
Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper

Secretariat, Royal Commission into Child Sexual Abuse

28 November 2012

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Acknowledgement

The Law Council acknowledges the assistance of the following Committees, Constituent Bodies and Sections of the Law Council in the preparation of this submission:

Access to Justice Committee

Indigenous Legal Issues Committee

National Criminal Law Liaison Committee

Law Institute of Victoria

Law Society Northern Territory

Law Society of the Australian Capital Territory

Law Society of New South Wales

Law Society of South Australia

Law Society of the Australian Capital Territory

Business Law Section

Family Law Section

International Law Section

Introduction

1. The Law Council is pleased to provide this submission to the Interim Secretariat of the proposed Royal Commission into Institutional Responses to Child Sexual Abuse in Australia (the Royal Commission). This submission addresses the Consultation Paper on the Establishment of the Royal Commission (the Consultation Paper).¹
2. The Law Council notes that the Consultation Paper was issued on 19 November 2012 and that comments were requested by 26 November 2012. The Law Council is grateful to the Secretariat for providing a short extension of time in which to make this submission. However, the Law Council is still concerned by the short time frame for comments on the Consultation Paper and for the establishment of the Royal Commission before the end of 2012.
3. The Law Council represents around 59,000 Australian lawyers through its Constituent Bodies, the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. The Law Council also has a number of specialist Sections consisting of individual members of the legal profession with a particular interest in specific areas of law or legal practice. These Sections are the Business Law Section, the Family Law Section, the Federal Litigation Section, the International Law Section and the Legal Practice Section. Further details of the Law Council's structure and aims are included at Attachment A.

¹ See Consultation Paper on the Establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse, 19 November 2012 at <http://childabuseroyalcommission.dpmc.gov.au/consultation-paper>

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4. In the period available for comment on the Consultation Paper, the Law Council has only been able to obtain brief comments from its Constituent Bodies, Committees and Sections. These comments are reflected in this submission. The Law Council also notes that one of its Constituent Bodies, the Law Society of South Australia (LSSA) has provided a separate submission based on the experience of a number of its members in relation to the South Australian Commission of Inquiry into Children in State Care and the Commission of Inquiry into the Children on Anangu Pitjanjijatjara Yankunytjatjara (APY) Lands (both inquiries are commonly referred to as the Mullighan Inquiry).²
 5. The Law Council hopes that the Royal Commission, once established, will allow more time for organisations such as the Law Council to make comments in response to any call for submissions.

Background

6. On 12 November 2012, the Prime Minister announced that she would recommend the establishment of the Royal Commission. It will be asked to identify what can be done to ensure that child sexual abuse is prevented in the future and, where it does occur, that organisational responses are just and supportive of survivors. While not diminishing the seriousness of child sexual abuse in other contexts, including within families, it is intended that the Royal Commission will focus on public and private institutions and organisations.
7. On 19 November 2012, the Australian Government released the Consultation Paper. The Consultation Paper seeks views on the following aspects of the Royal Commission:
 - The scope of the Terms of Reference;
 - The form of the Royal Commission;
 - The number and qualifications of Royal Commissioner/s; and
 - The reporting timetable for the Royal Commission.
8. This submission contains the Law Council's response to the Consultation Paper.

Response

General comments

9. The Law Council supports the establishment of the Royal Commission. However, the Law Council is concerned about the time frame of one week for comments on the Consultation Paper and the time frame to establish the Royal Commission before the end of 2012.
10. Given the sensitivity of the subject matter, the Law Council considers that a longer time frame for consultation and for consideration of relevant issues should be allowed.

² See *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) available at <http://www.legislation.sa.gov.au/LZ/C/A/Commission%20of%20Inquiry%20%28Children%20in%20State%20Care%20and%20Children%20on%20APY%20Lands%29%20Act%202004.aspx>

This would help to ensure that the Terms of Reference and the form of the Royal Commission will best facilitate the outcomes sought.

