



Australian Government  
Attorney-General's Department

# **Review of confidentiality protections in the *Royal Commissions Act 1902***

**March 2022**

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# 1. Introduction

## 1.1 Terms of Reference

The *Royal Commissions Amendment (Protection of Information) Act 2021* (the amending Act) commenced on 11 September 2021. This legislation amends the *Royal Commissions Act 1902* (Cth) (the Royal Commissions Act) to expand protections over certain information provided confidentially to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, by protecting certain witnesses' evidence and identities both during and after the inquiry.

During the passage of the amending legislation, the Australian Government agreed that the Attorney-General's Department (the department) would review the protection provisions in the Royal Commissions Act to examine any impediments to people coming forward and sharing information with a Royal Commission.

The terms of reference for this review, approved by the Attorney-General, Senator the Hon Michaelia Cash are as follows:

Terms of Reference	
<i>Background and context for the Review</i>	<ol style="list-style-type: none"><li>1. The <i>Royal Commissions Amendment (Protection of Information) Act 2021</i> (the amending Act), which commenced on 11 September 2021, applies new limitations on the use and disclosure of information given by individuals to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability about their experiences, where that information was given for purposes other than a private session and the information was treated as confidential by the Commission at all times. It also establishes protections for accounts of systemic violence, abuse, neglect and exploitation of people with disability, and protections for information given on behalf of another person.</li><li>2. During debate in the Parliament the Government undertook to review the effectiveness of measures in the amending Act, and other provisions within the <i>Royal Commissions Act 1902</i> (Royal Commissions Act) for the protection of information and identities.</li></ol>
<i>Objectives</i>	<ol style="list-style-type: none"><li>3. The key objectives of the review are to:<ol style="list-style-type: none"><li>a. identify impediments in the amended Act that would prevent or discourage a person from coming forward and sharing information with a Royal Commission, and</li><li>b. make recommendations about any policy or legislative options to address these impediments and facilitate greater public engagement with Royal Commissions, while maintaining their ability to report transparent findings and recommendations.</li></ol></li></ol>

<p><i>Matters to be examined</i></p>	<ol style="list-style-type: none"> <li>4. The review will examine issues or impediments to people coming forward and sharing information with Royal Commissions. In particular, it will look at: <ol style="list-style-type: none"> <li>a. the effectiveness of mechanisms in the amended Act for safeguarding the identities of people making confidential disclosures to Royal Commissions</li> <li>b. the effectiveness of other protections for witnesses providing evidence to Royal Commissions, and</li> <li>c. any gaps or deficiencies in legislative protections, which could potentially lead to detriment, or an unwillingness to engage with Royal Commissions.</li> </ol> </li> <li>5. The review will consider: <ol style="list-style-type: none"> <li>a. remedies available in other Commonwealth legislation and equivalent state and territory Royal Commissions and inquiries legislation, to a person who has suffered a detriment following a disclosure they have made to a Royal Commission or inquiry</li> <li>b. findings and recommendations of previous reviews and inquiries which have examined relevant matters in these terms of reference, and</li> <li>c. previous requests made by third parties for protected information, including instances known to the department or brought to its attention in the course of the review.</li> </ol> </li> <li>6. The review will examine circumstances raised in the course of the review, where: <ol style="list-style-type: none"> <li>a. a person has provided sensitive information to a Royal Commission and then experienced detriment, or</li> <li>b. a person's willingness or ability to engage with a Royal Commission was affected by existing confidentiality provisions or the absence of adequate protection.</li> </ol> </li> </ol>
<p><i>Consultation arrangements</i></p>	<ol style="list-style-type: none"> <li>7. The Attorney-General's Department will conduct a targeted public consultation process to inform the review.</li> <li>8. Views will be sought from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, disability representative organisations and other interested stakeholders.</li> <li>9. Public consultation will be conducted via the Attorney-General's Department website, and consultation materials will be presented in accessible formats.</li> </ol>

<i>Timeframes</i>	10. The Attorney-General's Department is required to report by 22 February 2022.
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On 25 February 2022, the Attorney-General extended the timeframe for the department to provide its final report by one month, to 22 March 2022.

## 1.2 Consultation process

The department conducted public consultation through its website. It invited submissions from members of the public through an online survey (the survey questions are provided in Appendix A), as well as options to provide views by email, mail, or over the phone. Accessible versions of the review webpage and the terms of reference were available. The online survey went live on 30 November 2021 and closed on 26 January 2022. The department received 2 submissions from the public through the webpage.

The department wrote to the Chair of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) and the Chair of the Royal Commission into Defence and Veteran Suicide inviting input for the review. The Office of the Disability Royal Commission provided input to inform the review, and the Chair of the Royal Commission into Defence and Veteran Suicide responded to the department in a letter.

The department also wrote to 20 peak disability representative organisations to invite them to provide submissions to inform the review. In these letters, the department suggested a series of questions for organisations to consider, but also invited them to provide any views they wished. Appendix A of this report provides a list of the 20 organisations to whom the department wrote, as well as the list of questions given to organisations. The department received submissions from 6 organisations.

A number of submissions raised issues falling outside the scope of the terms of reference. These issues broadly related to the processes and policies of the Disability Royal Commission. These issues are not covered in this report, but the department has contacted relevant organisations to seek consent for their submission to be provided to the Disability Royal Commission. For the organisations that agreed to this, their submissions have been provided.

## 1.3 Overview of report

**Chapter 2** sets out the existing protections in the Royal Commissions Act.

**Chapter 3** considers the effectiveness of protections in the Royal Commissions Act having regard to the views of stakeholders.

**Chapter 4** considers protections and remedies available in other contexts, including whether any elements of Commonwealth legislative frameworks that include whistleblower protections could apply in the Royal Commissions context.

**Chapter 5** makes concluding remarks about key findings of the review and sets out a list of this review's **recommendations**.

**Appendices A-F** provide further information detailing some of the matters described in the report's chapters.

## 2. Existing protections in the Royal Commissions Act

The terms of reference ask this review to examine issues or impediments to people coming forward and sharing information with Royal Commissions. This chapter examines the protections currently available in the Commonwealth legislation as well as the protections available in equivalent state and territory Royal Commissions and inquiries legislation.

### 2.1 Overview of available protections

The safeguards and protections available due to the operation of the Royal Commissions Act can be broadly grouped under the following headings:

- private session protections
- extended confidentiality protections applying to the Disability Royal Commission and the Royal Commission into Institutional Responses to Child Sexual Abuse (Child Abuse Royal Commission)
- non-publication directions
- exemption of Royal Commissions from the *Freedom of Information Act 1982* (Cth) (the FOI Act) and confidentiality of past Royal Commission records
- admissibility of Royal Commission evidence and information in court proceedings
- protections available for witnesses summoned to attend or appear before the Commission that are equivalent to the protections for witnesses appearing before the High Court
- protections against retribution for persons engaging with a Royal Commission and remedies potentially available for persons experiencing retribution.

#### 2.1.1 Private session protections

Private sessions were first introduced in 2013 for the Child Abuse Royal Commission. Private sessions facilitated 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 Child Abuse Royal Commission Letters Patent recognised 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 also allowed Commissioners the opportunity to better understand the context and circumstances of child sexual abuse.

Private sessions can now be used by Royal Commissions that have been prescribed under section 7 of the Royal Commissions Regulations 2019. The regulations permit both the Disability Royal Commission and the Royal Commission into Defence and Veteran Suicide to hold private sessions. The Royal Commission into Aged Care Quality and Safety (October 2018 to March 2021) was also permitted to hold private sessions, but did not do so.

