

**JURISDICTION OF THE ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEX ABUSE TO INQUIRE INTO ALLEGATIONS OF
CHILD SEX ABUSE AT THE NAURU REGIONAL PROCESSING CENTRE**

JOINT MEMORANDUM OF ADVICE

I. INTRODUCTION AND SUMMARY OF ADVICE

- 1 The Commonwealth established the Royal Commission into Institutional Responses to Child Sex Abuse (**Commission**) on 11 January 2013. The Commission was established pursuant to the *Royal Commission Act* 1901 (Cth) (**RC Act**) as well as under the equivalent State Acts. The Commission's terms of reference (**Terms of Reference**) direct the Commission to inquire into 'institutional responses to allegations and incidents of child sex abuse'.
- 2 We have been asked to advise whether the Commission can investigate actions of the Commonwealth and others in relation to allegations of child sex abuse at the Nauru Regional Processing Centre (**Centre**).
- 3 In particular, we have been asked to advise whether the Commission can investigate:
 - (a) the actions of Commonwealth employees at the Centre;
 - (b) the actions of contractors engaged by the Commonwealth at the Centre;
 - (c) the role and responsibility of the Commonwealth for child sex abuse occurring within the Centre;
 - (d) the response of the Commonwealth to reports of child sex abuse occurring within the Centre.
- 4 In summary, it is our view that the Commission has jurisdiction to investigate the response of the Commonwealth and its Australian contractors to allegations of child sex abuse at the Centre.
- 5 First, we think it is settled that the RC Act authorises an inquiry into extraterritorial matters so long as the inquiry is for a purpose of government. This issue was considered and determined by the Full Federal Court in *Boath v Wyvill*.¹ This position is also

¹ (1989) 85 ALR 621.

supported by a consideration of the nature and scope of the power to establish commissions of inquiry as articulated from time to time by the High Court.

- 6 Second, it would be contrary to the terms and purpose of the Terms of Reference, viewed in context, if the scope of the Commission's inquiry were limited to investigating institutional responses to abuse that occurred within Australia. It is true that the Commission's inquiry must have an Australian nexus. However, the better view of the Terms of Reference is that this nexus will be satisfied where an Australian government or entity is relevantly in a position to 'respond' to incidents or allegations of child sex abuse as that term is used in the Reference. In this sense, it may be said that the Commission's jurisdiction is limited to inquiring into responses to child sex abuse in the Australian institutional context, however the concept of 'Australian institution' and 'Australian institutional context' must be understood broadly.
- 7 Third, the Commission's jurisdiction extends to investigating the Commonwealth's response to allegations of abuse at the Centre. The Commonwealth is clearly in a position to relevantly 'respond' to such allegations as that term is used in the Terms of Reference. The Centre was established pursuant to a memorandum of understanding between Nauru and Australia for the purpose of Nauru being designated as a 'regional processing country' under the *Migration Act 1958* (Cth). Pursuant to the MOU the Commonwealth funds the Centre and is jointly responsible its governance. While the Centre is now 'hosted' by Nauru (and perhaps ultimately controlled by Nauru), the Commonwealth has a significant role in the management of the Centre, including its day-to-day operations. Further, critical services (including garrison and security services) are provided to the Centre pursuant to service agreements between the Commonwealth and Australian contractors. Most significantly, the Department of Immigration and Border Protection (**Department**) has acknowledged that it has a significant role to play in responding to allegations and incidents of child sex abuse at the Centre.
- 8 We are instructed that the Commission has expressed the view it does not have the power to investigate the Commonwealth's response to allegations of child sex abuse in

relation to the Centre as ‘it cannot investigate events that occur within another country’.² For the reasons set out in this advice, we consider that this view is incorrect.³

II LEGISLATIVE AND FACTUAL BACKGROUND

9 In this section, we set out the relevant provisions of the RC Act, the Terms of Reference and the constitution and management of the Centre.

A *Royal Commission Act 1902 (Cth)*

10 As explained further below, the RC Act gives statutory force to the common law power of the Crown to establish commissions of inquiry. It also confers coercive powers on such commissions (such as the power to compel the production of documents and summon witnesses). In summary, the relevant provisions are as follows.

11 Section 1A of the RC Act provides for the establishment of royal commissions. It provides:

... the Governor-General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons, as he or she thinks fit, requiring or authorising him or her or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

12 The coercive powers of the Commission are contained in Part 2 of the Act. Section 2 empowers a commission to summons a person to attend at a hearing to give evidence or to produce documents. Section 3 creates an offence for a failure to comply with any such summons. Part 3 of the Act creates other relevant offences, including giving false or misleading information (s 6H), destroying documents (s 6K) or acting in contempt of a commission (s 6O).