11. The Law Council notes recent comments by Professor Hal Wootten QC, a member of the Royal Commission into Aboriginal Deaths in Custody (the RCIADIC). Commenting on the recent announcement about the proposed Royal Commission, Mr Wootten stated that, ‘the government must take time to establish the right terms and scope and ensure that its goals are achievable.’³ Mr Wootten observed that the RCIADIC produced a disappointing result because not enough thought went into the Terms of Reference. He also remarked that, ‘we ended up being set up to answer the wrong question ... were police and prison officers killing Aborigines, whereas the real question was why were so many Aborigines being put in jail?’⁴
12. The Law Council notes that the RCIADIC was established following the issue of Letters Patent on 16 October 1987 by the Governor-General which appointed the Honourable James Muirhead QC to:

inquire into and report upon –
 - (i) The deaths in Australia since 1 January 1980 of Aboriginal and Torres Strait Islanders whilst in police custody, in prison or in any other place of detention,
 - (ii) Any subsequent action taken in respect of those deaths.
13. The Law Council notes that on 6 May 1988 other Commissioners were appointed to conduct inquiries in the States and the Northern Territory through the issue of Letters Patent or Commissions by the Governors of NSW, Victoria, Queensland, South Australia and Tasmania and by the Administrators of Western Australia and the Northern Territory. These Commissioners were required to report to Commissioner Muirhead.
14. The Law Council also notes that the Terms of Reference were amended on 6 May 1988 to:
 - (i) Inquire and report upon the deaths in Australia since 1 January 1980 of Aboriginals and Torres Strait Islanders whilst in police custody, in prison or in any other place of detention, but not including such a death occurring in a hospital, mental institution, infirmary or medical treatment centre unless injuries suffered while in police custody, in prison or in any other place of detention caused or contributed to that death;
 - (ii) Authorise [the Commissioner] for the purpose of reporting on any underlying issue associated with the deaths to take account of social, cultural and legal factors which, in his judgment appeared to have a bearing on the deaths;
 - (iii) Authorise [the Commissioner] to refer to other Commissioners for inquiry, or request another Commissioner not to undertake inquiry, into a particular death;

³ Jonathon Swan, “Former Royal Commissioner Warns of Potential Heartache”, *The Age*, 14 November 2012 at <http://www.theage.com.au/opinion/political-news/former-royal-commissioner-warns-of-potential-heartache-20121113-29ai0.html> ; “Framing key to Royal Commission success”, *University of NSW Newsroom*, 14 November 2012 at <http://newsroom.unsw.edu.au/news/law/framing-key-royal-commission-success>

⁴ *Ibid*

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- (iv) Authorise [the Commissioner] to issue guidelines to the Commissioners as to methods and procedures; and
- (v) Authorise [the Commissioner] to receive reports from the other Commissioners.
15. On 27 April 1989, Commissioner Muirhead's commission was revoked at his request and one of the other Commissioners, the Honourable Elliott Johnston QC, was appointed to take Commissioner Muirhead's role. At the same time, an amendment was made to exclude deaths after 31 May 1989.
16. On 28 June 1989, an Aboriginal Commissioner was appointed to inquire into underlying issues associated with deaths in Western Australia. Amendments were also made on several occasions to extend reporting dates.
17. The Law Council submits that the experience of the RCIADIC emphasises the need for sufficient time to be taken to: consider the Terms of Reference; the form of the Royal Commission; the numbers and qualifications of Commissioners; and the reporting timetable.
18. The Law Council notes that Professor Elena Marchetti conducted an analysis of the RCIADIC by surveying a large number of Indigenous and non-Indigenous people who had worked on the RCIADIC. One of those surveyed, when referring to the initial establishment of the RCIADIC recalled that:
- [t]here was a huge clamour at this stage at the start of the royal commission for it to get established immediately. Tremendous pressure to get cases underway, which we were trying to resist but like all royal commissions, you don't resist ...⁵
19. Professor Marchetti has observed that the RCIADIC was appointed without the Government having a complete understanding of how many deaths needed investigating and what challenges might arise.
20. The experience of the RCIADIC also emphasises the need for appropriate mechanisms for Commonwealth, State and Territory cooperation in examining issues arising from matters occurring in the States and Territories but which Commonwealth, State and Territory Governments seek to address.
21. The experience of the RCIADIC also illustrates the need for multiple Commissioners and a sufficient overall reporting period where the subject of the inquiry involves matters which have occurred over a lengthy period. Such a need also arises where an inquiry requires consideration of complex legal and social policy matters.
22. The RCIADIC experience is also relevant to the need for procedural guidelines for Royal Commissioners, particularly for Commissioners from non-legal backgrounds. The RCIADIC experience also illustrates that Commissioners undertaking such a lengthy inquiry may need to be replaced during the course of the Royal Commission.
23. Significantly, the experience of the RCIADIC is also relevant to the consideration of the need for a Commissioner or Commissioners of Aboriginal and Torres Strait Islander background. Although the subject matter of the RCIADIC would have suggested this need from the outset, it was not until almost two years after its establishment that an Aboriginal Commissioner was appointed. While the current Royal Commission is examining child sexual abuse generally, it is likely to be required