Information given at private sessions is not given under oath or affirmation. Private sessions are not hearings of the Royal Commission, the information provided at a private session is not evidence and the person giving information at the private session is not considered a Royal Commission witness.<sup>1</sup> A number of strong protections apply in relation to private sessions, to encourage people to give

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<sup>1</sup> Royal Commissions Act, s 6OC.

information to a Royal Commission without being concerned about adverse consequences of doing so:

- information given at, or for the purposes of, a private session is not admissible in civil or criminal proceedings in a court (section 6OE)<sup>2</sup> – for example, criminal proceedings or civil actions for defamation or breach of a confidentiality undertaking
- subject to some very limited exceptions, such as for the purpose of referrals for law enforcement investigations (under a Royal Commission’s powers in section 6P), it is a criminal offence to make a record of, use or disclose information given in a private session (section 6OH)<sup>3</sup>
- information obtained at, or for the purposes of, a private session, can only be used in reports or recommendations of a Royal Commission if it has been de-identified, or if the information is also given as evidence to the Royal Commission or produced under a summons or notice under section 2 of the Royal Commissions Act (section 6OJ)
- records of information given to the Child Abuse Royal Commission at a private session can only be accessed by the person who gave the information, or an authorised representative of that person. The information can also be accessed for law enforcement purposes only when a record contains information that has been included in a report or recommendation of that Royal Commission, or where the record does not identify, or enable to be identified, a natural person who appeared at a private session (section 12 of the Royal Commissions Regulations).

These protections continue to apply after a Royal Commission has concluded its inquiries.

### ***2.1.2 Extended confidentiality protections applying to the Disability Royal Commission and the Child Abuse Royal Commission***

The Royal Commissions Amendment (Protection of Information) Act 2021 amended the Royal Commissions Act to strengthen the protection of sensitive information provided to the Disability Royal Commission.

The amending Act introduced new section 6OP, which provides that the protections applicable to information given in a private session are also available for certain information that was provided to the Disability Royal Commission and then was treated as confidential at all times.<sup>4</sup> Section 6OP also provides that these protections apply to situations where the information is given to a Royal Commission on behalf of another person, and clarifies that the protections apply to information

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<sup>2</sup> Section 6OE reflects s 6DD of the Royal Commissions Act which prevents information given as evidence to a Royal Commission being admissible in civil and criminal proceedings against the person who gave the evidence. The Explanatory Memorandum to the legislation that introduced private sessions clarified that s 6OE means 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 that person in a proceeding for breach of the agreement.

<sup>3</sup> There are exceptions to this offence for authorised recordings, uses and disclosures. For example, information may be recorded and used for the purposes of performing functions or duties or exercising powers in relation to the Royal Commission, and the *Royal Commissions Regulations 2019* may prescribe that, after a Royal Commission has concluded, information given in a private session may be given to the person who provided it.

<sup>4</sup> The information provided must relate to an account of a person’s experiences of violence, abuse, neglect or exploitation.

about *systemic* accounts of violence, abuse, neglect and exploitation of people with disability. The information of this kind given to the Disability Royal Commission must have been other than for the purposes of a private session.

The purpose of the introduction of section 6OP was to ensure that people can tell their story to the Disability Royal Commission knowing that their information will continue to be fully protected when the inquiry ends, and to ensure the Disability Royal Commission's findings are based on people's experiences.<sup>5</sup>

This new provision reflects section 6ON which was inserted in 2019 for a similar purpose in relation to information given to the Child Abuse Royal Commission.<sup>6</sup> The insertion of section 6ON was the first time that legislative provisions were applied to protect confidential information that was obtained by a Royal Commission other than for the purposes of a private session. In some instances, the Child Abuse Royal Commission may have indicated that certain information would be treated as confidential and treated it as such, but it did not receive the private session protections.

In practice, Commissioners and members of the staff of the Child Abuse Royal Commission engaged with individuals before and after their private session. Before a private session, preliminary information was gathered about the individuals story so that it was possible to determine it was within the scope of the terms of reference, and so Commissioners were familiar with the persons situation. After a private session, the individual may have been contacted by a commissioner or a staff member of the Child Abuse Royal Commission to discuss any concerns arising from the private session and to be offered counselling or support.

Section 6ON addresses the specific practices of the Child Sexual Abuse Royal Commission in obtaining information from a person that may have led to that person believing their information, like the information described above, would be subject to the same protections as applied to information given at a private session.

### **2.1.3 Non-publication directions**

Under subsection 6D(3) of the Royal Commissions Act, a Royal Commission may make a direction – known as a non-publication direction – that certain evidence given before it, or the contents of a document produced or delivered to it (including in response to a notice issued by the Royal Commission) must not be published, or only published in ways specified by the Royal Commission. Contravention of a non-publication direction is a criminal offence punishable by a fine or imprisonment for up to 12 months.

Non-publication directions may be considered by a Royal Commission if a person requests that one be made in relation to particular information, or a Royal Commission may determine the need for a direction itself in the course of considering information or receiving documents produced or delivered to it, or taking evidence.

A non-publication direction can apply to any evidence given to a Royal Commission (including any information that would enable a person who has given the evidence to be identified), or to the contents of any document or thing produced or delivered to a Royal Commission. Non-publication

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<sup>5</sup> Royal Commissions Amendment (Protection of Amendment) Act, Explanatory Memorandum, paragraph 4, page 3.

<sup>6</sup>Royal Commissions Amendment (Protection of Amendment) Act, Explanatory Memorandum, paragraph 4, page 3.

directions extend beyond the life of a Royal Commission, maintaining the confidentiality of information after the Royal Commission has ended.

Because non-publication directions have the potential to shield information from the public view, Royal Commissions issue practice guidance for persons wishing to apply for a direction. Such guidance can include a requirement that applicants for non-publication directions provide written submissions and/or a statement of evidence in support of their application.<sup>7</sup>

#### **2.1.4 Exemption of Royal Commissions from the FOI Act and confidentiality of past Royal Commission records**

While a Royal Commission is operating, it is exempt from the operation of the *Freedom of Information Act 1982* (Cth) (FOI Act).<sup>8</sup>

At the conclusion of a Royal Commission, its records are transferred to the department, which becomes the custodian of the records for a 20-year period until they are transferred to the National Archives of Australia.<sup>9</sup>

This means that it is possible for Freedom of Information requests to be made for access to documents held as part of the records of a past Royal Commission. If a request for access to a record is made, the department considers the possible application of any potential exemptions prescribed under the FOI Act. Where an FOI request seeks documents that contain personal information, such as an account of a person's experience that they shared with a Royal Commission, the personal privacy exemption under section 47F of the FOI Act is likely to be applied.

Private session information and other confidential information within the scope of section 60P of the Royal Commissions Act is excluded from the FOI Act. This means that confidential information cannot be disclosed after the Disability Royal Commission has concluded. This approach follows the approach taken to similar information that was provided to the Child Abuse Royal Commission (see section 60N of the Royal Commissions Act).

#### **2.1.5 Admissibility of Royal Commission evidence and information in court proceedings**

Section 6DD of the Royal Commissions Act provides that statements made by a person to a Royal Commission in a hearing, or information given to the Royal Commission pursuant to a notice, may not be used against that person in civil or criminal proceedings in a court. This provides protection against civil or criminal liability for a person who is compelled to give information of a self-incriminating nature.

#### **2.1.6 Protections available for witnesses summoned to attend or appear before a Royal Commission that are equivalent to the protections for witnesses appearing before the High Court**

Section 7 of the Royal Commissions Act grants witnesses summoned to attend or appear before a Royal Commission the same protections available to witnesses appearing before the High Court.

This protection includes absolute privilege for statements made under oath, which means that witnesses (and Commissioners, and legal practitioners) are protected from legal liability for defamatory statements made before a Royal Commission. The protection is important in the context

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<sup>7</sup> See for example Practice Guideline 4 – Applications for Non-publication, available at <https://defenceveteransuicide.royalcommission.gov.au/publications/practice-guideline-4>

<sup>8</sup> FOI Act s 4(1) – definition of 'prescribed authorities'.

<sup>9</sup> See Regulation 10 of the Royal Commissions Regulations.

of an inquiry such as the Disability Royal Commission, which is inquiring into instances and experiences of violence against, and abuse, neglect and exploitation of people with disability. The information obtained by the Disability Royal Commission about these experiences will inevitably contain claims and accounts of misconduct or wrongdoing by another person that may be adverse to that person's interests or reputation. In this context the protection is important because it assists a Royal Commission to properly investigate matters, and for witnesses to engage freely.

