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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ROYAL COMMISSIONS AMENDMENT BILL 2013**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Prime Minister,  
the Hon Julia Gillard MP)

## **Royal Commissions Amendment Bill 2013**

### **General Outline**

There are two main purposes of the Bill. The *Royal Commissions Act 1902* ('the Act') envisages that a Royal Commission may be constituted by one or more persons appointed by the Governor-General by Letters Patent. Where a Royal Commission is constituted by more than one Commissioner, the Act currently allows evidence to be taken on oath or affirmation at a hearing by all the Commissioners or by a quorum. The first main purpose of the Bill, to apply to multi-member Royal Commissions, is to enable the President or Chair to authorise one or more members to hold a hearing. The proposed amendment will allow for efficient distribution of work between Commissioners where it is appropriate to do so. The Bill refers to these hearings as 'authorised member hearings'. This measure will have general application to Royal Commissions, including the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The evidence taken at a hearing of this kind would form part of the evidence for the inquiry as a whole.

The second main purpose of the Bill, in support of the work of the *Royal Commission into Institutional Responses to Child Sexual Abuse*, is to introduce measures particular to that Commission. The proposed measures will facilitate persons directly or indirectly affected by child sexual abuse and related matters in institutional contexts to present their account to a Commissioner in a setting that is less formal than a hearing. The Bill refers to this type of hearing as a 'private session'. The Letters Patent recognise that it is important that persons affected by child sexual abuse and related matters in institutional contexts can share their experiences in appropriate ways recognising that many participants will be severely traumatised or will have special support needs. Private sessions would also allow Commissioners the opportunity to better understand the context and circumstances of child sexual abuse. The proposed amendments will permit the Chair Commissioner to authorise members of the Commission to hold private sessions. The amendments will apply similar protection to participants who give information as would apply to a person giving evidence at a formal hearing. The information will not be taken on oath or affirmation and the sessions will be conducted in private and information that is received and used in a report of the Royal Commission will not identify individuals.

The Bill would also make minor amendments to address omissions and improve consistency in use of terms.

### **Financial Impact Statement**

The amendments in this Bill will have no financial impact on Government revenue.

### **Regulation Impact Statement**

The Office of Best Practice Regulation has advised that no regulation impact statement is required for the measures contained in this Bill.

## **Statement of Compatibility with Human Rights**

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

### **Royal Commissions Amendment Bill 2013**

This Bill 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 of the Bill**

The Act provides a framework for establishing Royal Commissions, with coercive information gathering powers, to undertake public inquiries into a broad range of matters of public importance. A Commission, which may be constituted by a sole Commissioner, or by more than one Commissioner, may hold a hearing for the purpose of taking evidence. For a multi-member Commission, the proposed amendments will permit the President or Chair to authorise one or more members to hold a hearing. These amendments are aimed at enabling an efficient distribution of work between members constituting a multi-member Commission and do not engage any applicable human rights.

Amendments are also proposed to introduce ‘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 (see item 30 of Schedule 1). To support private sessions, proposed amendments will include giving persons participating the same protections as would apply to a person giving evidence at hearing (proposed sections 6OE and 6OF), and requiring these sessions to be held in private (proposed section 6OD). It will be an offence to use or disclose information obtained at a private session otherwise than in accordance with certain defined circumstances (proposed subsection 6OD(2)).

### **Human rights implications**

The Bill engages the following applicable rights or freedoms:

- the prohibition against unlawful and arbitrary interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), and
- the right to freedom of expression in Article 19 of the ICCPR.

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person’s privacy, family, home or correspondence. Interferences with privacy may be permissible, provided they are authorised by law and not arbitrary. In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ in this context to imply that ‘any interference with privacy must be proportional to the end sought and be necessary in

the circumstances of any given case'. The collection, security, use, disclosure or publication of personal information will engage Article 17.

The Bill will promote the right to privacy by enabling persons who wish to give information to the *Royal Commission into Institutional Responses to Child Sexual Abuse* to do so voluntarily in a private session that will not be open to the public. This is considered appropriate given the deeply personal and distressing nature of people's experiences of child sexual abuse. The purpose of receiving the information is to assist the lawful purposes of the Royal Commission's inquiry. Information relating to a natural person could only be used in a report of the Royal Commission if the information is also given as evidence to the Commission or under a summons, requirement or notice under section 2 (proposed paragraph 6OD(3)(a)) or if it is de-identified (proposed paragraph 6OD(3)(b)).

Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression and that this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. This right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary on limited grounds, including for the respect of the rights or reputations of others.

The Bill will limit Article 19 by restricting who may attend private sessions and limiting the use and disclosure of information obtained at a private session. An amendment is proposed to make it an offence to use or disclose information obtained at a private session which is subject to exceptions including where the use or disclosure is for the purposes of performing functions or duties or exercising powers in relation to the *Royal Commission into Institutional Responses to Child Sexual Abuse* or where the information is de-identified when used in a report of the Commission. These amendments are considered appropriate given the deeply personal and distressing nature of people's experiences of child sexual abuse. The offence will serve to protect the privacy of participants. As the information obtained at a private session will not be given on oath or affirmation these measures will also serve to protect the reputations of other people.

The fair trial and fair hearing rights contained in article 14 of the ICCPR are not engaged by the amendments. A Royal Commission is not a court or tribunal and cannot adjudicate on a person's guilt or liability. A Royal Commission may report and make recommendations on matters into which it is inquiring.

### **Conclusion**

The Bill is compatible with human rights as it promotes the right to privacy and to the extent that it limits the right to freedom of expression, that limitation is reasonable, necessary and proportionate.

## **Notes on Clauses**

### **Abbreviations**

The Act means the *Royal Commissions Act 1902*.

### **Clause 1: Short title**

Clause 1 is a formal clause which provides the citation of the Bill.

### **Clause 2: Commencement**

Clause 2 provides that the Bill will commence on the day the Bill receives Royal Assent.

### **Clause 3: Schedules**

This clause provides for each Act specified in a Schedule to the Bill to be amended in accordance with the items set out in the relevant Schedule. The Bill only proposes amendments to the *Royal Commissions Act 1902*.

## **Schedule 1 – Amendments**

### *Royal Commissions Act 1902*

#### Item 1 – *before section 1*

This item inserts a heading to separate the Act into a part to assist with readability.

#### Items 2 and 3 – *section 1A*

The Act variously refers to ‘authorise’ and ‘authorize’. These items adopt the former spelling for consistency.

#### Item 4 – *subsection 1B(1)*

This item inserts a definition for an authorised member hearing and is related to items 5 and 8. The concept of an authorised member hearing will not apply where a Commission is constituted by a sole Commissioner.

#### Item 5 – *subsection 1B(1) (definition of Commission and Royal Commission)*

This item substitutes a new definition for *Commission* and *Royal Commission* and is consequential to the proposed amendments at item 8. The proposed definition reflects the existing definition but ensures that where members of a multi-member Commission undertake an authorised member hearing, they are taken to be persons sitting for the purposes of the inquiry of the Commission as a whole. This means that evidence taken at an authorised member hearing would form part of the Commission’s inquiry.

#### Item 6 – *at the end of section 1B*

This item is related to the proposed amendments to permit an authorised member hearing, and provides that where any other Act refers to a Royal Commission that reference includes a reference to one or more members of a Commission holding an authorised member hearing. For example, some Acts make provision permitting certain information to be disclosed to a Royal Commission. The amendment would ensure that the information could be provided to an authorised member hearing.

#### Item 7 – *after section 1C*

This item inserts a heading to separate the Act into a part to assist with readability.

#### Item 8 – *after subsection 2(1)*

Section 2 of the Act gives a Commission coercive powers to summon witnesses and take evidence on oath or affirmation at a hearing. For a multi-member Commission, proposed subsection 2(1A) will permit the President or Chair of the Commission to authorise one or more members to hold a hearing. The President or Chair would have authority to hold a hearing by themselves or with other authorised members. A hearing may also be held without the participation of the President or Chair. The amendment would mean that less than a quorum of members of a Commission could hold a hearing. The amendment will provide flexibility for a multi-member Commission in the conduct of its inquiry, and allow for efficient distribution of work between members of a Commission where the President or Chair considers it appropriate to do so. A hearing could still be held by all members or by a quorum of members.

Proposed subsection 2(1B) identifies the member who would be the presiding member at an authorised member hearing. Presiding members have particular powers, such as requiring a person appearing at a hearing to produce a document under subsection 2(2) of the Act. If the President or Chair is not participating at an authorised member hearing, the presiding member will be the person who is authorised by the President or Chair.