⁵ See Elena Marchetti, "Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody", *Macquarie Law Journal* (2005) Vol 5 103 available at <http://search.informit.com.au/documentSummary;dn=335970511969769;res=IELHSS>

to give particular attention to the sexual abuse of Aboriginal and Torres Strait Islander children by organisations and institutions. It has been recognised that the examination of such issues should be undertaken by a person or persons of Aboriginal and/or Torres Strait Islander background and/or a person or persons with particular experience in working with Aborigines and Torres Strait Islanders.⁶

Scope of the Terms of Reference

24. The Law Council supports the proposed scope of the Terms of Reference to:

- a. identify what public and private organisations and institutions should do to prevent child sexual abuse from occurring in their midst;
- b. what should be done by organisations and institutions when allegations are raised; and
- c. what can be done by the relevant institutions, organisations and government agencies to alleviate the impact of abuse that has already occurred.

25. The Law Council also supports the proposal in the Consultation Paper that the Royal Commission should provide an opportunity for those affected by child sexual abuse to share their experiences if they so wish. However, the Law Council suggests that the Royal Commission will be most effective by focusing on systemic issues – that is, causes and solutions – rather than on questions of individual blame or culpability.

26. The Law Council submits that the Terms of Reference and the form of the Royal Commission should enable victims to be heard through a ‘truth-telling’ mechanism. The individual matters considered through such a mechanism should inform the examination of responses to child sexual abuse and recommendations for prevention of such abuse. In formulating the Terms of Reference and establishing the necessary mechanism in this regard, the Law Council submits that the Government and the Royal Commission should be mindful of the need for the Commission not to be overwhelmed by evidence from victims and a consequent fact-finding process.

27. The experience of the RCIADIC supports this view. As noted above, during the course of the RCIADIC, it became clear that the most important focus was on the underlying causes of the problems. The view of former RCIADIC Commissioner Wootten is that it will be unrealistic for the current Royal Commission to address all or even most cases of individual abuse.⁷

28. The Law Council also supports the suggestion in the Consultation Paper that the Royal Commission’s findings and recommendations may extend to:

- a. Ensuring that there are no obstacles to the making of claims and that there is sufficient support for victims in pursuing claims;
- b. Identifying impediments to the proper notification, investigation and prevention of child sexual abuse;

⁶ See Northern Territory Government, *Ampe Akelyernemane Meke Mekarle, Little Children are Sacred, Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007 available at http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf; see also Human Rights and Equal Opportunity Commission, *Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997, available at http://www.humanrights.gov.au/social_justice/bth_report/report/index.html

⁷ See note 3

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- c. The need for changes to laws, policies or practices to prevent and respond to child sexual abuse, and the impact and effectiveness of such changes; and
 - d. The counselling and support needs of victims and their families.
29. The Law Council also supports a Term of Reference which will allow the Royal Commission to take into account relevant recent inquiries, such as the Mullighan Inquiry, the 'Little Children are Sacred' Inquiry and the Inquiry into the Stolen Generations.⁸ The Law Council notes that the recent Inquiry into Protecting Victoria's Vulnerable Children contains a useful precedent in this regard, 'The Inquiry Panel will also utilise and reference previous reports and reviews...'⁹
 30. The Law Council also supports the suggested Term of Reference regarding referral of matters to relevant police authorities and notes that the Royal Commission is not a substitute for criminal investigations. Statements made in Royal Commissions are subject to some forms of protection in subsequent court proceedings.¹⁰ The Law Council supports appropriate protocols for the Royal Commission to address matters subject to court proceedings during the Royal Commission or likely to be subject to proceedings at its conclusion.
 31. Members of the Law Council's Indigenous Legal Issues Committee (ILIC), the LSSA and the Human Rights Committee of the Law Society of New South Wales (LSNSW) have expressed support for a separate Term of Reference addressing the sexual abuse of Aboriginal and Torres Strait Islander children, due to particular problems which arose in the way that these children were treated in public and private institutions and organisations.
 32. As noted above, the experience of the RCIADIC also supports the need for a separate Term of Reference regarding underlying issues associated with the experience of Aboriginal and Torres Strait Islander people affected by child sexual abuse. The RCIADIC experience also supports the need for a Term of Reference regarding procedural guidelines for Commissioners. The relevant RCIADIC Term of Reference in this regard stated that Commissioner Muirhead was authorised to issue guidelines to other Commissioners as to methods and procedures.
 33. The experience of the Law Council's Constituent Bodies in relation to recent and ongoing State and Territory inquiries into child abuse may also help inform the Terms of Reference.
 34. The Law Institute of Victoria (LIV) recently made a submission to the Victorian Parliament's current inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations. The LIV's submission suggests that the Terms of Reference for the Royal Commission should address:
 - a. Barriers within the criminal justice system for victims of child sex abuse, such as the lack of effective mechanisms to encourage or facilitate reporting of such abuse;
 - b. Barriers to civil claims regarding child sex abuse such as limitation periods and vicarious liability issues;