13 Sections 7A and 7B relate to evidence obtained under foreign law. Section 7B, which is titled ‘Commission may take evidence outside Australia’, permits an Australian commissioner (that is, a commissioner appointed under s 1A) to examine witnesses in a foreign country for the purpose of the Australian commission pursuant to an

² Letter from Justice Peter McClellan AM (Commission Chair) to Senator Sarah Hanson-Young dated 7 May 2015.

³ We note that, to the extent that some of the factual material that we rely upon for the purposes of this advice is obtained from submissions to Parliament or a committee thereof, such material could not be relied upon or used in evidence in any legal proceedings, were such to be pursued: see *Parliamentary Privileges Act 1987 (Cth)*, s 16.

arrangement between Australian and the foreign country. Section 7A, which is titled ‘Effect of Royal Commissioner having authority to inquire under foreign law’, essentially provides a mechanism for information or evidence obtained by a Australian commissioner who is also exercising a foreign commission to be used for the purpose of the Australian commission, so long as there is an arrangement between Australia and the foreign country in relation to such ‘joint commission’.

- 14 Part 4 of the Act establishes a scheme for the holding of private sessions for the purpose of the Child Sex Abuse Royal Commission. A private session is not a hearing of the Commission, however the Commission may use information or evidence obtained in a private session in a similar way to information obtained by it in the ordinary course.

B Child Sex Abuse Commission

- 15 The Commonwealth issued the Letters Patent establishing the Commission on 11 January 2013 (as amended on 13 November 2014 to extend the term of the Commission). All of the States have also issued Letters Patent or their equivalent under their relevant legislation in similar terms to the Commonwealth.⁴
- 16 The Letters Patent contains the Terms of Reference for the Commission. The Letters Patent is attached as Annexure A to this advice.
- 17 The preamble recites certain matters, including:
- (a) Australia’s international obligations to take all measures to protect children from sexual abuse;
 - (b) the fact that all forms of child sexual abuse are a gross violation of a child’s rights and a crime under Australian law;
 - (c) the importance of exploring claims of systematic failures by institutions in response to child sexual abuse; and
 - (d) the importance of identifying best practices, including to protect against child sex abuse in the future and respond appropriately when incidents occur (including holding perpetrators to account and providing justice to victims).

⁴ We have not, however, considered the effect of the States’ Letters Patent and State legislation, because we think there could be difficulties in basing the Commission’s jurisdiction to inquire into matters concerning actions of the Commonwealth outside Australia on the States’ Letters Patent.

Recital seven of the preamble states that ‘it is important that those sexually abused as a child in an Australian institution can share their experiences to assist with healing and to inform the development of strategies and reforms’ (**Recital 7**).

18 The operative part of the Terms of Reference provides as follows:

‘We do ... require and authorise you to inquire into institutional responses to allegations and incidents of child sexual abuse and other related matters’.

19 The Terms of Reference provide further particulars of the scope of the inquiry, but expressly without limiting the scope of the inquiry, including:

(a) what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;

(b) what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;

(c) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse.

20 As explained further below, the critical terms of ‘child’, ‘government’, ‘institution’, ‘institutional context’ (ie the specification of when child sex abuse occurs in an institutional context) and ‘official’ of an institution are defined broadly in the Terms of Reference.

21 The Terms of Reference require the Commission to make recommendations arising out of its inquiry and to have regard to specified matters including the experience of persons affected by child sex abuse (and the need to provide such persons an appropriate way to share their experience) and the need to focus the inquiry on systematic issues and the adequacy of responses by institutions and their officials to reports of allegations of child sex abuse (clauses e-g).

22 The Terms of Reference provide that the Commission is not required to investigate a particular matter to the extent the Commission is satisfied that the matter has been, or will be, ‘sufficiently and appropriately dealt with’ by another inquiry or investigation.

- 23 Finally, clause 1 directs the Commission to consider ‘the need to establish appropriate arrangements in relation to current and previous inquiries in Australia and elsewhere, for evidence and information to be shared ... in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses.’

C Nauru Regional Processing Centre

Australian legislative context

- 24 Following amendments to the *Migration Act* 1958 (Cth) in August 2012, an ‘offshore entry person’ (now an ‘unauthorised maritime arrival’⁵) must be taken as soon as reasonably practicable to a ‘regional processing country’.⁶ The Minister may designate any country as a ‘regional processing country’.⁷ On 10 September 2012, the Minister designated Nauru as a regional processing country.⁸

MOU between Australia and Nauru

- 25 Just prior to the Minister declaring Nauru as a regional processing country Nauru and Australian entered into a memorandum of understanding providing for the establishment of a regional processing centre in Nauru.⁹ The preamble to the MOU recited, among other things, that Nauru had accepted Australia’s request that Nauru ‘host a Regional Processing Centre for Asylum Seekers’. The MOU provided that the centre would be established by the ‘Participants’ (cl 10), defined to mean Nauru and Australia. The MOU provided that Australia would bear all costs associated with the MOU (cl 6).
- 26 This MOU was replaced by a second memorandum of understanding entered into on 3 August 2013 (**2013 MOU**)¹⁰. The main change from the first MOU is that the 2013

⁵ See *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth).

