give a copy of a record to the person or body who provided it to the Royal Commission on request;
- provide that the custodian may provide access to or give a copy of a record of a private session of the Child Sexual Abuse Royal Commission to the person who appeared at the private session on request;
- provide that the custodian may provide access to or give a copy of an NT Royal Commission record or a Child Sexual Abuse Royal Commission record to a State or Territory government where the record was provided by an agency of that State or Territory;

- provide that the custodian may provide access to or give a copy of a record (other than records relating to a private session of the Child Sexual Abuse Royal Commission) a Commonwealth, State or Territory law enforcement agency for a law enforcement purpose.

These provisions provide a simple means for people or organisations who gave information or documents to the Royal Commission to access copies of that information, without the need to make a request under the *Freedom of Information Act 1982* or other legislation. They also provide for appropriate access to the records for law enforcement purposes.

Human Rights Implications

This Legislative Instrument engages the following rights:

- The right to a fair hearing—article 14 of the International Covenant on Civil and Political Rights (ICCPR); and
- The right to protection against arbitrary and unlawful interference with privacy and reputation—article 17 of the ICCPR.

The Right to Fair Hearing (Article 14 of the ICCPR)

The Regulations engage Article 14(3)(g) of the ICCPR, which specifies that in the determination of criminal charges, an individual is not to be compelled to testify against themselves or to confess guilt.

A Royal Commission has powers to enable it to effectively investigate matters of public importance, however it is not a court or tribunal and cannot adjudicate on a person's guilt or liability.

Section 6A of the Act specifically abrogates the privilege against self-incrimination. Section 6A of the Act provides that it is not a reasonable excuse for a person to refuse or fail to produce a document or thing, or to answer a question, on the ground that doing so might incriminate the person or make the person liable to a penalty.

Section 6DD of the Act also provides that statements or disclosures made by a person in the course of giving evidence to a Royal Commission, or the production of a document or thing in response to a summons or notice to produce, are not admissible in evidence against that person in 'any civil or criminal proceedings' in any Australian court, unless the proceedings are for an offence against the Act.

The scheme established by sections 6A and 6DD provides Royal Commissions with powers to effectively investigate matters of public importance, while ensuring a person's own statements cannot be used against them in subsequent proceedings.

However, Royal Commission records, including information or documents to which section 6A apply, may be used for law enforcement purposes in certain circumstances, such as for further investigations and in proceedings brought against another person.

Subsection 9(11) of the Act provides that there is no requirement for consultation with a person whose interests are affected before a record is used for law enforcement purposes. This ensures law enforcement agencies can effectively investigate potential criminal behaviour.

The Regulations will enable information and documents gathered by the NT Royal Commission, the Child Sexual Abuse Royal Commission (other than private session records) and the Banking, Superannuation and Financial Services Royal Commission to be accessed and used for law enforcement purposes. As a result of subsection 9(11) of the Act, there will be no requirement that a person's consent is obtained before they are investigated. However, section 6DD of the Act will mean that their own evidence to the Royal Commission cannot be used in evidence against them.

This access and use of information appropriately balances the rights of individuals to not be compelled to testify against themselves with the interests of the community in the prosecution of offences. While Royal Commissions serve the important function of inquiring into matters of public interest, they do not have powers to prosecute civil or criminal wrongdoing. Provision of access to the Royal Commission's records allows criminal and civil offences to be further investigated.

The Right to Protection against Arbitrary and Unlawful Interference with Privacy and Unlawful Attacks on Reputation (Article 17 of the ICCPR)

The Regulations also engage Article 17 of the ICCPR, which provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family or home nor to unlawful attacks on their reputation. Interferences with privacy may be permissible, provided they are authorised by law and not arbitrary.

The NT Royal Commission, the Child Sexual Abuse Royal Commission and the Banking, Superannuation and Financial Services Royal Commission kept records of evidence given to them in the course of their inquiries. Due to the nature of the inquiries, many of these records include private information.

The NT Royal Commission investigated the protection and detention of children in the NT, thus, many witnesses included children or young people, people who are or were in detention, in care, or with mental illnesses or cognitive disabilities. The Child Sexual Abuse Royal Commission inquired into institutional responses to child sexual abuse. The nature of people's experience of child sexual abuse is distressing and deeply personal. The Banking, Superannuation and Financial Services Royal Commission inquired into the banking, superannuation and financial services industry. Part of this involved consideration of the financial and business affairs of individuals, including instances of financial abuse by organisations.