⁸ See notes 2 and 6

⁹ See *Report of the Protecting Victoria's Vulnerable Children Inquiry*, 2012 available at <http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html>

¹⁰ Sections 6A and 6DD, *Royal Commissions Act 1902* (Cth)

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- c. Barriers to victims compensation claims, such as threshold requirements and caps on compensation amounts;
 - d. Deficiencies in complaints processes within public and private institutions and organisations, such as deficiencies in procedural fairness requirements and the lack of external review mechanisms; and
 - e. Clear guidance for victims regarding their rights and obligations in making submissions or giving evidence to the Royal Commission.¹¹
35. Members of the LSSA were involved in the Mullighan Inquiry into children in State care and children on the APY lands in South Australia. Some of these members consider that the Terms of Reference for the Mullighan Inquiry were too broad and that this resulted in it becoming protracted and in disappointment for the victims.
36. The Terms of Reference for the Inquiry into children in State care included:
- a. Inquiry into any allegations of sexual abuse of a child in State care and criminal conduct which resulted in the death of a child in State care;
 - b. The purposes of the Inquiry were to:
 - i. examine the above allegations;
 - ii. report on whether there was a failure by the State to deal with matters that gave rise to the allegations;
 - iii. report on whether appropriate and adequate records were kept in relation to the allegations; and
 - iv. report on any measures to provide assistance and support for victims of sexual abuse;
 - c. That the Inquiry was to relate only to conduct or omissions before its commencement;
 - d. That the Inquiry should not relate to matters subject to a previous review; and
 - e. That the Inquiry not purport to make a finding of criminal or civil liability.¹²
37. The Terms of Reference for the Inquiry into children on the APY lands included:
- a. Inquiry into the incidence of sexual abuse of children on the APY lands;
 - b. The purposes of the Inquiry were to:
 - i. select APY communities to form the focus of the inquiry;
 - ii. examine allegations of sexual abuse of children on the APY lands;
 - iii. assess and report on the nature and extent of sexual abuse of children on the APY lands;

¹¹ See Law Institute of Victoria, Submission to the *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations*, September 2012 available at <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Administrative-Law-Human-Rights/Submissions/Inquiry-into-the-Handling-of-Child-Abuse-by-Religi.aspx?rep=1&qlist=0&sdiag=0&h2=1&h1=0>