⁶ *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth), inserting ‘Sub-division B – Regional Processing’ into Division 8 of the *Migration Act*. See esp s 198AD(2).

⁷ s 198AB.

⁸ See Instrument IMMI 12/100 – Instrument of designation of the Republic of Nauru as a regional processing country [F2012L01851].

⁹ Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, dated 29 August 2012.

¹⁰ Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, dated 3 August 2013.

MOU provides for the settlement of some transferees in Nauru, as well as their processing.

27 The relevant terms of the 2013 MOU provide as follows:

- (a) Australia is to bear all costs incurred under and incidental to the MOU (cl 6);
- (b) Australia may transfer, and Nauru will accept, transferees from Australia (cl 7);
- (c) administrative arrangements giving effect to the MOU will be settled between Australia and Nauru (cl 8);
- (d) Nauru will host one or more regional processing centres for the purpose of the MOU (cl 10);
- (e) communications concerning the day-to-day operations and activities undertaken in accordance with the MOU are to be between the Nauruan Secretary for Justice and the Australian Department (cl 21);
- (f) Australia and Nauru will establish a Joint Committee with responsibility for the oversight of practical arrangements required to implement the MOU (cl 22).

Nauruan Legislation

28 The Centre is established by the Nauruan *Asylum Seekers (Regional Processing Centre) Act* 2012 (the **Nauruan Act**). Among other things, the preamble to the Nauruan Act states that its purpose is to ‘regulate the operation of centres at which asylum seekers ... brought to Nauru under the Migration Act of the Commonwealth of Australia are required to reside’. The Nauruan Act:

- (a) confers on a designated ‘Operational Manager’ the duty to manage operations at the centres (ss 5-7). The Operation Manager may be given this responsibility by either Australia or the relevant Nauruan Minister (s 3(1), definition of ‘Operations Manager’);
- (b) provides that the Nauruan Minister is the guardian of any unaccompanied child who arrives in Nauru (s 15(1));
- (c) provides that the Nauruan Secretary may enter into agreements on behalf of Nauru with any ‘service provider’, which is defined as a body engaged by Nauru or Australia to provide services of any kind in relation to a regional processing centre (s 16).

Governance and administration of the Centre

29 The Department has repeatedly stated that the Nauru Government controls the Centre.¹¹ However, the Australian government is heavily involved in the governance and administration of the Centre. This is apparent from the terms of the 2013 MOU (especially clauses 8, 21 and 22) as well as the following.

- (a) Nauru and Australia have established various joint governance forums to ‘consider various elements of the Nauruan Processing Centre’, including the Joint Advisory Committee (relating to the implementation and operation of the Centre) and the Nauru Joint Working Group (involving weekly meetings to discuss general issues, staff, and events/activities within the Centre).¹² It appears that the Secretariat for the Joint Advisory Committee is located in Canberra. According to the Department, ‘Nauruan and Australian officials work cooperatively on the management and oversight’ of the Centre’.¹³
- (b) At least 19 Department employees are present in Nauru to ‘support the Operational Managers’, ‘provide support, mentoring and training’ and administer service contracts.¹⁴
- (c) Pursuant to clause 8 of the 2013 MOU, Nauru and Australia entered into ‘administrative arrangements’, including in relation to the management of the Centre, on 11 April 2014. These arrangements are not publicly available. However, the Australian Department has stated: ‘Whilst the Government of Nauru has responsibility for the Nauru Regional Processing Centre, the Department supports the Government of Nauru through administration of contracts for service provisions.’¹⁵

¹¹ See eg Submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (May 2015) (**Department Submission**) at 11.

¹² Ibid at 10.

¹³ Ibid. See also *Review into recent allegations relating to conditions and circumstances at the Regional processing Centre in Nauru: Final Report* (20 March 2015) (the **Moss Review**) at [2.12].

¹⁴ Department Submissions at 13; Attachment D; Moss Review at [2.14] (stating the Department has 20 positions in Nauru).

¹⁵ Department Submission at 14.

- (d) It appears that the majority of services at the Centre are provided by Australian contractors (although there is some sub-contracting to Nauruans)¹⁶ We understand that many of these services are provided pursuant to contracts between the Australian company and the Commonwealth. These include contracts between the Commonwealth and Transfield Services (Australia) Pty Ltd (garrison services) and between the Commonwealth and International Health and Medical Services (medical services).¹⁷ Nauru is not a party to these contracts.
- (e) The contract between Transfield and the Commonwealth requires Transfield to provide many of the key operations of the Centre, including garrison and security services. The contract confers on the Commonwealth significant control over Transfield's operations at the Centre, including the issuing of guidelines and directions in relation to Transfield's operations.¹⁸ The contract is subject to the law and jurisdiction of the ACT.

