
Draft Practice Guidelines

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

19 April 2013

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Acknowledgements

The Law Council acknowledges the assistance of the Queensland Law Society and the Law Society of New South Wales in the preparation of this submission.

Introduction

1. The Law Council is pleased to provide this submission in respect of the initial Draft Practice Guidelines of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).
2. The Law Council strongly supports the establishment of the Royal Commission, which provides an important opportunity for Australians to better understand:
 - the experiences of people who have been affected by child sexual abuse within institutional contexts;
 - what should be done by institutions and governments to better protect children against such abuse in the future;
 - what should be done to respond appropriately to child sexual abuse in institutional contexts; and
 - what institutions and governments should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.
3. The Law Council previously made a submission regarding the Australian Government's consultation on the Royal Commission's establishment on 28 November 2012.¹
4. The Law Council represents around 60,000 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.

Background

5. The Law Council welcomes the information provided by the Chief Commissioner, the Hon. Justice Peter McClellan AM, and the Senior Counsel Assisting the Royal Commission, Ms Gail Furness SC, about the conduct of the Royal Commission at its first sitting on 3 April 2013. In particular, it welcomes the emphasis on:
 - the Convention on the Rights of the Child (CROC) as guiding an understanding of the obligations on society to protect its children; and
 - the need to support survivors of child abuse in institutional contexts sensitively and appropriately as the Royal Commission conducts its work.

¹ Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4A42BEE5-1999-B243-6E69-71C40DA6A8E4&siteName=lca

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6. At the sitting, Ms Furness announced the publication of initial Draft Practice Guidelines for the Royal Commission, noting that further Practice Guidelines will be issued on other matters as appropriate. The initial Draft Practice Guidelines focus on:

Guideline 1 - How to provide information to the Royal Commission

Guideline 2 - Producing material to the Royal Commission under Summons or Notices to Produce; and

Guideline 3 - Guide Questions for Providing a Statement or Information to the Royal Commission.

7. Ms Furness invited comments on the Draft Practice Guidelines by Friday 19 April 2013.
8. The Draft Practice Guidelines clarify that:
- (a) Individuals and organisations, on behalf of one or more individuals who wish to tell the Royal Commission of their experiences of child sexual abuse, are invited to register their interest in providing information; and
 - (b) Individuals and institutions who believe they have a direct and substantial interest in the matters which are the subject of the Royal Commission's terms of reference, and who may seek to be granted leave to appear before it, are invited to provide written expressions of interest to the Royal Commission.
9. In addition, Ms Furness stated at the first sitting that while the Royal Commission is not currently inviting submissions generally about the matters covered by its Terms of Reference, it will do so at a later stage and there will be public notice provided.
10. At this time, the Law Council does not propose to provide a written expression of interest or to seek leave to appear before the Royal Commission. Instead, it anticipates responding to the Royal Commission's more general invitation for submissions regarding its terms of reference at a later date. The Law Council will however monitor the subject matter before the Royal Commission and consider its position in this regard.

Comments - Draft Practice Guidelines

11. Many of the Law Council's comments below emphasise the need for the Royal Commission process to safeguard important individual protections.
12. In making these comments, the Law Council notes the particular vulnerability of both survivors of child sexual abuse 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 therefore important to ensure a fair process which allows all such individuals the opportunity to provide information to, and respond to, any adverse information provided to the Royal Commission. It is also important to ensure access to legal representation.

Registering interest and providing information to the Royal Commission

13. As stated above, the Law Council welcomes the emphasis provided to date by the Royal Commission on supporting survivors of child abuse in institutional contexts to tell their stories in the most sensitive and appropriate manner possible.
14. However, the Law Council considers that there is also a need to clarify how other people, who wish to give evidence about their experiences, should best approach the Royal Commission. These people may include: whistleblowers, employees of institutions and witnesses to abuse. While the Draft Guidelines are appropriately sensitive to the needs of survivors of abuse, they are lacking in detail in respect of these other witnesses. They should not feel discouraged from coming forward.
15. For example, Practice Guideline 3 provides Guide Questions for Providing a Statement or Information to the Royal Commission. While stating that it is “addressed to those who wish to provide information to the Royal Commission”, the Guide Questions are clearly directed to persons who were themselves abused. This could have the effect of discouraging other persons from disclosing important information. The questions in Draft Practice Guideline 3 should be framed in a manner so as not to exclude witnesses who were not personally abused.
16. Consideration should also be given to ensuring that Draft Practice Guideline 1 and the accompanying Frequently Asked Questions (FAQs) encourage evidence from the full range of relevant witnesses.