¹² See note 2

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- iv. identify and report on the consequences of abuse for the APY communities; and
 - v. report on any measures that should be implemented to prevent sexual abuse and to address the consequences of abuse for the APY communities; and
- c. Similar terms to those outlined at sub-paragraphs 33 c, d and e.¹³
38. The LSSA has also made a number of suggestions about the need for greater specificity in the matters proposed in the Consultation Paper for consideration regarding the Terms of Reference, for example the need for a definition of a public or private organisation or institution. The Family Law Committee of the LSNSW has also expressed concern that the definition of 'institution' may not cover children placed in out of home care services, such as foster homes. The Law Council submits that the Terms of Reference should extend to sexual abuse in out of home care services as children have often been placed in such services as an alternative to being placed in public or private institutions.
39. The Law Society of the ACT (LSACT) has suggested that the Terms of Reference should include:
- a. Uncovering instances of child sexual abuse by public and religious institutions;
 - b. Exposing the cover-up of child sexual abuse by public and religious institutions; and
 - c. Recommending methods of compensation for victims.
40. Member of the Law Council's International Law Section (ILS) have suggested that the Terms of Reference could also address:
- a. The development of national guidelines for institutional and organisational responses to abuse; and
 - b. The shortcomings of State and Territory courts in dealing with civil and criminal child sexual abuse matters, and possible requirements for specialist courts and specially trained judges.¹⁴
41. The Law Council's Family Law Section has noted that the Consultation Paper indicates that it is not intended that the Terms of Reference will include sexual abuse within families. It assumes that any consideration of the operation of the *Family Law Act 1975* (Cth), the work of the Family Court and the Federal Magistrates Court will be excluded.
42. The Law Council emphasises the need for as much precision as possible in the Terms of Reference and for a focus on the issues underlying: the responses of organisations and institutions to child sexual abuse; the efforts of governments, organisations and institutions to deal with the impact of such abuse; and the prevention of such abuse. While the Law Council also supports the Terms of Reference referring to the provision of opportunities for victims to be heard, it considers that this must be undertaken for the purpose of informing the Royal Commission of the relevant underlying issues.

¹³ Ibid

¹⁴ See Annie Cossins, *Alternative Models for Prosecuting Child Sexual Offences in Australia*, 2010 available at <http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/nationalcsareformcommitteereport2010.pdf>

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43. The Law Council also stresses the importance of the Commissioner or Commissioners being provided with the opportunity to comment on the Terms of Reference before they are finalised.

Form of the Royal Commission

44. The Law Council agrees with the observation in the Consultation Paper that it is essential to ensure that the Royal Commission has the necessary 'reach' to undertake its work, particularly in being able to access information held by State and Territory Governments. The cooperation of State and Territory Governments may be obtained in a number of ways including by the States and Territories providing concurrent powers to the Royal Commission pursuant to section 7AA of the *Royal Commissions Act 1902* (Cth) (the Act).
45. As noted above, the experience of the RCIADIC, where Letters Patent or Commissions were issued by a number of State and Territory Governors and Administrators, provides a possible model for cooperation.
46. The Law Council notes that the Governor-General can establish the Royal Commission pursuant to section 1A of the Act and require the Commissioner or Commissioners:

to make inquiry and report 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 or any power of the Commonwealth.

47. The Law Council notes that the Commonwealth can rely on a number of heads of Constitutional power to establish the Royal Commission, including the external affairs power. The use of this power will enable the Royal Commission to be established to investigate Australia's compliance with its international obligations under, for example, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Law Council supports the use of this head of power and the examination of the implementation of Australia's relevant international obligations.

Number and qualifications of Royal Commissioner/s

Number of Commissioners

48. The Law Council has addressed the general question of whether there should be single or multiple Royal Commissioners in its submissions to the 2009 Inquiry by the Australian Law Reform Commission (ALRC) into Royal Commissions and Official Inquiries (the ALRC submissions).¹⁵
49. The Law Council supported the ALRC's view that multiple Commissioners increase the diversity of skills, knowledge and experience within an inquiry and result in a more efficient use of government resources through the sharing of the workload of an inquiry.

¹⁵ See Law Council submission, *Review of the Royal Commissions Act*, 19 May 2009 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE80E58D-1E4F-17FA-D23B-4F21EB69725A&siteName=lca; see Law Council submission, *Royal Commissions and Official Inquiries*, 2 October 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE7F3E74-1E4F-17FA-D2A1-32983C6D2FAC&siteName=lca

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50. In relation to the current Royal Commission, it therefore agrees that it will be necessary to have more than one Commissioner to ensure that all relevant issues are adequately addressed and that the workload is appropriately managed. As noted in the Consultation Paper, the scope of this Royal Commission is likely to be extensive.¹⁶
51. As noted above, the RCIADIC commenced with a single Commissioner, but other Commissioners were subsequently appointed to consider matters in particular States and the Northern Territory.
52. 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. The need for multiple Commissioners for this Royal Commission has particular support from the LSACT and members of the Law Council's National Criminal Law Liaison Committee and the ILS.
53. Member of the ILS have also suggested that:
- a. There be three Commissioners comprising:
 - i. a forensic expert, preferably a trial judge, either serving or retired;
 - ii. an expert in psychology or psychiatry with experience in dealing with trauma; and
 - iii. an expert in 'interventionist' organisational behaviour;
 - b. There will be a need for procedures for the resignation and replacement of Commissioners given the likely duration of the Royal Commission. Procedures similar to those applying to Defence Boards of Inquiry into military deaths and serious incidents could be used.¹⁷
54. Depending on the number of Commissioners and resources, it may be desirable to form panels of Commissioners focusing on different aspects of the Royal Commission. For instance, different panels could focus on a 'truth-telling' process or the abuses suffered by Aboriginal and Torres Strait Islander children.