The Regulations facilitate the access and use of Royal Commission records, including private information, by law enforcement agencies to further investigate criminal wrongdoing. Given the subject matter of the NT Royal Commission and the Child Sexual Abuse Royal Commission, crimes against children will likely be a focus of further investigation. This access and use of Royal Commission records must be for the purposes of law enforcement. To the extent that this is an interference with privacy, it is not arbitrary. This is because it is consistent with upholding the inherent dignity of the human person, which underlies the provisions, aims and objectives of the ICCPR.

The regulations afford stronger protections to records of people who appeared at private sessions of the Child Sexual Abuse Royal Commission. The Regulations do not allow law enforcement agencies to access records which contain information or documents given at a private session or if the records identify a person who appeared at a private session. This is an appropriate protection of witnesses' privacy due to the deeply personal nature of matters

discussed in private sessions. It also reflects the fact that statements made at private sessions were not sworn evidence and not subject to cross-examination. There is correspondingly a higher risk that disclosure of a private session record could result in an illegitimate attack on a person's reputation. Accordingly, this aspect of the Regulations promotes the rights contained in Article 17.

Conclusion

This Legislative Instrument is compatible with human rights because it advances the protection of human rights, in particular the right to be free from arbitrary or unlawful interference of privacy. To the extent that the Legislative Instrument may limit human rights, those limitations are reasonable, necessary and proportionate.

Detail of the *Royal Commissions Amendment (Custody of Records) Regulations 2019*

Section 1 – Name

This section provides that the title of the Regulations is the *Royal Commissions Amendment (Custody of Records) Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after it is registered.

Section 3 – Authority

This section provides that the Regulations are made under the *Royal Commissions Act 1902*.

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as provided for in the applicable Schedule and any other item in a Schedule will have effect according to its terms.

Schedule 1 – Amendments

Item 1 – Before regulation 1

This item inserts the heading of ‘Part 1—Preliminary’ before Regulation 1.

Item 2 – Regulation 4

This item inserts into the existing Regulation 4 (Definitions) definitions of the Banking, Superannuation and Financial Services Royal Commission, the Child Sexual Abuse Royal Commission, and the NT Royal Commission.

Item 3 – Before regulation 5

This item inserts the heading of ‘Part 2—General’ before Regulation 5.

Item 4 – Before regulation 8

This item inserts the heading of ‘Part 3—Custody and use of records’ before Regulation 8.

Item 5 – After regulation 9

This item inserts new regulations 10, 11 and 12, to provide for custody of and access to records of the NT Royal Commission, the Child Sexual Abuse Royal Commission and the Banking, Superannuation and Financial Services Royal Commission.

Regulation 10

New regulation 10 provides for custody of and access to the Royal Commission records of the NT Royal Commission.

Subregulation 10(2) provides that any reference within this regulation to a Royal Commission record also includes any part of the record. This provision is included for clarification only. Although existing regulations 8 and 9 do not contain equivalent provisions for treating part of a record as a record, this provision reflects the basis on which regulations 8 and 9 are administered in practice and is not intended to require any change to or divergence from that practice.

Subregulation 10(3) provides that all NT Royal Commission Records are to be kept in the custody of the Secretary of the Attorney-General's Department (the custodian). In accordance with ordinary administrative principles, the custodian may delegate some or all of their powers.

Subregulation 10(4) sets out the circumstances in which the custodian may give a copy of or access to a record of the NT Royal Commission to a person or body that requests it. The circumstances are that:

- free access to the record is not publicly available;
- that the requesting person or body either gave the NT Royal Commission the record or information or matter contained in it, or is an authorised representative of that person or body;
- the request is not made on behalf of a State or Territory or by a department or agency of a State or Territory; and
- the custodian is reasonably satisfied of the identity of the requestor and, for a representative, their authorisation is genuine and currently effective.

This provision provides a simple means for people or organisations who gave information or documents to the Royal Commission to access copies of that information, without the need to make a request under the *Freedom of Information Act 1982* or other legislation. State and Territory governments and agencies are excluded from this subregulation, as subregulation 10(5) provides a specific mechanism for them to access records.

Subregulation 10(5) sets out circumstances in which the custodian may give a copy of or access to a record of the NT Royal Commission to a person requesting it on behalf of a State or Territory or a Department of State or agency of a State or Territory. The circumstances are that free access to the record is not publicly available and the record or information or matter contained in it was given to the NT Royal Commission by any person on behalf of that State or Territory or any Department of State or agency of that State or Territory.

This provision will ensure that a State or Territory government is able to access information provided to the Royal Commission by its agencies, even if that agency has changed name or function, or ceased to exist.

Subregulation 10(6) sets out circumstances in which the custodian may give a copy of or access to a record of the NT Royal Commission or to allow a person or body to access a record where the person or body performs a function relating to law enforcement purposes. The circumstances are that the record is not publicly available and the copy of or access to the record is requested for the purposes of performing a function relating to law enforcement.