Obligation to report allegations of abuse

- 30 The Department has acknowledged that it has a critical role to play in responding to allegations and incidents of abuse at the Centre.
- 31 According to the Department, service providers are contractually bound to report 'incidents' (including allegations) to the Department and the Operations Manager 'in accordance with incident management and reporting guidelines'.¹⁹ 'Incidents' is not defined, but appears to include assaults, including sexual assaults.²⁰
- 32 In its Submission to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (May 2015) the Department stated:²¹

The Department recognises that the reporting of allegations is an area that requires improvement. The Government of Nauru and the Department are committed to

¹⁶ Moss Review at [2.15].

¹⁷ See generally, Department Submission at 14; Moss Review at [2.15]; Parliament of Australia, Department of Parliamentary Services, *Background Note: Health care for asylum seekers on Nauru and Manus Island*, 28 June 2013 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/AsylumSeekersHealthCare>.

¹⁸ See generally Draft Statement of Claim in *Plaintiff M68 of 2015 v Minister for Immigration and Border Protection*, at [25]-[26].

¹⁹ Department Submission at 18. See also Moss Review at [2.23].

²⁰ Department Submission at 18, referring to allegations of 'physical and sexual assault'.

²¹ Ibid 18-19.

improving the mechanisms in place to capture all allegations, with a view to encouraging reporting, and enhancing the effectiveness of current reporting systems to ensure information is readily accessible and accurate.

In particular, the Department will work with service providers to review processes to ensure that allegations that are not formally reported are recorded and tracked in a similar manner. This will ensure a comprehensive understanding of issues and enable follow up action to be transparently monitored.

- 33 Similarly, in relation to ‘child safeguarding protocol’ at the Centre, the Department stated:²²

The Department is committed to identifying opportunities for improvement to process, practice, policy and cultural norms in response to incidents involving children in regional processing centres. The Department has established a section within the Child Protection and Wellbeing Branch, which actively supports the implementation of practices that better protect and care for children, including ensuring that child protection is given due recognition in regional processing arrangements. This section will be engaging with the Government of Nauru, the Nauru Police Force and service providers to develop a child protection framework that upholds child protection in the Regional Processing Centre and in the refugee community.

Underpinning this framework will be improvements in the clear identification of roles and responsibilities in respect of child protection and consistent protocols for incident management and reporting.

This section will also drive implementation of relevant actions arising from the Moss review and address any identified gaps in this important area of policy.

D Inquiries into allegations of abuse at Centre

- 34 Allegations relating to child sex abuse at the Centre were investigated and reported by the Moss Review. This review was established by the Minister for Immigration and Border Protection.
- 35 The Commonwealth Senate has also established a Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru. The committee is in the process of completing its inquiry.

III DOES THE RC ACT AUTHORISE AN INQUIRY INTO EVENTS OCCURRING OUTSIDE AUSTRALIA?

- 36 The first question is whether the RC Act authorises the Commonwealth to establish a commission to inquire into matters and events that occur outside Australia (ie extraterritorial matters). In order to answer this question we must consider the power of

²² Ibid 16-17.

the Crown to establish a commission of inquiry, both at common law and under statute. The presumption against the extraterritorial application of statutes is also relevant.

- 37 For the reasons set out below, we consider that s 1A of the RC Act plainly authorises the Commonwealth to establish a Royal Commission to inquire into extraterritorial matters, so long as the inquiry is for a government purpose and otherwise satisfies the conditions in s 1A of the Act.

A. Statutory construction and the presumption against extraterritorial application

- 38 Under the modern approach to statutory construction, the legislative text is central.²³ However, regard must also be had to purpose and context ‘in the widest sense’.²⁴ Pursuant to s 15AA of the *Acts Interpretation Act* 1901 (Cth) ‘the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation’. General canons of construction, including established presumptions, form part of the relevant context and must be considered as part of any statutory interpretation exercise. However, the strength of a particular presumption depends on consideration of the statute as a whole, in accordance with the modern approach.
- 39 At common law, and under statute, there is a general presumption against the extraterritorial application of Commonwealth statutes.²⁵ Section 21(1)(b) of the *Acts Interpretation Act* 1901 (Cth) provides that in any Act ‘references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.’ Both at common law and under statute, the presumption may be overcome by a contrary intention.²⁶ The presumption applies to legislative instruments as well as statutes.²⁷

²³ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

²⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ. See also *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [22] per French CJ, Crennan and Kiefel JJ.

²⁵ See eg *Jumbunna Coal Mine NL v Victorian Coal Miners' Assn (Coal Miners' Case)* (1908) 6 CLR 309 at 363 per O'Connor J.

²⁶ *Acts Interpretation Act* 1901 (Cth) s 2(2); *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10.

²⁷ *Legislative Instruments Act* 2003 (Cth) s 13(1); *Acts Interpretation Act* 1901 (Cth) s 46(1).