Qualifications of Commissioners

55. The Law Council agrees with the observation in the Consultation Paper that the knowledge and skills required of Commissioners will include substantial legal knowledge as well as experience in child welfare, health and social services. As noted above, the Law Council submits that at least one Commissioner should be an Aboriginal or Torres Strait Islander and/or a person with particular experience in working with persons of Aboriginal and Torres Strait Islander backgrounds. This is particularly supported by the members of the Law Council's ILIC, the LSNSW Human Rights Committee and the LSSA.
56. In the ALRC submissions, the Law Council supported the appointment of persons with substantial legal knowledge, such as senior members of the legal profession or retired judges as Commissioners. While the Law Council is not, on balance, opposed to the appointment of serving judges as Royal Commissioners, it prefers the appointment of senior lawyers and retired judges. The appointment of serving judges may have

¹⁶ See note 1

¹⁷ For example, see sections 23 and 27B of the *Defence (Inquiry) Regulations 1985* (Cth)

negative impacts on perceptions of independence and on the resources of the courts.¹⁸

57. If serving judges are to be appointed, the Law Council suggests that the principles adopted by the Council of Chief Justices of Australia and New Zealand on the appointment of judges to other office by the Executive be followed.¹⁹
58. The Law Council notes that any Commissioners appointed who do not have a legal background are less likely to be familiar with safeguards such as procedural fairness, the privilege against self-incrimination and client legal privilege. In the Law Council's view, it is important that all Commissioners are well versed in such safeguards and their rationale. As noted above, the Law Council supports a Term of Reference dealing with procedural guidelines for Commissioners.
59. While the Law Council supports Commissioners having relevant qualifications, it notes that Commissioners will require substantial administrative and specialist support. This includes counsel assisting, as well as analysts, investigators, counsellors and other experts.

The reporting timetable for the Royal Commission

60. The Law Council notes that the Commonwealth Government has indicated that the Royal Commission is likely to require years rather than months to produce its final report and that it is likely to provide regular interim reports.²⁰ Members of the Law Council's Access to Justice Committee have suggested that the RCIADIC provides a good precedent when considering reporting timetable issues. The RCIADIC was established on 16 October 1987 and provided a general interim report on 21 December 1988. It also provided individual reports for each death investigated. It provided its final report in 1991.²¹
61. Members of the ILS have emphasised the need for flexibility around interim reporting so that the Royal Commission is not pressed to deliver premature 'outcomes'. The LSSA has stressed the importance of the Commission not becoming protracted and the LSACT has suggested a timetable of between three and five years with interim reporting.

Process of the Royal Commission

62. The following comments emphasise the need for the Royal Commission process to safeguard important individual protections. They are drawn from the ALRC submissions. In making these comments, the Law Council notes the particular vulnerability of both victims and people who are likely to be the subject of adverse findings, given the degree of public interest and highly sensitive subject matter of the Royal Commission. It notes that people who may be the subject of adverse findings include people who may be prosecuted and people against whom no charges will ever be brought. It is important to ensure a fair process which allows all such individuals the opportunity to put their case, and provides them with access to legal representation.

¹⁸ See note 15

¹⁹ Ibid

²⁰ See note 1, see also "Commission will take years, regular reporting and many Commissioners: Roxon", ABC AM, 14 November 2012 available at <http://www.abc.net.au/am/content/2012/s3632251.htm>

²¹ See National Archives of Australia, Royal Commission into Aboriginal Deaths in Custody, Fact Sheet 112 available at <http://www.naa.gov.au/collection/fact-sheets/fs112.aspx>