This provision engages subsection 9(11) of the Act, which provides that the custodian may, for law enforcement purposes, provide access to or copies of Royal Commission records to a person or body without obtaining the consent of, giving notice to, giving an opportunity to make submissions to or taking into account submissions made by any person.

Subregulation 10(7) provides that the custodian may give a copy of a record or allow access to a record in any form reasonably considered by the custodian to allow access to the information or matter contained in the record. In particular, the custodian may respond to a request for a copy of a record by providing access to the record and respond to a request for access to a record by providing a copy of the record.

This provision also allows the custodian to determine the form in which a copy of a record or access to a record will be given to a person. For example, the custodian may provide access to a record which is a recording by allowing the recording to be listened to or by providing a copy of a transcript of that recording.

Subregulation 10(8) indicates that the Regulations do not limit the circumstances in which the custodian may give, or allow access to, a record of the Royal Commission. For example, the *Freedom of Information Act 1982* may also allow access in some circumstances, as may other laws or administrative principles.

Subregulation 10(9) makes it clear that the Regulations do not limit the circumstances in which the custodian, as Secretary of the Attorney-General's Department, may use the records of the NT Royal Commission for the purpose of exercising their powers and functions. This subregulation also makes it clear that the Regulations do not limit the circumstances in which the custodian can provide the records to a public office holder or public authority for the purposes of exercising their functions and powers.

Regulation 11

New regulation 11 provides for custody of and access to the Royal Commission records of the Child Sexual Abuse Royal Commission.

Subregulation 11(2) provides that any reference within the Regulations to a Royal Commission record also includes any part of the record. This provision is included for clarification only. Although regulations 8 and 9 do not contain equivalent provisions for treating part of a record as a record itself, this provision reflects the basis on which regulations 8 and 9 are administered in practice and is not intended to require any change to or divergence from that practice.

Subregulation 11(3) provides that all Child Sexual Abuse Royal Commission Records are to be kept in the custody of the Secretary of the Attorney-General's Department (the custodian). In accordance with ordinary administrative principles, the custodian may delegate some or all of their powers.

Subregulation 11(4) sets out the circumstances in which the custodian may give a copy of or access to a record of the Child Sexual Abuse Royal Commission to a person or body that requests it. The circumstances are that:

- free access to the record is not publically available;
- that the requesting person or body gave the Child Sexual Abuse Royal Commission the record or information or matter contained in it, or if the record is of a private session of the Child Sexual Abuse Royal Commission, appeared at the private session, or is an authorised representative of that person or body;
- the request is not made on behalf of a State or Territory or by a department or agency of a State or Territory; and

- the custodian is reasonably satisfied of the identity of the requestor and, for a representative, their authorisation is genuine and currently effective.

This provision provides a simple means for people or organisations who gave information or documents to the Royal Commission to access copies of that information, without the need to make a request under the *Freedom of Information Act 1982* or other legislation. In relation to private sessions of the Royal Commission, it allows a person who appeared to obtain access to or a copy of records of their session. State and Territory governments and agencies are excluded from this subregulation, as subregulation 11(5) provides a specific mechanism for them to access records.

Subregulation 11(5) sets out the circumstances in which the custodian may give a copy of or access to a record of the Child Sexual Abuse Royal Commission to a person requesting it on behalf of a State or Territory or a Department of State or agency of a State or Territory. The circumstances are that free access to the record is not publicly available and the record or information or matter contained in it was given to the Child Sexual Abuse Royal Commission by any person on behalf of that State or Territory or any Department of State or agency of that State or Territory.

This provision will ensure that a State or Territory government is able to access information provided to the Royal Commission by its agencies, even if that agency has changed name or function, or ceased to exist.

Subregulation 11(6) sets out the circumstances in which the custodian may give a copy of a record of the Child Sexual Abuse Royal Commission or to allow a person or body to access a record where the person or body performs a function relating to law enforcement purposes. The circumstances are that:

- the record is not publicly available;
- the copy of or access to the record is requested for the purposes of performing a function relating to law enforcement purposes; and
- the record does not contain information or a matter, or enable information or a matter to be obtained, that was given or obtained at a private session under section 6OB of the Act unless the matter is included under section 6OJ of the Act in a report of recommendation of the Royal Commission into Child Sexual Abuse, or identify a natural person or enable a natural person to be identified as a person who appeared at any private session.

This provision engages subsection 9(11) of the Act, which provides that the custodian may, for law enforcement purposes, provide access to or copies of Royal Commission records to a person or body without obtaining the consent of, giving notice to, giving an opportunity to make submissions to or taking into account submissions made by any person.