40 Under the modern approach, it appears that the presumption may be of lesser significance. The High Court has confirmed that the required territorial connection (if any) must be ascertained by construing the legislation as a whole, having regard to its context and subject matter.²⁸

41 The presumption may be displaced in a number of situations, including:

- (a) by express words²⁹;
- (b) where this is indicated by ‘reading the Act as a whole’³⁰;
- (c) if the legislation would otherwise be ‘severely hampered or rendered unworkable’³¹; or
- (d) if a contrary intention is indicated by ‘the object, subject matter or history of the enactment’.³²

Similarly, the presumption should not be applied to defeat the purpose of the statute.³³

42 The strength of the presumption will depend on the subject matter of the legislation.³⁴ Dixon J has confirmed that it is ‘a rule of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter’.³⁵ Similarly, the courts have cautioned against an ‘unduly rigid’ application of the presumption: it is not necessary to require a strict territorial connection in relation to each statutory element.³⁶ It may be, depending on the statutory context, that only one of a number of statutory elements or matters (if any) is to be territorially limited.

²⁸ *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at [29]–[36] per the Court.

²⁹ See eg *Waller v Freehills* (2009) 177 FCR 507.

³⁰ See eg *Birmingham University v Federal Commr of Taxation* (1938) 60 CLR 572

³¹ See eg *Australian Securities Comm v Bank Leumi Le-Israel* (1995) 134 ALR 101.

³² *Air-India Wiggins* [1980] 1 WLR 815 at 820-821 per Lord Scarman, approved in *Australian Securities Comm v Bank Leumi Le-Israel* (1995) 134 ALR 101 at 123 per Sackville J.

³³ *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414 at 428 per Kirby J.

³⁴ See eg *Air-India Wiggins* [1980] 1 WLR 815 at 820-821 per Lord Scarman.

³⁵ *Wangau-Rangtikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 per Dixon J.

³⁶ In relation to a New South Wales statute, Jacobs JA observed: ‘... it is not every aspect of every sentence or clause of legislation which gave be given the local New South Wales connotation’: *O’Connor v Healey* (1967) 69 SR (NSW) 111; approved in *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414 at 428 per Kirby J; *Sportsbet Pty Ltd v Victoria* (2011) 282 ALR 423; [2011] FCA 961 at [43] per Gordon J.

43 The most relevant modern justification for the presumption is comity of nations: the Australian Parliament is presumed not to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign.³⁷

B General principles: Power to establish a commission of inquiry

44 At common law, the Crown has the power to establish a commission of inquiry to inquire and report into any matter, so long as the inquiry is for ‘a purpose of government’.³⁸ This power has been described as ‘an essential part of the equipment of all executive authority’.³⁹ There is some debate as to whether the power is part of the executive’s prerogative power but it is not necessary to address this question for the purpose of this advice.⁴⁰ Absent statutory authority, a commission of inquiry does not have any coercive powers.⁴¹ That is, it cannot compel the attendance of witnesses or require the production of documents. The primary purpose of the RC Act and the equivalent state statutes is to confer such coercive powers in aid of a commission of inquiry.

45 The High Court has explained the scope and limits of the power to establish a commission of inquiry, both under statute and at common law. The most relevant principles are as follows:

³⁷ See eg *Bacelo v Electrolytic Zinc Co of Australiasia Ltd* (1932) 48 CLR 391, 423. *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 70 at [17] per Ryan and Kiefel JJ.

³⁸ *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at 156 per Brennan J (‘BLF Case’).

³⁹ *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330 at 370 per O’Connor J.

⁴⁰ cf *Clough v Leahy* (1904) 2 CLR 139 at 156 per Griffith CJ (Barton and O’Connor JJ agreeing) (the power to initial and undertake inquiries is one the Crown has in common with ‘every individual citizen’); *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 83-85 per Latham J (appearing to agree with Griffith CJ in *Clough*, but also referring to the Crown’s prerogative powers), at 93-94 per Dixon J (referring to the prerogative as the source of the authority of the executive to establish commissions of inquiry); *BLF Case* (1982) 152 CLR 25 at 124-125 per Gibbs CJ (noting the divergent views but finding it unnecessary to decide the question), at 148 per Brennan J (the power to issue commissions is a prerogative power). See generally Nicholas Aroney, ‘A power “singular and eccentric”’: Royal commissions and executive power after Williams’ (2014) *Public Law Review* 99 at 101-106.

⁴¹ See eg *Clough v Leahy* (1904) 2 CLR 139 at 152 per Griffith CJ; *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 83 per Latham J; *BLF Case* (1982) 152 CLR 25.