Access to legal assistance for persons participating in Royal Commissions

63. As noted in the ALRC submissions, the Act does not make provision for the payment of legal fees incurred by witnesses and other third parties involved in Royal Commissions.
64. The Law Council considers that legal assistance affords a necessary balance between the powers of Royal Commissioners – which include the power to require attendance, and/or compel the production of documents and other evidence – and the protections of the rights and liberties of persons interested in or affected by the Royal Commission.
65. In particular, the funding of legal assistance for a person who is likely to be subject to adverse comment and who cannot afford a lawyer is essential to support the requirements of natural justice and access to justice.
66. The Law Council considers that provision should be made to ensure that the costs of legal assistance are met in such cases. The Law Council notes that the Attorney-General's Department (AGD) has provided such assistance in recent Royal Commissions through ad hoc non-statutory financial assistance schemes. The AGD has produced guidelines for each Royal Commission setting out criteria for assistance, the procedure for applications and the scope of financial assistance available.²²
67. The Law Council supports the recommendation of the ALRC in its report relating to its Inquiry into Royal Commissions and Official Inquiries. The ALRC recommended that proposed legislation relating to Royal Commissions and Official Inquiries should empower the AGD to determine that the cost of legal and related expenses for witnesses and other inquiry participants should be met, or not met, in whole or in part by the Government. The factors to be considered by the AGD in making such a recommendation should include:
- a. Whether the person has a valid reason to seek legal representation;
 - b. Whether it would cause hardship or injustice for the person to bear the costs of legal representation or appear without legal representation;
 - c. The nature and possible effects of any allegations made about the person;
 - d. Whether the person could be the subject of adverse findings; and
 - e. The nature and significance of the contribution that the person will or is likely to make to the inquiry.²³
68. The Law Council submits that these criteria could be adapted for use by the AGD in the process of this Royal Commission.
69. The need for proper funding of legal assistance for witnesses and other third parties, who are unable to afford such assistance, is of particular concern to members of the Law Council's Access to Justice Committee and the ILS. The Law Council submits that this need must be addressed in the process of the Royal Commission.

²² See Australian Law Reform Commission (ALRC), *Making Inquiries: A New Statutory Framework* ALRC Report 111 (2010), available at <http://www.austlii.edu.au/au/other/alc/publications/reports/111/>

²³ Ibid

Procedural Fairness

70. In the ALRC submissions, the Law Council raised its concerns regarding the current lack of statutory protection for procedural fairness in Royal Commissions. It 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.*²⁴

71. While the Government is yet to respond to the ALRC's recommendations, the Law Council considers that the procedural fairness requirements outlined above should be adopted in the process of the current Royal Commission. This 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 law²⁵ are inadequate to afford sufficient protection to people involved in or with the Royal Commission.

72. The Law Council considers that the Terms of Reference for the Royal Commission should require that procedural guidelines be established.

73. Given the strong media focus on the Royal Commission to date, it is particularly important that the rights of individuals and institutions whose behaviour is called into question before the Royal Commission are safeguarded by emphasising procedural fairness, as well as the protections for witnesses which are highlighted below.

74. The need for procedural fairness is of particular concern to members of the Criminal Law Committee of the LSNSW and of the ILS, who have observed that there is not just a risk of damage to the reputations of persons involved with the Royal Commission, but also to the reputations of deceased persons, especially where there is a possibility that they may be used as scapegoats.

Coercive powers and protections for witnesses

75. Royal Commissions have strong information-gathering powers, including coercive powers to summons witnesses to appear, to require witnesses to answer questions and to require witnesses and third parties to produce documents or things. The Law Council acknowledges the need for such powers for Royal Commissions to perform their important and legitimate function of providing public scrutiny regarding significant matters.

76. However, the Law Council considers that the use of such powers should be exceptional. The use of such powers is justified only when necessary to achieve a legitimate purpose and only when accompanied by sufficient protections against their overuse or misuse. The Law Council is concerned about the impact of the use of such powers by Royal Commissions on individual rights.

77. In particular, concerns have been raised by the legal profession that Royal Commissions significantly dilute the traditional common law protections usually

²⁴ Ibid

²⁵ As discussed in Law Council submission, *Review of the Royal Commissions Act: Australian Law Reform Commission*, 19 May 2009, pages 15-18

afforded to witnesses appearing before tribunals or courts, such as the privileges against self-incrimination and client legal privilege.