Legal Assistance and Representation

17. The Law Council's previous submission called for the provision of legal assistance for persons participating in the Royal Commission, who are unable to afford to pay for such assistance.² It emphasised that the provision of legal assistance is essential to support the requirements of natural justice and access to justice in this context.
18. Therefore, the Law Council has welcomed the Australian Government's announcement of a free national legal advisory service for people “engaging or wishing to engage with the Royal Commission”. Draft Practice Guideline 1 makes specific reference to the national legal advisory service at paragraphs 14 and 15, noting that further details will be provided on the Royal Commission's website.
19. The national legal advisory service, to be delivered by the National Association of Community Legal Centres (NACLC), will provide people with advice including on preparing submissions, and their broader legal options in relation to abuse. The Law Council considers that it will be important to provide people at the outset with this independent advice, to ensure that they can adopt the pathway most appropriate to their personal circumstances.
20. As noted in Draft Practice Guideline 1, the service does not provide for the legal representation of people appearing before the Commission. Instead, it will offer referral advice and advice on accessing financial assistance for legal representation.
21. In addition to funding the national legal advisory service, the Attorney-General's Department has recently confirmed that it is providing legal financial assistance for legal representation of people who are called as individual witnesses, or given leave to appear in front of the Royal Commission. This legal financial assistance will be

² *Ibid.*, page 14

provided in the form of grants to cover reasonable costs for legal representation and associated costs. Payments will commence when hearings begin later in 2013.³

22. The Law Council considers that this funding for legal representation of witnesses is essential to support the requirements of natural justice and access to justice during the Royal Commission, particularly for people who are likely to be the subject of adverse comment and cannot afford a lawyer. It will help to afford 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.
23. The Law Council considers that Draft Practice Guideline 1, the FAQs and the broader information on the Royal Commission’s website, should all emphasise the availability of legal financial assistance for legal representation of Royal Commission witnesses, as well as the national legal advisory service. It is vital that witnesses are made aware of both of these forms of support.
24. The Law Council is currently seeking more detailed information about the eligibility criteria for both the national legal advisory service and financial assistance for legal representation of witnesses at the Royal Commission.

Conduct of hearings including Private Sessions

25. The Law Council welcomes the information provided in Draft Practice Guideline 1 regarding the conduct of private sessions, and private and public hearings. It welcomes the Commission’s approach to conduct its hearings in public as far as possible, as it considers that this helps to preserve public confidence in the integrity of the process. However, the Law Council also recognises the need for private sessions in particular circumstances, given the deeply personal and distressing nature of people’s experiences of child sexual abuse.
26. Prior to the passage of the recent *Royal Commissions Amendment Act 2013* (Cth), the Law Council identified a number of questions regarding how information provided by individuals at a private session would be disclosed. In particular, it queried:
 - whether individuals’ consent would be sought prior to disclosure, noting that if information could be passed on without consent, their confidence in the privacy of the sessions may be undermined; and
 - whether disclosure of information relating to a contravention of the law would be permitted to the full range of individuals contemplated under section 6P of the Royal Commissions Act.
27. Therefore, the Law Council is pleased that Draft Practice Guideline 1 clarifies that information provided by individuals in private sessions will be kept confidential unless:
 - (a) the individual provides consent to it being made public;⁴ or

³“Royal Commission into Institutional Responses to Child Sexual Abuse Legal Financial Assistance Schemes”, Attorney-General’s Department website page, accessed 18 April 2013, available at: <https://www.ag.gov.au/LegalSystem/Legalaidprograms/Commonwealthlegalfinancialassistance/Pages/RoyalCommissionintoInstitutionalResponsestoChildSexualAbuselegalfinancialassistancescheme.aspx>

⁴ Paragraph 31, Draft Practice Guideline 1

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- (b) the Commission Chair considers that it is necessary to prevent harm to any person. In this instance, the information can be disclosed to a law enforcement agency without first discussing the matter with the individual concerned.⁵