### ***2.1.7 Protections against retribution for persons engaging with a Royal Commission***

The Royal Commissions Act establishes a number of offences in respect of interference with, and/or reprisal action taken against, a witness (or individual compelled to produce information/documents to a Royal Commission) by another person. The key offences are:

- an offence, punishable by one year's imprisonment, for preventing a person from attending a Royal Commission as a witness, or from producing anything in evidence pursuant to a summons issued by a Royal Commission (section 6L)
- an offence, punishable by a fine or one year's imprisonment, for causing injury to a witness, including inflicting any violence, punishment, damage, loss, or disadvantage to a person (section 6M)
- an offence, punishable by one year's imprisonment, for an employer who dismisses an employee from his or her employment, or prejudices any employee in his or her employment, because the employee has appeared as a witness, given evidence, or produced a document or thing to a Royal Commission under a summons (section 6N).

These offences protect witnesses giving evidence at a Royal Commission hearing and, by virtue of subsection 6OC(5), they also protect persons giving information to a Royal Commission in a private session.

These offences are intended to protect witnesses and individuals attending private sessions against conduct intended to cause harm to them by reason of their engagement with a Royal Commission, or prevent or discourage such persons from providing information to a Royal Commission. This is designed to ensure that people are willing to come forward and share their stories and experiences without fear of facing retribution.

### ***2.1.8 Potential common law remedies for retribution***

If a person considers they have suffered detriment as a result of having engaged with a Royal Commission, it may be possible in some circumstances for them to seek a remedy by bringing a civil action against the person or body who has allegedly caused that detriment. To bring a civil proceeding, a person must establish one or more causes of action.

The department has identified a number of common law causes of action that might be available to a person depending on the particular Royal Commission and the circumstances of their matter, albeit each with significant limitations as indicated below. The department has undertaken this analysis by reference to the Disability Royal Commission.

#### *Breach of contract*

- Remedies under the law of contract are only available where there is a contractual relationship between the parties, and where an act that caused detriment to a person was in breach of a term of the contract.

### *Breach of confidence*

- This cause of action in equity is founded in situations where information is known or available to one party, but not to others. This means that an action by, for example, a person wishing to engage with the Disability Royal Commission by providing information about a care provider whom the person fears may seek to cause them detriment for doing so, seems unlikely.

### *Actions in tort*

- A number of different actions in tort could conceivably be available to a person who suffers detriment as a result of them providing information to the Disability Royal Commission – for example, trespass to the person (including assault or battery), intentional interference with economic interests, nuisance, intimidation, or negligence.
- For a court to order compensation in damages under a cause of action in tort, the person needs to prove that the detriment suffered was caused by another person's actions, and they also need to prove the injury or loss for which the amount of damages sought.

Appendix B sets out these causes of action in detail, including the circumstances in which they may possibly apply, the elements that are required to be established and the possible remedies available.

## **2.2 Protections in state and territory Royal Commissions legislation**

There is legislation in each of the states and territories providing for the establishment of Royal Commissions. Terminology for inquiries can vary between jurisdictions, and some jurisdictions allow different forms of inquiry to be established (some state and territory legislation may refer to, for example, Commissions of Inquiry). For consistency and ease of reference for the purposes of this chapter, the term 'Royal Commissions' is used.

A comparative analysis of each jurisdiction's legislation is at Appendix C. Each jurisdiction's legislation establishes similar powers to those exercisable by a Commonwealth Royal Commission, such as the power to compel the provision of information or documents. Each jurisdiction's legislation also establishes broadly similar protections on the use and disclosure of information.

The department has examined the legislation relating to Royal Commissions in each of the states and territories to identify whether any protections exist in state or territory legislation that do not exist in the Commonwealth's legislation, and if so, whether they would be appropriate to introduce.

### ***2.2.1 Provisions protecting identities and information***

Similar to Commonwealth legislation, state and territory legislation provides protections for identities and information in a number of ways. The key ones are:

- restrictions on the use and disclosure of information given to a Royal Commission
- providing Royal Commissions with powers to prohibit publication (and other relevant actions) of names or identifying information and evidence or other information provided to it
- conferring powers to take evidence in private, and to conduct private hearings and private sessions.

These protections are outlined in detail in the first table in Appendix C.

Protections for identities and information differ in some respects in the way they are framed, but are generally equivalent and comparable across Commonwealth, state and territory legislation. For example, the Commonwealth does not have an express power to direct that hearings be conducted in private (as is the case in some jurisdictions), but the general power under subsection 6D(3) of the Royal Commissions Act to prohibit the publication of any evidence given or material produced to a Royal Commission allows it to take effectively the same steps to protect witnesses as those that can be taken under state and territory legislation. Similarly, the Royal Commissions Act does not contain an express provision prohibiting disclosure of information by staff of a Royal Commission, however there are relevant provisions contained in the *Public Service Act 1999* and the *Criminal Code Act 1995* which establish prohibitions.<sup>10</sup>

### **2.2.2 Witness protections and remedies**

Similar to Commonwealth legislation, state and territory legislation also contain protections that are specifically applicable to witnesses and others giving evidence to or engaging with Royal Commissions. Across the various pieces of legislation, the key protections in this regard are:

- providing that witnesses summoned or appearing before a Royal Commission have the same protection as witnesses in cases tried in a superior court
- providing that evidence given by a person before a Commission or material produced pursuant to a summons, requirement or notice, is not admissible in evidence against that person in any civil or criminal proceedings
- in relation to the witness's engagement with a Commission, prescribing offences for:
  - threatening or insulting witnesses
  - bribery of witnesses
  - fraud on witnesses
  - preventing a witness from attending or producing evidence
  - causing injury or detriment to witnesses
  - prejudicing a witness's employment or dismissing a witness.

State and territory legislation governing Royal Commissions generally contain similar offences for witness protections to those in the Commonwealth legislation. This review has not identified offences that could be brought across from equivalent legislation in other jurisdictions that provide protections that are significantly different from what is already available. Some protections for witnesses in Royal Commissions are framed in different ways, but broadly speaking the outcomes the protections seek to achieve are comparable. For example, the offence in the Royal Commissions Act of preventing a witness from attending a Royal Commission hearing or producing a document does not specifically refer to attempting to do so as the equivalent legislation in Tasmania and Western Australia does,<sup>11</sup> section 11.1 of the Criminal Code operates to also criminalise attempting to commit an offence. For another example, while in Queensland and Western Australia there is a specific offence for threatening or insulting a witness which is not replicated in the Royal Commissions Act, the offence in section 6M of the Royal Commissions Act of causing or inflicting violence, punishment, damage, loss or disadvantage to a witness (which, by virtue of section 11.1 of the Criminal Code, includes attempts to commit the offence) would in practice likely cover similar conduct. More detailed information about provisions in the Royal Commissions Act and equivalent state and territory legislation regarding witness protections are in the second table in Appendix C.

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<sup>10</sup> Public Service Act, s 13; Criminal Code, div 122.

<sup>11</sup> *Commissions of Inquiry Act 1995* (Tas), s 33(1); *Royal Commissions Act 1968* (WA), s 28.

### **3. Effectiveness of protections in the Royal Commissions Act**

This chapter analyses the effectiveness of the protections outlined in section 2.1 above. Where applicable, the analysis draws on submissions made to the review. In conducting this review, the department has also sought to identify findings and recommendations of previous reviews and inquiries which have examined relevant matters in the terms of reference. The department notes that the Australian Law Reform Commission (ALRC) conducted a review of the Royal Commissions Act across 2009 and 2010. The ALRC Report 111 *Making Inquiries: A New Statutory Framework* provides some analysis of provisions within the Royal Commissions Act that have been referenced in this report, but the relevant parts of the ALRC report do not provide comment on the effectiveness of the operation of those provisions for encouraging a person to engage with a Royal Commission.

#### **3.1 Effectiveness of existing private session protections**

Private sessions were a crucial component of the Child Abuse Royal Commission's inquiries, as they allowed survivors and others affected by abuse to speak confidentially to a Commissioner in a private, supportive and trauma-informed environment. The Child Abuse Royal Commission held around 8000 private sessions over the course of its inquiry. For some people who gave information at a private session, it was the first time they had disclosed the abuse they had suffered and/or the first time they had been heard from by somebody in a position of authority.

The Disability Royal Commission has also made extensive use of private sessions as part of gathering information to inform its inquiry, to date having held almost 900 private sessions.