Self-Incrimination

78. The privilege against self-incrimination in criminal proceedings is recognised as a fundamental human right. However, under section 6A of the Act, unless criminal proceedings or proceedings for civil penalties have already commenced, the fact that answering a question may require a person to incriminate him or herself is not a 'reasonable excuse' for the purpose of the strict liability offences that apply if a person fails to comply with a summons or a notice or to answer questions.²⁶ The right to silence cannot be claimed.
79. While a statement or disclosure made in the course of evidence or the production of a document or a thing is generally not admissible in evidence against the person in any civil or criminal proceedings ('direct use immunity') under the Act²⁷ no 'derivative use' immunity is provided. This means that information gathered as a result of information obtained under the coercive powers, such as information obtained following a police investigation triggered by evidence given at a Royal Commission, can be used against the person in subsequent criminal or civil proceedings.
80. The Law Council considers that people should be able to refuse to answer a question or provide documents or things to a Commissioner on the grounds that doing so may incriminate the person. At the very least, the Law Council considers that people should be entitled to both direct use and derivative use immunity.
81. The Law Council submits that the Terms of Reference should refer to procedural guidelines for the Commission to consider appropriate protections for persons who may be subject to criminal or civil proceedings as a result of the Commission's activities.

Client legal privilege

82. The Law Council regards client legal privilege as a fundamental common law right, which is essential to the proper administration of justice. It considers that as a central tenet of the rule of the law, people should be able to obtain independent and skilled advice about the application of the law. This necessarily requires that a person be free to communicate fully and frankly with their legal advisor, which in turn requires a guarantee of confidentiality.
83. However, the Act allows a Royal Commissioner to require a person to produce a document that is subject to client legal privilege.²⁸ There are offences for failing to produce documents, but they do not apply if a person has a 'reasonable excuse' for not doing so.²⁹ A person cannot claim a 'reasonable excuse' in relation to a document subject to client legal privilege unless a court has made such a finding or a Royal Commissioner accepts such a claim.³⁰ The Law Council is concerned about the approach to client legal privilege in the Act and about a proposal by the ALRC in its Inquiry into Client Legal Privilege that the Act should be amended to enable the Governor-General by Letters Patent to determine that client legal privilege should not

²⁶ Section 6A precludes a person from refusing or failing to produce a document or other thing on the grounds that its production might incriminate the person or make the person liable to penalty, except in limited circumstances.

²⁷ Section 6DD, although this exception does not apply to proceedings for an offence against the *Royal Commissions Act 1902* (Cth)

²⁸ Section 2

²⁹ Section 3 and section 6AB

³⁰ Section 6AA

apply in relation to a particular Royal Commission or to particular aspects of a Royal Commission.³¹

84. The Law Council is concerned about current and proposed restrictions on client legal privilege in the context of Royal Commissions. The Chair of the Law Council's Business Law Section (BLS) has stressed the importance of not abrogating client legal privilege in Royal Commissions and has noted that an issue arose as to the abrogation of client legal privilege in the Longford Royal Commission in Victoria.³²
85. The Law Council submits that the Terms of Reference should refer to procedural guidelines for the Commission regarding protections afforded to individuals through the operation of client legal privilege.

Conclusion

86. The Law Council supports the Royal Commission, but is concerned at the short time frames for comments on the Consultation Paper and for its establishment before the end of 2012. The Law Council considers that experience with the establishment of other Royal Commissions such as the RCIADIC illustrates the need for the Government to have a more comprehensive understanding of the matters to be addressed and the challenges that may arise for the Royal Commission in dealing with such matters. Allowing more time for comments on the Consultation Paper and for consideration of such issues would facilitate the greater understanding required.
87. Nevertheless in the time allowed for comments on the Consultation Paper, the Law Council has raised a number of issues for the Government to consider relating to:
- a. The suggested Terms of Reference;
 - b. The form of the Royal Commission;
 - c. The number and qualifications of Commissioners;
 - d. The reporting timetable; and
 - e. The process of the Commission.
88. The Law Council hopes that the issues it has raised will be of assistance in establishing the Royal Commission. Once the Royal Commission is established, the Law Council hopes to be able to make further submissions relating to this important inquiry.

³¹ ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, 2007, Recommendation 6-2 available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC107.pdf>

³² See Parliament of Victoria, *The Esso Longford Gas Plant Accident, Report of the Longford Royal Commission* 1999; see also *Esso Australia Resources Ltd v Sir Daryl Dawson* [1999] FCA 363

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 59,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.