Item 9 – *paragraph 2(3)(b)*

The Act variously refers to ‘authorise’ and ‘authorize’. This item adopts the former spelling for consistency.

Item 10 – *after subsection 2(3A)*

This item is consequential to item 30 which would insert a new Part into the Act to assist the work of the *Royal Commission into Institutional Responses to Child Sexual Abuse*, in particular to facilitate receipt of information from people affected by an incident of child sexual abuse other than as sworn or affirmed evidence. As participation at the proposed private sessions will be voluntary, this item will not permit the Commission to require production of documents under subsection 2(3A) of the Act at a private session.

Item 11 – *subsection 2(4)*

Subsection 2(3) of the Act permits a member of a Commission, and an authorised person, to administer an oath or affirmation to a person appearing at a hearing. This item is consequential to item 8, and provides for the presiding member to authorise a person to administer an oath or affirmation for the purposes of an authorised member hearing. The item preserves the existing authority of a President or Chair of a multi-member Commission, or the Commissioner of a sole member Commission, to authorise a person for that purpose at a hearing.

Item 12 – *at the end of section 3 (after the note)*

Section 3 of the Act makes it an offence for a person to fail to answer a summons to appear as a witness or to produce a document. It is a defence to a prosecution if the document the subject of a summons is not relevant to the matters into which the Commission is inquiring. The effect of this item is that, for the purposes of an authorised member hearing, the test is whether the document is relevant to the matters into which the Commission as a whole is inquiring.

Items 13, 14, and 15 – *subsection 4(3), paragraphs 4(4)(b) and (c), and subsection 4(5)*

The Act variously refers to ‘authorise’ and ‘authorize’. These items adopt the former spelling for consistency.

Item 16 – *after subsection 4(5)*

This item is consequential to item 8. Section 4 of the Act permits a relevant Commission to authorise a member of a Commission, or a member of the police, to apply to a court for a search warrant. The effect of this item is that members undertaking an authorised member hearing could not make an authorisation for that purpose. The existing position would be preserved so that an authorisation could only be given by the Commission as a whole or by a quorum of the members.

Item 17 – *at the end of section 6AB (after the note)*

Section 6AB of the Act makes it an offence for a person to refuse to produce a document on the ground that it is subject to legal professional privilege where that claim has been rejected by a member of the Commission. It is a defence to a prosecution if the document the subject of a summons is not relevant to the matters into which the Commission is inquiring. The effect of this item is that, for the purposes of an authorised member hearing, the test is whether the document is relevant to the matters into which the Commission is inquiring as a whole.

Item 18 – *subsection 6B(1)*

Subsection 6B(1) provides for the President or Chair of a Commission to issue a warrant for the apprehension of a person who has failed to answer a summons to attend as a witness. This item clarifies that a warrant may also be issued by a sole Commissioner, that is, the only member constituting a Commission.

Item 19 – *subsection 6B(2)*

The Act variously refers to ‘authorise’ and ‘authorize’. This item adopts the former spelling for consistency.

Item 20 – *at the end of subsection 6B(2)*

Subsection 6B(2) provides that a warrant issued under subsection 6B(1) shall authorise the detention in custody of the witness until the witness is released by order of the President or Chair. Like item 18, this item clarifies that, for the purposes of subsection 6B(2), a person detained in custody may be released by order of a sole Commissioner in addition to an order of the President or Chair of a Commission.

Item 21 – *at the end of section 6B*

Where a warrant has been issued for the apprehension of a person who has failed to answer a summons to attend 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. The effect of this item is that a person who has been apprehended could not be brought before an authorised member hearing. The existing position would be preserved so that a person could be brought before the Commission as a whole or a quorum of the members.

Item 22 – *section 6C*

This item would replace ‘meeting’ with ‘hearing’ for consistency in terminology used in the Act.

Items 23 and 24 – *subsection 6D(2) and subsection 6F(1)*

The Act variously refers to ‘authorise(d)’ and ‘authorized’. This item adopts the former spelling for consistency.

Item 25 – *subsection 6F(3)*

This item is consequential to item 8. Subsection 6F(1) of the Act permits an authorised person to inspect and take copies of a document produced to the Commission. This item permits a member who is undertaking an authorised member hearing to authorise a person for that purpose. The item preserves the existing authority for an authorisation to be given by the President or Chair of a multi-member Commission or the Commissioner of a sole member Commission.