28. The Law Council does however support further clarifying that in situations where information is communicated without consent in order to prevent harm, the relevant individual will be notified that this communication has occurred, and to whom.
29. It also considers that it may be useful to clarify what agencies are considered to be “law enforcement agencies”. In this respect, it notes that s.6P of the Act contemplates a range of potential individuals to which information can be communicated in certain circumstances, including federal and state and territory Attorneys-General, the Chief Executive Officer of the Australian Crime Commission and the Law Enforcement Integrity Commissioner. These individuals may not fall within the general community understanding of “law enforcement agencies”.
30. The Law Council is pleased that support persons will be allowed to assist witnesses at private sessions. It is also pleased that counselling and support services will be available to individuals and affected family members before, during and after their engagement with the Royal Commission.⁶ Members of the Queensland Law Society (QLS) and the Law Society of New South Wales (LS NSW) have raised the need for such support with the Law Council, noting survivors’ vulnerability to self-harm after giving evidence of their traumatic experiences.

Anticipated Adverse Evidence

31. The Law Council has previously raised its concerns regarding the lack of statutory protection for procedural fairness in Royal Commissions. It also recommended that procedural guidelines be established on this matter under the current Royal Commission, given the strong media focus on its establishment to date.⁷
32. Therefore, the Law Council is pleased that Draft Practice Guideline 1 places an emphasis on ensuring that:
- (a) Where adverse evidence is anticipated in a public hearing and there is a risk of damage to the reputation of a person or institution: the person will be given advance notice and a summary of that evidence, as well as an opportunity to respond (paragraph 64); and
 - (b) Information obtained in a private session which contains allegations against a person or institution will generally only be relied upon after: the person providing the information has sworn or affirmed its truth; and the person or institution against whom the allegations have been made is given an opportunity to respond and ask questions of the person making the allegations (paragraph 66).

⁵ Paragraph 32, Draft Practice Guideline 1

⁶ Prime Minister of Australia, “More Support for Survivors of Child Sexual Abuse” press release, 13 April 2013

⁷ As discussed in Law Council Submission, *Review of the Royal Commissions Act: Australian Law Reform Commission*, 19 May 2009, pages 15-18; and Law Council submission regarding the establishment of the Royal Commission (at n1), page 15

Children and Other Vulnerable Witnesses

33. The Law Council notes that the Royal Commission appears to envisage that children and young people will provide information to it, including children who are in juvenile detention centres or who are in the care of the State. It agrees with the QLS's view that children and young people are particularly vulnerable and should be granted "special witness" status.
34. In this regard, the QLS has drawn the Law Council's attention to the separate procedural guidelines for special witnesses which have been developed by the Queensland Child Protection Commission of Inquiry.⁸ A "special witness" is defined in the procedural guidelines as:
- Special witness means:***
- (a) A person under 18 years of age; or
 - (b) A person who, in the Commissioner's opinion –
 - (i) Would, as a result of a mental or physical impairment, or any other relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) Would be likely to suffer emotional trauma as a witness; or
 - (iii) Would be likely to be so intimidated as a witness as to be disadvantaged as a witness.
35. The guideline then provides a number of procedural protections for these witnesses, such as providing for limits on the types of questions that will be allowed and directions about issues such as rest breaks. While it understands that many of the witnesses interviewed by the Royal Commission may fall within a similar category, the Law Council submits that separate special witness guidelines should also be considered for the Royal Commission's purposes.
36. The Draft Practice Guidelines discuss a number of complex legal issues such as the communication of information which may be provided to law enforcement agencies, the use of information in private sessions, private hearings and public hearings, and the standard of proof for findings of fact. Witnesses who are particularly vulnerable or disadvantaged will require an appropriate level of legal assistance and representation to negotiate the issues raised.
37. The Practice Guidelines should also refer to the need for the Royal Commission to consult with relevant experts, including the Commonwealth and State and Territory Children's Commissioners, regarding the needs of children and young people who wish to engage with it.

Coercive powers and protections for witnesses

38. As the Law Council commented in its previous submission on the establishment of the Royal Commission, 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

⁸ Available at <http://www.childprotectioninquiry.qld.gov.au/hearings/procedural-guidelines>

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.