- (a) First, s 1A of the RC Act ‘gives the force of statute to the powers of the Crown to establish a commission of inquiry’.⁴² Accordingly, the scope of the power in s 1A to authorise commissions is co-extensive with the scope of the power at common law, subject to constitutional limits.
- (b) Second, both at common law and under statute, the executive may establish a commission to inquire into any subject, so long as the inquiry is ‘for a purpose of government’. According to Brennan J in the *BLF Case*:⁴³

A commission to inquire and report cannot be issued in exercise of the prerogative or of the statutory power merely to satisfy an idle curiosity. ... What distinguishes a prerogative commission ... is that it is an inquiry on behalf of the executive government for the purpose of government. Absent that purpose and no support for the inquiry can be found either in the prerogative or statute. ... Given the official purpose of the inquiry, however, there is no limit to the subjects into which inquiry might be authorised.

- (c) Third, the power is subject to certain limits, including constitutional limits. It appears that the Commonwealth may only confer coercive powers on a commission in respect of matters within its constitutional legislative power.⁴⁴ Similarly, an inquiry cannot be constituted so as to constitute a contempt of court⁴⁵ and cannot make a binding determination as to the criminal guilt of a person.

⁴² *BLF Case* (1982) 152 CLR 25 at 86 per Mason J. Mason J appeared to leave open the possibility that s 1A might extend the power of the Crown to establish a commission at common law; it is not necessary to address this issue for the purpose of this advice. cf *Boath v Wjyvill* (1989) 85 ALR 621 at 635 per Sheppard, Beaumont and Gummow JJ (‘No doubt it is true to say ... of s 1A of the federal Act that it does no more than give the force of statute to the common law powers of the Crown to establish a commission of inquiry and it does not extend those common law powers’) (citing Mason J in *BLF*).

⁴³ (1982) 152 CLR 25 at 156.

⁴⁴ *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 (Privy Council decision on appeal from a split decision of the High Court in *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182. See also *Lockwood v Commonwealth* (1954) 90 CLR 177 at 182-184 per Fullagar J. See generally, Nicholas Aroney, ‘A power “singular and eccentric”’: Royal commissions and executive power after Williams’ (2014) *Public Law Review* 99 at 111-115.

⁴⁵ See eg *Clough v Leahy* (1904) 2 CLR 159 at 156; *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 85.

(d) Fourth, the reference to ‘any matter’ in s 1A has a ‘wide operation’.⁴⁶ The word ‘matter’ in s 1A is ‘used as a comprehensive term to refer to any subject of inquiry ... that is to say any subject matter that may be chosen for inquiry’.⁴⁷

46 It is with these principles in mind that we turn to the question of extraterritorial reach of s 1A.

C Does s 1A of the RC Act authorise an inquiry into extraterritorial matters?

47 The principles concerning extraterritorial application of legislation might be thought to suggest that under the RC Act there is no power to establish an inquiry into matters or events occurring outside Australia. However, for the reasons that follow, we think that such a conclusion about the operation of the RC Act is not correct.

48 The question of whether the statutory power to establish royal commissions authorises an inquiry into extraterritorial matters has been considered and answered by the Full Federal Court in *Boath v Wyvill*⁴⁸ (holding that it does so extend), albeit in the context of a State statute. In our view, for the reasons set out below, the decision is dispositive of the issue in relation to the Commonwealth statute as well.

49 In *Boath*, one of the questions before the Court was whether the Western Australian equivalent of the RC Act validly authorised an inquiry into Aboriginal deaths in custody occurring in other Australian States; that is, whether s 5 of the WA Act, which was the equivalent provision to s 1A of the RC Act, had extraterritorial application. The Full Federal Court (Sheppard, Beaumont and Gummow JJ) held that it did.

50 The Court’s reasoning comprised three steps.

(a) First, the Court explained (relying on High Court authority) that s 5 of the WA Act, like s 1A of the Commonwealth Act, ‘gives the force of statute to the common law power of the Crown to establish a commission of inquiry’.⁴⁹ Accordingly, if the scope of the common law power authorised the Crown to establish inquiries into extraterritorial matters, then s 5 would have the same

⁴⁶ *Boath v Wyvill* (1989) 85 ALR 621 at 630 per Sheppard, Beaumont and Gummow JJ.

⁴⁷ *R v Thomas; Ex parte Brodsky* (1963) 109 CLR 434 at 438 per Kitto, Menzies and Windeyer JJ (citing the Privy Council in *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 and Fullagar J in *Lockwood v Commonwealth* (1954) 90 CLR 177).

⁴⁸ (1989) 85 ALR 621. Special leave to appeal to the High Court was refused.

⁴⁹ *Ibid* at 635 (citing Mason J in the *BLF Case*).

effect (or in the Court's own word 'if [the issue of the Commission] were authorised by the prerogative it would be authorised by the legislation'⁵⁰).

- (b) Second, the Court held that the Crown's power to inquire at common law extended to matters occurring outside the jurisdiction.⁵¹

the purposes of government in pursuit of which the Crown might properly wish to inform itself upon various matters may include, in a proper case, events which wholly or partly occurred outside the jurisdiction, thus making it appropriate to conduct inquiries wholly or partly outside the jurisdiction.

