



Law Council
OF AUSTRALIA

Office of the President

13 January 2023

Mr Andrew Peters
Director
Information Protection Section
National Security Information Branch
Attorney General's Department

By email: secrecyreview@ag.gov.au

Dear Mr Peters

Secrecy provisions review: Protections for individuals providing information to Royal Commissions

1. The Law Council welcomes the opportunity to make this submission in response to the Attorney-General's Department's Consultation Paper *Secrecy Provisions Review: Protections for individuals providing information to Royal Commissions (the Consultation Paper)*.
2. The Consultation Paper seeks views about the operation of the existing protections in Commonwealth secrecy offences for individuals who provide information to Royal Commissions.
3. The Law Council has not been able to provide a comprehensive response to the questions raised in the Consultation Paper due to the limited time period for consultation. In this regard, the Law Council relies on perspectives from its members and expert practitioners who have significant practical experience in these areas. However, consultation with these parties has been constrained due to the timeframes in which to respond.
4. For this reason, this letter is intended as a precursor to ongoing dialogue with the Attorney-General's Department within more appropriate timeframes.
5. The Law Council recognises the importance of ensuring adequate legal protections for persons wanting to engage with Royal Commissions. The importance of this objective has been highlighted by the experience of recent Royal Commissions that have been hampered in achieving their terms of reference. This includes, most recently, the Royal Commission into Defence and Veteran Suicide whose Interim Report (**the Interim Report**),¹ was submitted to Government in August 2021.
6. The inconsistent framing of existing legal protections for individuals who want to provide secrecy-regulated information to Royal Commissions has the effect of creating

¹ Commonwealth, Royal Commission inquiring into Defence and Veteran Suicide, [Interim Report \(2022\)](#) (**Interim Report**).

uncertainty, and there is a need to increase clarity and legal certainty of existing legal protections in this regard.²

7. By way of illustration, the Interim Report highlighted the unwillingness of serving and ex-serving Australian Defence Force (ADF) members and others, including public servants, to engage with the Royal Commission because existing protections were considered inadequate. In particular, the Interim Report pointed to inadequate protections inhibiting two cohorts of potential witnesses before the Royal Commission:
 - serving ADF members disclosing sensitive personal information intending to remain in service and concerned about the impact their disclosure of sensitive information may have on their careers; and
 - ex-serving ADF members whose lived experience is intrinsically linked to classified or operationally sensitive information being in a situation where disclosure of information to the Royal Commission without the appropriate approvals may expose them to criminal liability for a secrecy offence.³
8. The Law Council supports the Government's implementation of Recommendation 6 of the Interim Report and, to that end, its commitment to 'consult the Royal Commission and other key stakeholders on drafting of the amendments' and 'consider secrecy offences for future Royal Commissions as part of the Secrecy Provisions Review being undertaken by the Attorney-General's Department.'⁴
9. In the immediate term, the Law Council recognises the urgency of ensuring these issues are addressed sufficiently to enable the Royal Commission into Defence and Veteran Suicide to continue its work effectively. In this context, providing individuals with clarity that they will not be held civilly, criminally, or administratively liable for disclosure of secrecy-regulated information to Royal Commissions (in certain situations) will increase the willingness of individuals to provide relevant secrecy-regulated information.
10. As a general principle, there must be an appropriate balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure, for reasons such as those related to national security, defence, international relations, and personal privacy.⁵ Criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government.
11. The calibration of secrecy provisions and the power of a Royal Commission to compel relevant information in relation to an inquiry requires careful balancing of competing public interests. In this regard, the ALRC *Making Inquiries* Report states:

On the one hand, there is a strong public interest in full disclosure to a public inquiry. The purpose of an inquiry—particularly an investigatory inquiry—is usually to ascertain all the facts. Exemptions from disclosure impede this function. The public interest in disclosure may be even stronger where the purpose of the inquiry is to examine government management and conduct. On the other hand, consideration must be given to the interests that are protected by a particular secrecy provision. Secrecy provisions are designed to protect a wide variety of interests,

² See further, Australian Law Reform Commission, [Making Inquiries: A New Statutory Framework](#) (October 2009) Report 111, 476 18.35 ('*ALRC Making Inquiries Report*').

³ [Interim Report](#), 260-262 and Recommendation 6.

⁴ Department of Defence and Department of Veterans' Affairs, [Australian Government Response to the Interim Report of the Royal Commission into Defence and Veteran Suicide](#) (September 2022), 10.

⁵ Law Council of Australia, [Review of Australian Secrecy Laws](#), Australian Law Reform Commission (27 February 2009), 3.

some of which may justify an exemption from disclosure (such as national security) and others of which may not (such as ensuring confidence in the handling of government information). The balance between these competing interests should be struck differently, therefore, depending upon the nature of the interest sought to be protected by the secrecy provision.⁶

12. The ALRC's *Making Inquiries* Report recommended a general provision in the enabling legislation for the Royal Commission overriding specific secrecy provisions in the following terms:

The recommended Inquiries Act should provide that Royal Commissions or Official Inquiries may require a person to answer questions or produce documents or other things, notwithstanding any secrecy provision if the inquiry specifies that the requirement is made notwithstanding that secrecy provision. This power should not apply in the case of:

(a) secrecy provisions that specifically govern the disclosure of information to Royal Commissions or Official Inquiries; and

(b) secrecy provisions as prescribed in regulations under the recommended Inquiries Act.⁷

13. The Law Council is generally supportive of an approach described by the ALRC in the above terms, which if drafted appropriately, would provide certainty and clarity to individuals who provide information to Royal Commissions, while also balancing other essential public interests associated with the disclosure of secrecy regulated information.
14. Please contact Mr Nathan MacDonald, Deputy Director of Policy on (02) 6246 3721 or at Nathan.MacDonald@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely



Luke Murphy
President

⁶ ALRC Making Inquiries Report, 18.37-18.38.

⁷ Ibid, Recommendation 18-2 478.