Items 26 and 27– *section 6FA and subsection 6G(2)*

The Act variously refers to ‘authorise(d)’ and ‘authorized’. These items adopt the former spelling for consistency.

Item 28 – *before section 6H*

This item inserts a heading to separate the Act into a part to assist with readability.

Item 29 – *at the end of section 6H*

This item is consequential to item 8. Subsection 6H(1) of the Act makes it an offence for a person to intentionally give evidence that is false or misleading in respect of a matter that is material to the inquiry being undertaken by the Commission. The effect of this item is that, for the purposes of an authorised member hearing, the inquiry is the inquiry being undertaken by the Commission as a whole.

Item 30 – *after section 6O*

To support the work of the *Royal Commission into Institutional Responses to Child Sexual Abuse*, this item inserts a new part into the Act to facilitate the Royal Commission receiving information from persons directly or indirectly affected by child sexual abuse. The proposed ‘private sessions’ will enable victims and others affected by child sexual abuse to voluntarily give their accounts to a Commissioner in a setting that is less formal than a hearing. The Commission will be able to ask questions about the information that is given. A response to those inquiries would be voluntary. The Letters Patent recognise that it is important that persons affected by child sexual abuse and related matters in institutional contexts can share their experiences in appropriate ways recognising that many participants will be severely traumatised or will have special support needs. This Part will only apply to the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

Proposed section 6OA inserts definitions for the purposes of proposed new Part 4.

The effect of proposed subsection 6OB(1) is to permit the Chair of the *Royal Commission into Institutional Responses to Child Sexual Abuse* to authorise a member of the Commission to hold a private session to obtain information for the purposes of the inquiry. A private session will be able to be held by one or two Commissioners only (proposed subsection 6OB(2)).

Under proposed subsection 6OB(3) the conduct of a private session will generally be at the discretion of the Commissioner or Commissioners holding a hearing. A Commissioner will need to have regard to any directions made by the Chair that are relevant to the conduct of a private session and to the requirements of proposed 6OD (including session to be held in private, and limits on who may be present and on publication of information).

Participation at a private session will be voluntary. The Commission would not use compulsory powers at these sessions to require attendance, an answer to an inquiry or production of documents. Information received at a private session would not be taken on oath or affirmation. For these reasons, proposed subsections 6OC(1) and 6OC(2) provide that a person who appears at a private session is not a witness and

does not give evidence to the Commission and makes clear that a private session is not a hearing of the Commission.

The purpose of proposed subsection 6OC(3) is to ensure that certain powers available to the Royal Commission will apply to information or a document received at a private session. This includes powers under section 6F of the Act to inspect, copy and retain documents that may be voluntarily provided at a private session, and under section 6P of the Act to communicate information to certain office holders, including the Commissioner of a police force.

The effect of proposed paragraph 6OC(3)(c) and proposed subsection 6OC(4) is to make records and documents from a private session, records of the Royal Commission for the purposes of section 9 of the Act. That section deals with custody and use of records of a Royal Commission when they are no longer required by the Commission. This has been dealt with in two separate provisions for drafting reasons to accommodate the different terms used in sections 6F, 6P and 9.

Proposed subsection 6OC(5) applies certain offences, that apply in the case of persons giving evidence or intending to give evidence at a hearing, to persons appearing, or intending to appear, at a private session. Some of these offences will protect persons intending to appear, or appearing, at a private session such as section 6L (offence to intentionally prevent a person from attending), section 6M (offence to cause injury or disadvantage to a person who has appeared) and section 6N (offence to dismiss or cause prejudice to an employee who has appeared). Other offences relate to information that is received at a private session, such as section 6H (offence to intentionally give information that the person knows is false or misleading) and section 6I (offence to bribe a witness to give false information).

The purpose of proposed subsection 6OC(6) is to ensure that the offence for contempt of a Royal Commission will apply to private sessions. Under existing section 6O of the Act, a person will be guilty of an offence if they intentionally insult or disturb a Commission, interrupt the Commission's proceedings, use insulting language towards a Commission, or use words false or defamatory of a Commission.

Proposed subsection 6OD(1) will require a private session to be held in private. A private session will provide a less formal setting for those persons wishing to tell their story. It is important also that the sessions be in private because information will not be taken on oath or affirmation and will not be tested in cross examination. Only persons who are authorised by a member of the Commission may be present at the hearing. A Commissioner will, for example, be able to authorise support persons to accompany a person giving information.