In our view, the common law does extend to inquiries of this character. The common law power was described by Todd in *Parliamentary Government in England*, 1982 ed, vol II, pp 92-93 in general terms. No authority was cited for the contrary view.

- (c) Third, because the power at common law extends to extraterritorial matters, the statutory power should be similarly construed:⁵²

[Accordingly], the provisions of s 5 of the WA Act as to inquiry into any matter specified in the appointment are to be construed without reading into them words of territorial limitation. ...

[G]iven a proper purpose of government, the common law, and thus s 5 of the WA Act, would authorise a Commission to inquire inside and outside the State into circumstances present inside and outside the State. A lesser connection with the State may well suffice, but this connection plainly would be adequate.

- 51 The reasoning in *Boath* applies with equal force in the federal context. The Court was explicit that s 1A, like s 5 of the WA Act, incorporated the common law power to inquire and should be interpreted co-extensively with that power (subject to constitutional limits). Similarly, it is clear from the context of the decision that the Court's observations about the scope of the Crown's power at common law were general observations about the power; they were not limited to the power in right of the State⁵³. Finally, there is no constitutional principle that would apply to compel a different result in the case of the Commonwealth: the Commonwealth plainly has power to legislate with respect to matters and events outside Australia.⁵⁴

⁵⁰ Ibid

⁵¹ Ibid (emphasis added).

⁵² Ibid 635-636, 638 (emphasis added).

⁵³ Indeed, the Court relied on authority relating to the power under English law.

⁵⁴ See eg *XYZ v Commonwealth* (2006) 227 CLR 532; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

- 52 Accordingly, following *Boath*, the power in s 1A of the RC Act extends to inquiries into matters ‘occurring outside the jurisdiction’ so long as the inquiry is for ‘a purpose of government’, that is, the inquiry otherwise satisfies the conditions in s 1A.
- 53 In our view, *Boath* is dispositive. In addition, the following factors provide further support for the conclusion that s 1A authorises an inquiry into extraterritorial matters:
- (a) First, as set out above, the High Court has confirmed that the reference to ‘matter’ in s 1A has the widest possible meaning, namely ‘any subject matter that may be chosen for inquiry’.⁵⁵ This suggests that so long as the inquiry is for a government purpose (that is, it falls within the conditions set out in s 1A) and is otherwise within constitutional power, it is a subject that is authorised by s 1A, irrespective of whether the inquiry touches on matters external to Australia. (As explained above, the Commonwealth Parliament is empowered to legislate with respect to matters and events outside Australia.)
 - (b) Second, the limits on the potential scope of a commission on inquiry are well-recognised — and extraterritoriality is not one of these limits. (For example, a royal commission may not interfere with the administration of justice in the courts. Similarly, there may be limits on the lawful subject matter of inquiries flowing from the constitutional limits on Commonwealth legislative power.⁵⁶)
 - (c) Third, the first royal commission that was issued following enactment of the RC Act in 1902 was a commission expressly authorised to inquire into extraterritorial matters, being an investigation into the ‘arrangements made for the transport of troops returning from service in South Africa in the SS Drayton Grange’. The SS Drayton Grange was the last Australian ship to return home following the Boer War and many troops died or became very sick on the journey, resulting in a public outcry and subsequent royal commission. The commission investigated the circumstances relating to the embarking of troops onto the ship in Durban, South Africa; the treatment of troops during the voyage itself; and the failure to disembark sick troops in Albany, Western Australia. It appears that the letters patent were issued around the time the RC Act received royal assent in September

⁵⁵ *R v Thomas; Ex parte Brodsky* (1963) 109 CLR 434 at 438 per Kitto, Menzies and Windeyer JJ.

⁵⁶ See paragraph 45(c) above.

1902 and the commission issued its report in October 1902.⁵⁷ The SS Drayton Grange commission is significant for two reasons. First, it provides support for the proposition that Parliament intended that the RC Act authorise commissions with the power to investigate extraterritorial matters.⁵⁸ Second, it supports the view taken by the Court in *Boath*: that it was always understood that the common law power extended to inquire into extraterritorial matters where this was required for a government purpose.

- (d) Fourth, the parliamentary debates concerning the Royal Commission Bill 1912 (Cth), which added s 1A to the RC Act, reflect that the government intended the power in s 1A to be as wide as constitutionally permissible.⁵⁹ In the Second Reading Speech, the Attorney General, Mr Hughes, explained:⁶⁰

There is no limit to the right of the Commonwealth authority to inquire. It is for the High Court to determine whether our laws are constitutional ... Clearly, our power to inquire must be at least as wide as our power to legislate....⁶¹

⁵⁷ See List of Royal Commissions and Commissions of Inquiry on the website of the Parliament of Australia <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions>.