Private sessions provide very strong protections for information to be kept confidential both during and after a Royal Commission's inquiries, given the very limited circumstances in which information given at a private session can be disclosed. That is, private session information – and as a result of the amendments in the Royal Commissions Amendment (Protection of Information) Act, also information that was given outside of a private session but treated as confidential by the Disability Royal Commission at all times – will only be accessible by the person that gave the information, an authorised representative, or for law enforcement purposes.

In its role as custodian of the records of the Child Abuse Royal Commission, the department has not identified any situation in which it has been unable to protect information as a result of any gaps in the existing legislative frameworks.

On the basis of the demonstrated public demand for private sessions, and as the legislative frameworks have ensured that private session information can be protected from disclosure by the department, the department considers the private session provisions to be a powerful tool through which sensitive information can be provided in a confidential manner to Royal Commissions. This review has not identified a need for any substantial amendments to these provisions, although a possible technical amendment to prevent information from use against a person in tribunal proceedings is discussed below at section 3.6.

### **3.2 Effectiveness of the confidentiality provision amendments**

The amending Act significantly strengthened the protection of sensitive information provided to the Disability Royal Commission (see above at 2.1.2). The protections have been welcomed by the Disability Royal Commission and by disability representative organisations.

The Disability Royal Commission and disability representative organisations have worked to raise awareness of the new protections, and submissions made to this review indicated that people with a disability have welcomed the greater assurances provided by the amendments as to how sensitive information can be provided and kept confidential both during and after the Disability Royal Commission. Because the provisions have only been in place for approximately six months, it is difficult at this stage to definitively assess the degree to which these amendments have directly influenced engagement with the Disability Royal Commission. However, some submissions indicated an increase in people's willingness to provide information to the Disability Royal Commission since the commencement of the amendments.

Early trend data from the Disability Royal Commission indicates that since the legislative changes took effect, there has been a reduction in registrations for private sessions and an increase in the number of submissions. This would appear to indicate that the new protections are operating as intended, as there can be increased confidence that sensitive information provided to the Disability Royal Commission outside of a private session can be kept confidential.

Neither the Disability Royal Commission nor disability representative organisations have identified any concerns about the operation of section 6OP in relation to the Disability Royal Commission, and have not sought any further changes in relation to how this provision protects sensitive information given to the Disability Royal Commission. One stakeholder submission has proposed that these protections be applied to future Royal Commissions.

On the basis of the early indications identified in the experience of the Disability Royal Commission and reflections from disability representative organisations, and given the new provisions have been welcomed by stakeholders with no issues raised about their operation, the department considers that the legislative amendments made in 2021 have been effective so far.

### **3.3 Extension of confidentiality protections to future Royal Commissions**

A submission to the review noted that the protections over sensitive information given to the Child Abuse Royal Commission and the Disability Royal Commission, under sections 6ON and 6OP respectively, only apply to those particular Royal Commissions and not to Royal Commissions generally. The submission recommended a legislative amendment that would generally apply protections to confidential information given to future Royal Commissions, without the need to create provisions in Royal Commissions Act in relation to specific inquiries. The submission suggests that having such protections in the legislation from the outset would encourage people to engage with a Royal Commission earlier knowing that their information is safe.

Royal Commissions are established to inquire into matters as openly and transparently as possible to bring to light issues of significant public concern. Gathering information in confidential settings will be important for inquiries into some subjects. Sections 6ON and 6OP are framed according to the

specific circumstances in which the Child Abuse Royal Commission and the Disability Royal Commission received (or are receiving) information, and by reference to the type of information that is to be protected. Section 6ON applies protections to people's accounts of child sexual abuse in an institutional context, and section 6OP sets out that the protections apply to an account of the natural person's, or another person's, experiences of violence, abuse, neglect or exploitation, including a systemic account. In recognition of the subject matter of those specific Royal Commissions, and the very personal nature of the accounts, the Government determined it was appropriate that limits applied to the use and disclosure of that information.

Whether or not, and how, information can be provided to a Royal Commission on a private basis and remain confidential will be heavily influenced by the subject matter and scope of the Royal Commission. Past Royal Commissions have inquired into a very diverse range of subject matter, which would have required a range of different information to be examined and had expanded confidentiality protections been considered for these, different considerations would have applied to different inquiries. For example, any protections relevant to corporate records examined in the 2003 Royal Commission into the HIH Insurance collapse would likely have been quite different to those relevant to documents about international relations that may have been considered in the 2006 Royal Commission into the United Nations Oil-For-Food Programme.<sup>12</sup> It is also possible that for some Royal Commissions, there may be other legislative frameworks governing the use and disclosure of information that may be relevant to a Royal Commission's inquiries. This may be the case, for example, in relation to the Royal Commission into Defence and Veteran Suicide, which may consider information relating to specific military operations over which restrictions related to national security may apply.

The department acknowledges there are likely to be future Royal Commissions that inquire into sensitive subject matter, and there could be a need for them to have equivalent protections along the lines of sections 6ON and 6OP. The department also recognises there may be benefit in having protections able to be in place as early as possible once a Royal Commission commences and time may not always be available to put legislative amendments in place to address the situation.

There may, for example, be options for extending the provisions by using the Royal Commissions Regulations, which can be amended more swiftly than primary legislation, or through Letters Patent which are specifically tailored to the scope and circumstances of a particular Royal Commission.

However, it is important that confidentiality protections applying to future Royal Commissions are tailored specifically to the needs and circumstances of those inquiries. It is also important that any expansion of confidentiality protections is balanced against the need to ensure that investigations or prosecutions that might need to occur after the conclusion of a Royal Commission are still able to proceed effectively, to avoid inadvertently protecting the perpetrators of illegal or inappropriate conduct.

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<sup>12</sup> A list of all previous Royal Commissions since 1901 is at Appendix E, and a list available online at the Australian Parliament House website contains more information and links to the final reports of these inquiries:  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_topic/law/royalcommissions](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_topic/law/royalcommissions)

**Recommendation 1:** The department give further consideration to options for allowing the protections prescribed under sections 6ON and 6OP to have more general application, while also ensuring they can accommodate circumstances or requirements of particular Royal Commissions.

### 3.4 Non-publication directions

The ability for Royal Commissions to make non-publication directions is a powerful tool for protecting sensitive information while still enabling the Royal Commission to receive the evidence and have regard to it in the conduct of its inquiry.

One drawback of non-publication directions, provided for by section 6D(3) of the Royal Commissions Act, is that they are generally considered and applied in relation to each piece of potentially sensitive information. This can be a significant burden on Commissioners, particularly where a large volume of information is received which contains both sensitive and non-sensitive material. The department considers there may be merit in broader consideration of how non-publication directions can be made by Royal Commissions. This consideration would desirably be informed by more detailed exploration of the degree to which the consideration and making of non-publication directions has been an issue in current and previous Royal Commissions, which has not been possible to undertake within the scope of this review.

Another drawback is that non-publication directions operate in perpetuity, and the Royal Commissions Act does not provide a clear mechanism for removing or amending the scope or application of a direction once a Royal Commission has concluded. In the time following the conclusion of a Royal Commission's inquiry, there may be circumstances where there are legitimate reasons in the interests of public transparency for a non-publication direction to be removed or adjusted. For example, information that was confidential at the time of an inquiry may subsequently come into the public domain or may become less sensitive over time (for example information about criminal investigations). As such, there may be merit in exploring options for the Royal Commissions Act to prescribe methods of lifting a direction after a Royal Commission has concluded.

**Recommendation 2:** The department give further consideration to the operation of non-publication directions, including possible ways in which non-publication directions can be made more efficiently during an inquiry, and more effectively managed after a Royal Commission has concluded.

### 3.5 Effectiveness of the department's role as custodian of Royal Commission records

The Royal Commissions regulations set out strict criteria for situations in which Royal Commission records can be accessed. In conducting this review, the department has considered its experience in handling the Royal Commission records over which it has custody. The Royal Commission Regulations provide that the Secretary of the Attorney-General's Department is the custodian for the records of all Royal Commissions that concluded from 2017 onwards:

- the Child Abuse Royal Commission
- the Royal Commission into the Protection and Detention of Children in the Northern Territory

- the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission)
- the Royal Commission into National Natural Disaster Arrangements, and
- the Royal Commission into Aged Care Quality and Safety.