39. 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.
40. In particular, concerns have been raised by the legal profession that Royal Commissions significantly dilute the traditional common law protections usually afforded to witnesses appearing before tribunals or courts, such as the privilege against self-incrimination and client legal privilege.

Self-Incrimination

41. 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.⁹ The right to silence cannot be claimed.
42. 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 Act,¹⁰ 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.
43. 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.
44. The Law Council submits that the Royal Commission should consider issuing Practice Guidelines regarding its approach to the use of its coercive powers and the protections for witnesses. This would include its approach to the privilege against self-incrimination for persons who may be subject to criminal or civil proceedings as a result of the Royal Commission's activities.

Client legal privilege

45. 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

⁹ 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.

¹⁰ Section 6DD, although this exception does not apply to proceedings for an offence against the *Royal Commissions Act 1902* (Cth)

free to communicate fully and frankly with their legal advisor, which in turn requires a guarantee of confidentiality.

46. However, the Royal Commissions Act allows a Royal Commissioner to require a person to produce a document that is subject to client legal privilege.¹¹ There are offences for failing to produce documents, but they do not apply if a person has a 'reasonable excuse' for not doing so.¹² 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.¹³
47. The Law Council is concerned about the approach to client legal privilege in the Act. It submits that the Practice Guidelines should also address the protections afforded to individuals through the operation of client legal privilege.

Additional comments

General Submissions

48. As stated above, Ms Furness stated at the first sitting of the Royal Commission that while it is not currently inviting submissions generally about the matters covered by its Terms of Reference, it will do so at a later stage and there will be public notice when that occurs.
49. It would be useful for information to be separately published on the Royal Commission website confirming how, and when, the Royal Commission will invite these more general submissions. This will ensure that individuals and institutions with a broader connection to the subject matter – such as academics or professionals working in related areas – are clear on how they can best respond to the Royal Commission's work. Their views will be particularly important given the requirement set out in the Terms of Reference that the Royal Commission should address the underlying systemic issues of child abuse in the institutional context. The Law Council looks forward to providing a general submission in this regard.

Research work of the Royal Commission

50. The Law Council would also welcome further information regarding the work of the research arm of the Royal Commission. It understands that the Royal Commission has already identified a number of areas of research including:
- (a) determining the range of services available to survivors of child sexual abuse;
 - (b) considering avenues available for restorative and therapeutic justice;
 - (c) the prevalence of sexual abuse in an institutional context;
 - (d) compliance with Australia's obligations under the United Nation's Convention on the Rights of Child;
 - (e) organisational impediments to reporting and responding to allegations of child sexual abuse;

¹¹ Section 2

¹² Section 3 and section 6AB

¹³ Section 6AA

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- (f) the requirements for mandatory reporting of children at risk in each State and Territory;
 - (g) systems for overseeing the management of complaints concerning people working with children;
 - (h) the sentencing regime that has applied and applies to sexual offences committed against children; and
 - (i) the checks required by states and territories before people can be approved to work with children.

51. The Law Council may be able to assist the Royal Commission in relation to a number of these priority research areas. It would be happy to consider how it can draw on the expertise of its constituent bodies, sections and committees with this in mind. It looks forward to further information on how to assist the work undertaken by the research arm of the Royal Commission.

Conclusion

The Law Council welcomes the information provided to date in the Royal Commission's Draft Practice Guidelines. While they are appropriately sensitive to the needs of survivors of abuse, the Law Council considers that they should clarify how other people who wish to give evidence about their experiences should best approach the Royal Commission. They should also refer to the financial assistance which has now been announced as available for legal representation of Royal Commission witnesses, as well as the national legal advisory service. The Draft Practice Guidelines should also clarify that individuals will be notified when information obtained in private sessions has been communicated without their consent, and the kinds of law enforcement agencies which will receive that information.

The Law Council suggests that consideration be given to developing "special witness" guidelines in relation to children, young people and other witnesses who may be particularly vulnerable witnesses before the Royal Commission. The Law Council also submits that the Royal Commission should consider issuing Practice Guidelines regarding its approach to the use of its coercive powers and the protections for witnesses. This would include its approach to the privilege against self-incrimination and client legal privilege.

The Law Council looks forward to further engaging with the Royal Commission as it progresses its important work.

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 Territory 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 60,000 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:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

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