This arrangement does not apply to records of private sessions or to records which identify a person who appeared at a private session. This reflects the higher level of confidentiality provided to these categories of records, consistent with the expectations of participants in private sessions and the untested nature of the information included in the records.

Subregulation 11(7) provides that the custodian may give a copy of the record or allow access to the record in any form reasonably considered by the custodian to allow access to the information or matter contained in the record. In particular, the custodian may respond to a

request for a copy of a record by providing access to the record and respond to a request for access to a record by providing a copy of the record.

This provision also allows the custodian to determine the form in which a copy of a record or access to a record will be given to a person. For example, the custodian may provide access to a record which is a recording by allowing the recording to be listened to or by providing a copy of a transcript of that recording.

Subregulation 11(8) indicates that the Regulations do not limit the circumstances in which the custodian may give, or allow access to, a record of the Child Sexual Abuse Royal Commission. For example, the *Freedom of Information Act 1982* may also allow access in some circumstances, as may other laws or administrative principles.

Subregulation 11(9) makes it clear that the Regulations do not limit the circumstances in which the custodian, as Secretary of the Attorney-General's Department, may use the records of the Child Sexual Abuse Royal Commission for the purpose of exercising their powers and functions. This subregulation also makes it clear that the regulation does not limit the circumstances in which the custodian can provide the records to a public office holder or public authority for the purposes of exercising their functions and powers.

Regulation 12

New regulation 12 provides for custody of and access to the Royal Commission records of the Banking, Superannuation and Financial Services Royal Commission.

Subregulation 12(2) provides that any reference within this regulation to a Royal Commission record also includes any part of the record. This provision is included for clarification only. Although existing regulations 8 and 9 do not contain equivalent provisions for treating part of a record as a record, this provision reflects the basis on which regulations 8 and 9 are administered in practice and is not intended to require any change to or divergence from that practice.

Subregulation 12(3) provides that all Banking, Superannuation and Financial Services Royal Commission Records are to be kept in the custody of the Secretary of the Attorney-General's Department (the custodian). In accordance with ordinary administrative principles, the custodian may delegate some or all of their powers.

Subregulation 12(4) sets out the circumstances in which the custodian may give a copy of or access to a record of the Banking, Superannuation and Financial Services Royal Commission to a person or body that requests it. The circumstances are that:

- free access to the record is not publicly available;
- that the requesting person or body either gave the Banking, Superannuation and Financial Services Royal Commission the record or information or matter contained in it, or is an authorised representative of that person or body; and
- the custodian is reasonably satisfied of the identity of the requestor and, for a representative, their authorisation is genuine and currently effective.

This provision provides a simple means for people or organisations who gave information or documents to the Royal Commission to access copies of that information, without the need to make a request under the *Freedom of Information Act 1982* or other legislation.

Subregulation 12(5) sets out circumstances in which the custodian may give a copy of or access to a record of the Banking, Superannuation and Financial Services Royal Commission or to allow a person or body to access a record where the person or body performs a function relating to law enforcement purposes. The circumstances are that the record is not publicly available and the copy of or access to the record is requested for the purposes of performing a function relating to law enforcement purposes.

This provision engages subsection 9(11) of the Act, which provides that the custodian may, for law enforcement purposes, provide access to or copies of Royal Commission records to a person or body without obtaining the consent of, giving notice to, giving an opportunity to make submissions to or taking into account submissions made by any person.

Subregulation 12(6) provides that the custodian may give a copy of a record or allow access to a record in any form reasonably considered by the custodian to allow access to the information or matter contained in the record. In particular, the custodian may respond to a request for a copy of a record by providing access to the record and respond to a request for access to a record by providing a copy of the record.

This provision also allows the custodian to determine the form in which a copy of a record or access to a record will be given to a person. For example, the custodian may provide access to a record which is a recording by allowing the recording to be listened to or by providing a copy of a transcript of that recording.

Subregulation 12(7) indicates that the Regulations do not limit the circumstances in which the custodian may give, or allow access to, a record of the Royal Commission. For example, the *Freedom of Information Act 1982* may also allow access in some circumstances, as may other laws or administrative principles.

Subregulation 12(8) makes it clear that the Regulations do not limit the circumstances in which the custodian, as Secretary of the Attorney-General's Department, may use the records of the Banking, Superannuation and Financial Services Royal Commission for the purpose of exercising their powers and functions. This subregulation also makes it clear that the Regulations do not limit the circumstances in which the custodian can provide the records to a public office holder or public authority for the purposes of exercising their functions and powers.