The Secretary of the Attorney-General's department will become the custodian for the records of the two currently ongoing Royal Commissions and for future Royal Commissions.<sup>13</sup>

Requests for access to or copies of records of a Royal Commission are relatively infrequent – since the beginning of 2020 the department has received 17 FOI requests for records of a Royal Commission, and 150 requests from individuals wanting to access their own private session information. The department has not identified any situation in which it has been unable to protect information as a result of any gaps in the existing legislative frameworks.

The department at this stage does not consider that full exemption of all records of a past Royal Commission is necessary. There may, for example, be situations in which information that is within the records of a Royal Commission may appropriately be disclosed – for example, a Royal Commission's records may contain data sets or policy analysis that, while not otherwise publicly available per se, may not need to be held strictly in confidence and may in fact lead to furtherance of the work undertaken by a Royal Commission (for example, requests from academics to further their research work into subject matter inquired into by a Royal Commission).

**Recommendation 3:** At this time, no further changes should be made to the current arrangements for access to records of a Royal Commission.

### 3.6 Protections for the inadmissibility of evidence in future proceedings in a court or tribunal

A submission received by the department proposed that the protections provided by sections 6DD and 6OE of the Royal Commissions Act (inadmissibility of evidence or information given to a Royal Commission in a court proceedings), should be extended to proceedings before a tribunal. The provisions currently apply only in relation to a court and do not extend to proceedings in a tribunal, as was confirmed by the Full Court of the Federal Court of Australia in the matter of *Belan v National Union of Workers – New South Wales Branch* [2018] FCAFC 239.

This suggestion was made on the basis that many people who access disability support services have matters before tribunals and there may be concerns about how information provided in the Royal Commissions context might be used in a different forum. The submission did not indicate specific instances of information provided to a Royal Commission being used against a person in a tribunal proceeding, but it did suggest that the absence of a prohibition on use of information in tribunal proceedings could have a deterrent effect for people wishing to engage with a Royal Commission. The department notes that the *Inquiries Act 2014* (Vic) specifically extends admissibility protections to tribunal proceedings,<sup>14</sup> however legislation across the various jurisdictions is not consistent on this issue.

<sup>13</sup> Royal Commission Regulations 2019 s 11.

<sup>14</sup> *Inquiries Act 2014* (Vic) s 40.

Section 6DD is an important protection in that a Royal Commission has the power to compel people to provide information to a Royal Commission, including information that may be of a self-incriminatory nature. The department recognises that if a person is compelled to provide information of a self-incriminatory nature to a Royal Commission, in principle that information should not be able to be used directly against that person in future legal proceedings of any kind. As such, the department considers there is merit in exploring the extension of this protections to tribunal proceedings as well as court proceedings.

**Recommendation 4:** The department considers whether legislative amendments to provide that information given to a Royal Commission pursuant to a notice, or in a private session, should be prohibited from use against that person in proceedings in a tribunal.

### 3.7 Effectiveness of retribution protections

The department does not have data to indicate the extent to which the offence provisions for taking retribution action against a person have been relied on in practice – for example, whether any recent Royal Commissions have made references to law enforcement bodies for breaches of these provisions, or whether law enforcement investigations have taken place and whether prosecutions have been taken forward. It may be useful to further investigate this point to seek to establish an evidence base on this point, however it can be said that the offences also are designed to have a deterrent effect. This deterrent effect was utilised in the context of the Royal Commission into Misconduct in the Financial Services Royal Commission, in relation to non-disclosure agreements signed between bank employees and bank customers and the banks in two scenarios:

- where an employee has an agreement with an employer in relation to the confidentiality of information obtained in the course of employment, and
- where a customer has signed a confidentiality agreement with respect to a financial settlement.

The Chair of the Financial Services Royal Commission, the Hon Kenneth Hayne AC QC, expressed in his opening statement at that Royal Commission's initial public hearing his position that a confidentiality clause in a non-disclosure agreement would not prevent a person from responding to a notice to produce or a summons to appear as a witness at a hearing.<sup>15</sup> Further, the Chair stated that any employer that took action against an employee with respect to a breach of a confidentiality agreement would almost certainly be subject to the offence provision in section 6M of the Royal Commissions Act (described in section 2.1.7 above). It was reported in the media that the big four banks (Westpac, ANZ, Commonwealth Bank, NAB) would not pursue action against any customer that had agreed to a confidentiality clause in a settlement.<sup>16</sup>

In addition to the above, section 6OE gives 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 Royal Commissions Act to a person who has given evidence before a hearing of a

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<sup>15</sup>Transcript of Proceedings (12 February 2018) Hon K. Hayne AC QC – In the matter of a Royal Commission into misconduct in the banking, superannuation and financial services industry .

<sup>16</sup> Frost J (8 February 2018) Banks free staff from confidentiality agreements in Royal Commission oneoff, *AFR* <<https://www.afr.com/companies/financial-services/banks-free-staff-from-confidentiality-agreements-in-royal-commission-oneoff-20180208-h0vsnp>>.

Commission. The Explanatory Memorandum to the 2013 private sessions amendments clarified that section 6OE meant 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.<sup>17</sup>

As indicated above in section 2.2, there do not appear to be offences in state and territory legislation for Royal Commissions that would significantly increase protections against reprisal action being taken against a person wishing to engage with a Royal Commission.

### **3.8 Extending offences for retribution**

Stakeholder submissions raised the possibility of some expansion to the effect of particular offence provisions, and also the possibility of the Royal Commissions Act prescribing other types of remedies to be sought as a response to detriment suffered for engaging with a Royal Commission. These suggestions are analysed below, in addition to consideration of the possibility of clarifying the provisions as they relate to non-disclosure agreements.

#### ***3.8.1 Extension of the offences in sections 6M and 6N to confidential submissions provided outside of a private session***

The Royal Commissions Act prescribes offences for engaging in retribution against individuals appearing as a witness before a Royal Commission. Section 6M of the Royal Commissions Act makes it an offence to use, cause or inflict any violence, punishment, damage, loss or disadvantage to any person for or on account of the fact they appeared as a witness, gave evidence, or produced a document to a Royal Commission. Section 6N protects individuals who appear as a witness, provide evidence, or produce a document to a Royal Commission from dismissal or prejudice in the workplace. Subsection 6OC(5) of the Royal Commissions Act provides that these offences also apply in circumstances where detriment is caused to a person providing information to a Royal Commission at a private session.

However, the offences are not currently prescribed to apply to situations to which section 6OP is relevant, i.e. where a person is providing confidential information to the Disability Royal Commission other than for the purposes of a private session. A submission received proposed that section 6M and 6N also be prescribed to apply to these situations.

The policy intention behind new section 6OP which was introduced by the Royal Commissions Amendment (Protection of Information) Act, was to give confidence to people that they could safely come forward and share their story. The department recognises that extending sections 6M and 6N to the situation described in section 6OP would be consistent with that objective. Some individuals may feel greater confidence in sharing confidential information with the Disability Royal Commission outside of a private session if it was an offence for them to be injured or dismissed from their employment for doing so.

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<sup>17</sup> Royal Commissions Amendment Bill 2013, Explanatory Memorandum, page 10.

**Recommendation 5:** The department give further consideration to extending the offences in sections 6M and 6N to confidential information within the scope of section 6OP of the Royal Commissions Act.

### ***3.8.2 Extension of the offences in sections 6M and 6N to the subject of a submission***

It is common for family members, friends, carers and supporters to make submissions to the Royal Commission sharing information on behalf of people with a disability. In order to obtain an inclusive picture of the diverse experiences of people with a disability, it is important that people are encouraged to share the stories of others who may not be in a position to do so.

As noted above, section 6M of the Royal Commissions Act makes it an offence to cause injury to a person who has appeared at a hearing as a witness, given evidence, or produced a document pursuant to a summons, to a Royal Commission. Section 6N makes it an offence for an employer to dismiss an employee for appearing at a hearing as a witness, giving evidence, or producing a document pursuant to a summons, to a Royal Commission. Subsection 6OC(5) provides that these offences apply to causing injury or detriment to a person who has provided information to a Royal Commission at a private session.