Proposed subsection 6OD(2) will make it an offence to use or disclose information obtained at a private session except where the use or disclosure is for the purposes of performing functions or duties or exercising powers in relation to the Child Sexual Abuse Royal Commission or where disclosure is used in a report of the Commission in accordance with proposed subsection 6OD(3) or where the information may be communicated to certain public officials under section 6P of the Act. The offence will also not apply where the disclosure accords with section 9 of the Act which deals with the custody and use of records of a Royal Commission.

Under proposed subsection 6OD(3), where information has been received at a private session that relates to a natural person, that information can only be included in a report or recommendation of the Royal Commission if the information is also given in evidence at a hearing of the Commission or produced in a document pursuant to a notice given under section 2, or if the information is de-identified. This limitation on publication in a report or recommendation does not apply to information received at a private session that does not relate to a natural person.

Subsection 22(4) of the *Archives Act 1983* 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 for the purposes of that Act. The effect of proposed subsection 6OD(4) is to apply the rule in subsection 22(4) of the *Archives Act* to information obtained at a private session so that publication of the information is prohibited until it is in the open access period under the *Archives Act*. A record that is created by the Child Sexual Abuse Royal Commission will be in the open access period 21 years after its creation. Access may be granted to a record in the open access period unless an exemption applies. A number of grounds exist to exempt access to a record, including if disclosure would involve the unreasonable disclosure of the personal affairs of any person including a deceased person. The *Freedom of Information Act 1982*, which gives rights of access to documents of Commonwealth agencies that are not in the open access period, does not apply to a Royal Commission.

Proposed section 6OE would give the same protection to an individual for statements made at a private session, or for documents produced at a private session, as applies under section 6DD of the Act to a person who has given evidence before a hearing of a Commission. For example, statements made at a private session could not be used in evidence against the person in a defamation proceeding. The provision would also 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.

Proposed subsection 6OF(1) would give the same protection to a person who appears at a private session as applies to a witness appearing before a hearing under subsection 7(2) of the Act. The protection would also apply to a person who is authorised to attend with a person who is appearing. A Commissioner may authorise a legal practitioner to attend with a person who is giving information to a private session. Proposed subsection 6OF(2) would give the same protection to a legal practitioner in that case as applies under subsection 7(3) of the Act when a legal practitioner is appearing on a behalf of a person at a hearing. Existing subsection 7(3) of the Act would protect legal practitioners assisting the Commission in any circumstance, including at a private session.

Item 31 - *subsection 6P(2)*

The Act variously refers to ‘authorise(d)’ and ‘authorized’. This item adopts the former spelling for consistency.

Item 32 – *at the end of section 6P*

This item is consequential to item 8. Section 6P of the Act permits a Commission to communicate information or furnish evidence to certain office holders, such as the Director of Public Prosecutions or a Police Commissioner, if in the opinion of the Commission it is appropriate to do so. The effect of this item is that, in the case of a multi-member Commission, a member or members undertaking an authorised member hearing could not make a decision for that purpose. The existing position would be preserved so that a decision of this kind would be made by the Commission as a whole or a quorum of its members.

Item 33 – *subsection 9(12) (heading)*

This item is consequential to item 34 and amends the heading.

Item 34 – *subsection 9(12)*

Existing subsection 9(12) of the Act preserves the operation of section 6DD of the Act for the purposes of dealings with Royal Commission records that are no longer required by the Commission. Section 6DD provides that statements made by witnesses are not admissible in evidence against the witness. The effect of this item is to similarly preserve the operation of proposed section 6OE, which would give the same protection to witnesses participating at a private session as section 6DD gives to a witnesses appearing at a hearing.

Item 35 – *before section 10 (heading relating to legal proceedings)*

This item repeals the heading as it is unnecessary.

Item 36 – *paragraph 16(1)(a)*

The Act variously refers to ‘authorise’ and ‘authorize’. This item adopts the former spelling for consistency.

Item 37 – *application*

The amendments that would be made by items 10, 30, 33 and 34 relate to private sessions. Those amendments apply only in relation to the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The other amendments proposed in Schedule 1 would apply to any Royal Commission that conducts an inquiry after commencement of the Schedule, whether the Royal Commission is established before or after the amendments commence. These measures would apply to the *Royal Commission into Institutional Responses to Child Sexual Abuse*.