A submission received by the department noted that those provisions do not apply to a person who is the subject of information given to a Royal Commission. An example given in that submission was that if a parent has provided information to the Disability Royal Commission in a private session on behalf of their child with a disability, the retribution protection in section 6M would protect the parent from any violence, punishment, damage, loss, or disadvantage by a person, by operation of section 6OC(5) of the Royal Commissions Act. The protection provided by section 6M would not extend to the child that is the subject of the submission, against any violence, punishment, damage, loss, or disadvantage. The submission therefore proposed that the offences should extend to criminalise detriment being caused to the subject of a submission made to a Royal Commission.

The department recognises that there will be circumstances in which it will be appropriate for the offences in sections 6M and 6N aimed at preventing reprisal action against a person to apply to both the person providing the information and a person who is the subject of the information. However, care needs to be taken in expanding these provisions to avoid having them apply to situations in which it may not be appropriate. For example, there might be circumstances where a submission is made about (but not on behalf of) another person which raises concerns about that other person's conduct, and the concerns are of such significance that it may be appropriate for that other person to face employment consequences. As such, the department sees merit in the suggestion in principle, but would carefully consider how it should be given effect in legislation.

**Recommendation 6:** The department further considers expanding the offence in sections 6M and 6N to also cover the subject of submissions, where appropriate.

### ***3.8.3 Clarification of application of the offences to non-disclosure agreements***

While the offences in sections 6M and 6N operate as a deterrent for a party to a contract to rely on a confidentiality provision in a contractual arrangement, and while the strong foreshadowing comments by the Chair of the Banking Royal Commission was helpful in minimising the limitations in information being provided to that inquiry, there may be scope to strengthen provisions within the Royal Commissions Act to encourage people to come forward and share information with a Royal Commission. For example, specific amending provisions could clarify that confidentiality provisions

in contractual arrangements would not be enforceable against a party in circumstances where information has been shared with a Royal Commission (whether in evidence or otherwise).

However, care would need to be taken in legislating a general provision ensuring that non-disclosure agreements do not prevent information being given to a Royal Commission, as it would need to be applied appropriately to the particular circumstances of a future Royal Commission. For example, arrangements with respect to confidentiality agreements would need to apply specifically in relation to information that is within the terms of reference of the inquiry, and avoid inadvertently covering non-disclosure agreements over information that is outside the scope of a Royal Commission's inquiry. In these circumstances, it might be that the Royal Commissions Regulations could more efficiently prescribe rules for the application of, or restrictions on the reliance on, non-disclosure agreements in the context of information relevant to a Royal Commission.

<p><b>Recommendation 7:</b> The department further considers amending provisions that would clarify that confidentiality provisions in contractual arrangements would not be enforceable against a party in circumstances where the relevant information has been shared with a Royal Commission.</p>
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### 3.9 Effectiveness of common law remedies

If a person has suffered detriment as a result of engaging with a Royal Commission, it may be possible, depending on the circumstances, for them to seek a common law remedy by pursuing one of the causes of action described above in section 2.1.8.

These causes of action have developed in the common law over a long period from a variety of court cases and circumstances, but none of them have arisen from or been adapted to the circumstances of an individual suffering detriment as a result of them having engaged with a Royal Commission. A person who considered they had suffered detriment and wished to bring civil proceedings would need to satisfy a court that all of the circumstances of their alleged detriment met all the criteria for one or more of these causes of action. However, the overarching theme from submissions received as part of this review was fear of suffering some detriment, retribution or adverse consequence from another party if they provide information to the Disability Royal Commission, such as losing access to important disability care or supports if they provide information about their care provider's policies or practices. In other words, for common law remedies to be available, the adverse consequences feared by individuals would need to have materialised, which is an undesirable outcome.

There are also substantial practical barriers to persons effectively accessing remedies for detriment through common law remedies. Most significantly, accessing a remedy under any cause of action requires litigation, which may not be a practical or efficient solution for some types of detriment suffered. Commencing civil proceedings generally involves substantial financial implications for individuals, or access to legal assistance, and/or a thorough understanding of the relevant legislative frameworks, and is a very time-consuming and draining process. Difficulties in accessing the supports required to proceed with litigation may be exacerbated in situations where there is a power imbalance, such as where a person is in a vulnerable position or reliant on the person or organisation that caused them detriment. There is also the practical risk that seeking to proceed with litigation action may also lead to a person suffering further detriment before a court has been able to consider their claims.

## 4. Protections and remedies available in other contexts

The terms of reference require this review to identify whether there are any gaps or deficiencies in the legislative protections applying to Royal Commissions, which could potentially lead to detriment, or an unwillingness to engage with Royal Commissions. This chapter examines other settings in which sensitive information is sought to be disclosed for the purposes of bringing to light or supporting investigations into alleged wrongdoing in order to identify whether any of the protections available in those settings might be usefully applied to Royal Commissions.

While the discussion in this chapter is relevant to protections in relation to the disclosure of information about alleged wrongdoing unlawful or inappropriate conduct, in the Royal Commissions context, protections also need to cover other types of sensitive information that can differ depending on the subject matter of each Royal Commission. Examples include sensitive personal information, operational or security information and sensitive financial information.

There are also a range of public policy considerations that are relevant when considering the regulation of disclosures to Royal Commissions. Any legislative protections put in place to protect information needs to be carefully balanced against the public interest in ensuring that Royal Commissions remain able to conduct open and transparent inquiries into matters of significant public concern.

### 4.1 Commonwealth whistleblower-type protections

During the passage of the Royal Commissions Amendment (Protection of Information) Act and during stakeholder consultation for this review, there were suggestions that other whistleblower-type protections might be considered in the Royal Commissions context.

In undertaking this review, the department has summarised the protections afforded under a number of other Commonwealth Acts:

- *Public Interest Disclosure Act 2013 (Cth)* (the PID Act)
- *National Disability Insurance Scheme Act 2013 (Cth)*
- *Aged Care Act 1997 (Cth)*
- *Corporations Act 2001 (Cth)* (the Corporations Act).
- *Fair Work (Registered Organisations) Act 2009 (Cth)*
- *Taxation Administration Act 1953 (Cth)*

The protective frameworks established under these Acts are outlined in detail in the table at Appendix D.

For the purposes of this chapter, the department has considered the PID Act and the framework in Part 9.4AAA of the Corporations Act.

#### 4.1.1 The PID Act

In broad terms, the PID Act establishes a scheme for facilitating public interest disclosures by public officials, so as to promote the integrity and accountability of the Commonwealth public sector.<sup>18</sup> It

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<sup>18</sup> PID Act s 6.

provides a range of protections for disclosers. Such protections include, for example, that the discloser would (where the disclosure is eligible):<sup>19</sup>

- not be subject to civil, criminal or administrative liability for the disclosure of information
- be shielded from contractual or other remedy that might be enforced
- have absolute privilege in proceedings for defamation, and
- be shielded from a contract (to which they are a party) being terminated on the basis that the disclosure was in breach of the contract.

These protections are available to public officials who make a disclosure concerning certain conduct engaged in by Commonwealth agencies, public officials and contractors (referred to as ‘disclosable conduct’ under the PID Act).

The PID Act makes it an offence to take a reprisal or threaten to take a reprisal against a person, with a maximum penalty of two years imprisonment or 120 penalty units (or both).<sup>20</sup> The PID Act also enables a person to seek a range of civil remedies where they experience reprisals on the basis of a belief by another person that the first person has made, may have made or proposes to make a disclosure under the PID Act.<sup>21</sup> Civil remedies may be ordered by the Federal Court of Australia or the Federal Circuit and Family Court of Australia (Division 2) and include compensation, injunctions from taking certain actions, issuing of apologies, and reinstatement of employment.<sup>22</sup>

#### **4.1.2 The Corporations Act**

Part 9.4AAA of the Corporations Act establishes a whistleblower regime for disclosures about the conduct of entities regulated by the Corporations Act (including registered companies and others as described in section 1317AAB of the Corporations Act). The scheme sets out broadly equivalent protections to those contained in the PID Act in respect of such disclosures. However, the disclosures can be made only by certain persons (generally people associated with a regulated entity, as defined in section 1317AAA), and they need to be made to a financial regulatory body (as per section 1317AA).

#### **4.1.3 Application of the PID Act or Corporations Act regimes to Royal Commissions**

Arguably, the protections in the PID Act and the Corporations Act could be applied in the context of a Royal Commission by deeming persons disclosing information to a Royal Commission as disclosers for the purposes of those Acts (for example, by providing that a person disclosing confidential information to a Royal Commission is a ‘public official’ for the purposes of the PID Act, or an ‘eligible whistleblower’ for the purposes of the Corporations Act).

The department does not recommend this as a viable solution, principally because the PID Act establishes not only protections for disclosers, but also a prescriptive framework for the investigation of the alleged wrongdoing which would not seem to be applicable in the Royal Commissions context. The framework of the PID Act was designed and legislated to provide necessary protections to public officers for the purpose of promoting integrity and accountability of the Commonwealth public sector. While the protections offered in the PID Act share similarities with and, in some cases, overlap with the protections offered in the Royal Commissions Act, the technical and tailored provisions of the PID Act were not designed to provide a remedial mechanism for

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<sup>19</sup> PID Act s 10.

<sup>20</sup> PID Act s 19.

<sup>21</sup> PID Act s 13.

<sup>22</sup> PID Act ss 14-16.

persons making generalised complaints or submissions in a broader forum (such as a Royal Commission). Unless the amendments expanded the definition of ‘public official’ or ‘disclosable conduct’, it is not clear that the proposed amendments would significantly expand the scope for a general witness or person who engages with the Royal Commission to make a protected disclosure. Questions would arise as to the appropriateness of amending the PID Act, given its specific scope and purpose, to encompass such submissions or complaints of the kind that might be relevant in the Royal Commissions context.

**Recommendation 8:** The department recommends that the whistleblower frameworks under the PID Act and the Corporations Act not be applied in the Royal Commissions context.

#### ***4.1.4 Application of particular protections to Royal Commissions***

Although the department does not recommend the application of the PID Act or Corporations Act regimes to Royal Commissions, the department has considered whether the individual protections specifically available under those regimes could be usefully adapted and applied in the Royal Commission context. Section 10 of the PID Act provides express provisions to the effect that a person:

- is not to be subject to civil, criminal or administrative liability for the disclosure of information
- is shielded from contractual or other remedy that might be enforced
- has absolute privilege in proceedings for defamation, and
- is be shielded from a contract (to which they are a party) being terminated on the basis that the disclosure was in breach of the contract.

The provisions of the Royal Commissions Act provide a similar field of protections to an individual giving evidence or information in a private session. Section 6DD of the Royal Commissions Act establishes that statements and disclosures made in the course of giving evidence before a Commission, or in writing in response to a notice, and the production of a document or other thing pursuant to a summons, are inadmissible against a witness in civil or criminal proceedings in any Australian court.

Additionally, if an employee disclosed information to a Royal Commission in circumstances attracting the protections in sections 6M and 6N of the Royal Commissions Act, their employer could face criminal penalties if they were to take reprisals on the basis of that person having given evidence to a Royal Commission.

Section 7 of the Royal Commissions Act grants witnesses summoned to attend or appear before a Royal Commission the same protections available to witnesses appearing before the High Court. The protection includes absolute privilege for statements made under oath, which means that witnesses are protected from legal liability for defamatory statements made before a Royal Commission. The protection is discussed further in detail above at 2.1.6.

## **4.2 Civil penalties and remedies**

Currently, the protections in the Royal Commissions Act are delivered by prescribing criminal offences. There is no legislative provision for a civil penalty to be imposed on a person in respect of conduct causing detriment, or as is available under the PID Act, for a person to seek civil remedies as a means of or providing redress to persons who suffer detriment.

A submission made to the review suggested that statutory civil remedies (such as those provided for by the PID Act) could be prescribed to be available in circumstances for which offence provisions under the Royal Commissions Act currently apply, such as where a person suffers detriment as a result of having provided information to a Royal Commission. This is because while the offences prescribed in the Royal Commissions Act seek to deter people from taking actions that might cause a person detriment as a result of him or her engaging with a Royal Commission, the offences can only result in consequences for the person causing the detriment and do not provide a remedy of benefit to the person suffering the consequences. A stakeholder submission also suggested that in some cases, people may be unwilling to seek a resolution to an issue through law enforcement processes and instead may benefit from being able to seek a remedy themselves.

As satisfying offence provisions requires a high standard of proof (beyond reasonable doubt), allowing a civil remedy to be accessed would also mean that a lower standard of proof (balance of probabilities) would be required for a court to make an order.

#### **4.2.1 Civil penalties**

As indicated above, the only way currently for protections against reprisal action to be effective (other than by their inherent deterrent effect) is by way of prosecution of a person for offences under sections 6M and 6N of the Royal Commissions Act. The prospects of success of any such prosecution would turn on the prosecution establishing, beyond reasonable doubt, that the accused person intentionally caused injury to a person (section 6M), or dismissed from or otherwise prejudiced a person's employment (section 6N), on account of that person having given evidence or information to a Royal Commission. Inclusion of civil penalties would mean that enforcement action could be taken under a lower standard of proof.

One significant issue with applying a civil penalty regime to the Royal Commissions context is that, for other regulatory schemes, there is a regulatory body charged with responsibility for taking civil enforcement action. For example, the Australian Securities Investments Commission or the Australian Competition and Consumer Commission have powers under their legislation to seek from a court civil penalty orders against bodies within their jurisdiction who contravene provisions of the legislation they administer. There is no regulatory body for the Royal Commissions context generally, and it would seem difficult to establish a viable body of that kind – for example, such a body would need to be adaptable to any possible topic on which a Royal Commission was to be called, and it would need to potentially be adaptable to situations in which a Royal Commission is called into an area where there is already a significant regulatory body in operation. It is unclear how much use would need to be made of a regulatory body, as this would depend on the frequency of circumstances where a civil penalty was desired to be pursued. The department has not identified any other functions that would be exercised by a regulatory body for Royal Commissions generally. Subject to consideration of possible legal barriers, it would be possible to give a Royal Commission itself powers to seek civil penalty orders in relation to contravention of provisions of the Royal Commissions Act. However, giving a Royal Commission these powers may take away valuable resources and focus from its primary function of inquiring into matters within its terms of reference.

Careful policy consideration would also need to be given to whether a lower standard of proof would be appropriate for the type of conduct that is currently criminalised by offences under the Royal Commissions Act. For example, one type of civil penalty that can be used in some circumstances is an infringement notice, but the Commonwealth *Guide to Framing Commonwealth*

*Offences, Infringement Notices and Enforcement Powers* indicates that these should generally be used for minor offences that are regulatory in nature. It is possible that these could be used in relation to offences for failing to comply with a notice issued by a Royal Commission, although to maintain the strength of a Royal Commission's coercive powers, it may be desirable for this to remain as a criminal offence. This principle means it is also less likely to be applicable for offences against causing detriment to a person for engaging with a Royal Commission, which would appear to involve relatively serious contraventions.

#### **4.2.2 Civil remedies**

It would be possible to amend the Royal Commissions Act to provide for some of the civil remedies available under the PID Act and Corporations Act frameworks, including compensation, injunctions from taking certain actions, issuing of apologies, and reinstatement of employment.<sup>23</sup> Given the frameworks were specifically designed for the regulation of the Commonwealth public sector and corporate entities respectively, further detailed consideration would need to be given to which of the remedies might be suitable to be applied specifically to a Royal Commissions context and/or if any modifications would be needed.

In considering common law remedies that may be available in response to detriment being suffered by a person for engaging with a Royal Commission, the department has noted that there are likely to be difficulties for many people in accessing these remedies through court-based action (see in particular section 3.9). These difficulties would also apply if civil remedies such as those available under the PID Act or the Corporations Act, were prescribed in the Royal Commissions Act, because it would be still be necessary to commence litigation to access them.

Despite these barriers, there may nevertheless be merit in further considering the possible prescription of civil remedies under the Royal Commissions Act, as it may help some people in some circumstances, if not all situations.

<p><b>Recommendation 9:</b> The department further considers the possibility of prescribing civil remedies to be available under the Royal Commissions Act, as potential remedies for a person who suffers detriment as a result of engaging with a Royal Commission.</p>
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### **4.3 Application of other Commonwealth Laws**

#### **4.3.1 Administrative remedies**

There are a range of legislative and administrative frameworks which provide remedies that may have some applicability to people wishing to engage with a Royal Commission but who have suffered detriment, or fear they may suffer detriment.

Where a person wishes to seek a remedy for detriment suffered as a result of engaging with a Royal Commission, seeking this through a complaint to a relevant authority may be more likely to produce a result than pursuing a common law remedy as explored above in sections 2.1.8 and 3.9. Approaches under some of these frameworks may not lead to compensation or restitution to the

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<sup>23</sup> PID Act ss 14-16.

same degree as might be attainable through a common law remedy, but they may produce a more direct, cost effective and tailored outcome than taking action through court proceedings.

Administrative frameworks of this kind include:

- *Industry regulators.* Some sectors have complaints-handling agencies or bodies which investigate complaints and regulate their industry to varying degrees. For example, a complaint by an aged care recipient to the Aged Care Quality and Safety Commission about the decline in care since their engagement with a Royal Commission might result in an investigation by that regulatory body.
- *Ombudsmen.* More generally than regulators of specific sectors, Commonwealth and State and Territory Ombudsmen play a broader complaints-handling role. Ombudsmen do not generally have powers to remedy the subject matter of a complaint, but the attention of an investigations and the potential that the complaint would be referred to other authorities or reported publicly may serve to change the behaviour of the entity occasioning detriment to the complainant.
- *Anti-discrimination laws.* There may be situations where a person who has been discriminated, harassed or victimised as a result of engaging with a Royal Commission could rely on the Commonwealth's anti-discrimination legislation to seek a remedy. This could arise under one or more of the *Age Discrimination Act 2004 (Cth)*, *Sex Discrimination Act 1984 (Cth)* and the *Disability Discrimination Act 1992 (Cth)*. For instance, harassment of a person with disability because of their engagement with a Royal Commission may be unlawful and could be subject of a complaint to the Australian Human Rights Commission (AHRC). The AHRC is only empowered to conciliate complaints and cannot award damages or other remedies, but the terms of a settlement reached through conciliation between parties could include them. There is also the possibility of appealing to a federal court and seeking an order in that context.

These frameworks, including frameworks that have been established specifically for the disability sector, are examined in detail in Appendix F. In conducting this review, the department has taken care to avoid interfering with the independence of an ongoing Royal Commission. It would not be appropriate for the department, in this review, to consider critically and in detail the adequacy or suitability of disability-specific legislative or administrative frameworks, which are within the ambit of the Royal Commission's terms of reference.

#### **4.3.2 Secrecy obligations in other Commonwealth legislation**

The Chair of the Royal Commission into Defence and Veteran Suicide, Mr Nick Kaldas APM, was invited to provide input to the department to inform this review. By letter dated 22 December 2022 the Chair did not raise any concerns with protections in Royal Commissions Act, but noted that provisions of the *Criminal Code Act 1995 (Cth)* (the Criminal Code) that impose secrecy obligations over Commonwealth officers in relation to certain types of information may present a barrier to people providing information to a Royal Commission. For some future Royal Commissions, there could be relevant secrecy provisions in specific subject matter legislation. Division 122 of the Criminal Code prescribes various offences that are committed when certain information is communicated in certain situations by current and former Commonwealth officers. The offences in Division 122 in the Criminal Code have wide application, being applicable to current and former Commonwealth officers.

There is a defence under subsection 122.5(5) of the Criminal Code to these offences that a person communicated the information to a court or tribunal. These provisions could have relevance to the Royal Commission into Defence and Veteran Suicide, as information relating to national security and defence, including intelligence and operationally-sensitive information, could arise in the context of that Royal Commission's inquiries. The Chair has proposed that the Criminal Code be amended so that the defence would also apply when information is communicated to a Royal Commission.

A range of legislative provisions, including but not limited to those raised in the Chair's letter, would need to be carefully examined in considering the appropriate balance of Royal Commission powers to compel information and protections contained in the Royal Commissions Act, as against relevant legislative provisions that are designed to prevent the disclosure of information. Given the potential wide-ranging implications of this issue, and given that the relevant secrecy arrangements will differ depending on the subject matter of a particular Royal Commission, the department intends to further consider the Chair's letter beyond the timeframe for the delivery of this report, and will separately engage with the Royal Commission on this issue.

<p><b>Recommendation 10:</b> The department further considers the interaction between the way in which information is provided to a Royal Commission (both under a Royal Commission's coercive powers and where people wish to provide information voluntarily) and secrecy provisions in other Commonwealth legislation.</p>
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## 5. Conclusion

This review has examined how the Royal Commissions Act operates to protect sensitive information given, or sought to be given, to a Royal Commission, and how it operates to encourage people to come forward and share their stories and experiences. This report identifies a number of possible amendments that merit further detailed consideration:

- applying confidentiality protections to future royal commissions (discussed at section 3.3)
- establishing processes for the operation of non-publication directions, including their lifting or amendment in appropriate circumstances (discussed at section 3.4)
- the admissibility of evidence given to a Royal Commission in tribunal proceedings (discussed at section 3.6)
- extending the scope of retribution protections for confidential submissions (discussed at section 3.8)
- options for clarifying circumstances in which non-disclosure agreements might restrict information being provided to a Royal Commission (discussed at section 3.8.3)
- the possibility of allowing civil remedies to be sought within the Royal Commissions Act (discussed at section 4.2.2).

In conducting this review, the department has been careful to avoid any possible conflict with inquiries that are within the remit of the Disability Royal Commission or the Royal Commission into Defence and Veteran Suicide to consider. It is vital that these ongoing Royal Commissions have clear air to conduct their inquiries as they see fit, and that this department's review does not risk making findings that would more appropriately be considered by one of these Royal Commissions.

Only a small number of submissions were received for this review. However, feedback was generally positive and indicated that the new confidentiality protections implemented by the Royal Commissions Amendment (Protection of Information) Act have been helpful in terms of giving people greater confidence to share stories and experiences with the Disability Royal Commission. Given these protections only came into effect in September 2021, there has not been an opportunity at this time to establish a firm evidence base about their operation. The department acknowledges that the Disability Royal Commission and stakeholders may wish to share feedback on the operation of the provisions as they are used in the future.

A list of departmental recommendations arising from the review is provided below.

## Recommendations

**Recommendation 1:** The department give further consideration to options for allowing the protections prescribed under sections 6ON and 6OP to have more general application, while also ensuring they can accommodate circumstances or requirements of particular Royal Commissions.

**Recommendation 2:** The department give further consideration to the operation of non-publication directions, including possible ways in which non-publication directions can be made more efficiently during an inquiry, and more effectively managed after a Royal Commission has concluded.

**Recommendation 3:** At this time, no further changes should be made to the current arrangements for access to records of a Royal Commission

**Recommendation 4:** The department considers whether legislative amendments to provide that information given to a Royal Commission pursuant to a notice, or in a private session, should be prohibited from use against that person in proceedings in a tribunal.

**Recommendation 5:** The department give further consideration to extending the offences in sections 6M and 6N to confidential information within the scope of section 6OP of the Royal Commissions Act.

**Recommendation 6:** The department further considers expanding the offence in sections 6M and 6N to also cover the subject of submissions, where appropriate.

**Recommendation 7:** The department further considers amending provisions that would clarify that confidentiality provisions in contractual arrangements would not be enforceable against a party in circumstances where the relevant information has been shared with a Royal Commission.

**Recommendation 8:** The department recommends that the whistleblower frameworks under the PID Act and the Corporations Act not be applied in the Royal Commissions context.

**Recommendation 9:** The department further considers the possibility of prescribing civil remedies to be available under the Royal Commissions Act, as potential remedies for a person who suffers detriment as a result of engaging with a Royal Commission.

**Recommendation 10:** The department further considers the interaction between the way in which information is provided to a Royal Commission (both under a Royal Commission's coercive powers and where people wish to provide information voluntarily) and secrecy provisions in other Commonwealth legislation.