⁵⁸ Indeed, from time to time over the years, royal commissions have been established that expressly concern extraterritorial matters, including the Royal Commission on Australia's security and intelligence agencies (1983), the Royal Commission on the use and effects of chemical agents on Australian personnel in Vietnam (1985) and the Inquiry into certain Australian Companies in relation to the UN Oil-For-Food Programme (2005). It would clearly frustrate the purpose and intent of the RC Act if such investigations were beyond power.

⁵⁹ The 1912 Act added s 1A to the RC Act and also strengthened the commission's coercive powers, including creating offences for non-compliance. Interestingly, s 1A was added, in part, in response to a New Zealand decision holding that the inclusion of a statutory power to establish a commission had the effect of limiting the Crown's power to do so at common law. Accordingly, the opening words of s 1A as enacted in 1912 (and in their current form) provide that: 'Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor-General, to make or authorise any inquiry, or to issue any commission to make any inquiry, it is hereby enacted and declared that...'. See Commonwealth Hansard, House of Representatives, 24 July 1912, 1181-1193 (Mr Hughes, Attorney General); Commonwealth Hansard, House of Representatives, 25 July 1912, 1308-1309 (Mr Hughes, Attorney General).

⁶⁰ Commonwealth Hansard, House of Representatives, 24 July 1912, 1181-1193 (Mr Hughes, Attorney General).

⁶¹ The Privy Council later rejected this view, holding that the statutory power was limited to matters within the Commonwealth's legislative powers in s 51 of the Constitution: *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 (Privy Council decision on appeal from a split decision of the High Court in *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182). However, the relevant point is that the legislature intended the power to be as wide *as constitutionally possible*; this would extend to extraterritorial inquiries where supported by legislative power.

Similarly, in response to a request from the opposition that the reference to an inquiry for ‘any public purpose’ be limited to an inquiry for ‘any public purpose of the Commonwealth’, Mr Hughes explained that a relevant public purpose may be broader than the Commonwealth’s express legislative powers in s 51 of the Constitution, as it could include a purpose relating to the Commonwealth’s executive powers or ‘the interest of the nation’.⁶²

- (e) Fifth, ss 7A and 7B of the RC Act confirm the legislative intent that a commission established under s 1A should have power to inquire into extraterritorial matters. These provisions were added by the *Statute Law (Miscellaneous Amendments) (No 1) Act 1982 (Cth)*. As explained above, these provisions permit a commission to hear evidence in a foreign country pursuant to foreign law and use this information for the purpose of the Australian commission (so long as there is an arrangement in place between Australia and the relevant foreign country for the obtaining of such information). The extrinsic materials confirm that these powers were intended to be conferred in aid of a commission making inquiries into extraterritorial matters, not just in aid of inquiries into matters within Australia where relevant evidence might be held overseas. According to the second reading speech.⁶³

The amendments made by Part XXXIV of the Bill will enable an Australian royal commission to function in a foreign country where appropriate arrangements in that regard have been made with the foreign country. It is envisaged that in some cases a royal commission would take evidence in the foreign country pursuant to its Australian commission and in other cases it would take evidence pursuant to an authority issued to it under the law of the foreign country. See clause 203. The legislation is proposed against the background of discussions between Australia and New Zealand for the Royal Commission of Inquiry into Drug Trafficking, conducted by Mr Justice Stewart, to take evidence in New Zealand for the purposes of its inquiries.

⁶² Commonwealth Hansard, House of Representatives, 25 July 1912, 1308-1309 (Mr Hughes, Attorney General).

⁶³ Commonwealth Hansard, House of Representatives, 22 April 1982, p 1816 (Mr Viner, Minister for Industrial Relations). See also the observation of the Opposition: ‘A quite important [amendment] is the amendment to enable royal commissions to function in foreign countries. Again, we support that provision’: Commonwealth Hansard, House of Representatives, 4 May 1982, p 2193 (Lionel Bowen, Member of the Opposition).

(The explanatory memorandum observed that the amendments in the bill were ‘uncontroversial’)⁶⁴.

- (f) Finally, the presumption against extraterritoriality does not require an interpretation of s 1A which is limited to matters within Australia. . As noted above, the presumption will not be applied where this would frustrate the purpose of the statute or is otherwise contrary to the ‘object, subject matter or history of the enactment’.⁶⁵ In this case, the power of the Commonwealth to inquire into matters for a government purpose would clearly be frustrated if the Act were interpreted to authorise inquiries into matters within Australia only. Such an interpretation would also be contrary to the ‘history’ of the power, as confirmed in *Boath*.

54 Accordingly, in our view s 1A authorises an inquiry into matters and events outside Australia, so long as the conditions in s 1A are otherwise met.

55 For completeness we observe that it is highly likely that the coercive provisions in the RC Act do not have extraterritorial effect. The presumption against extraterritorial application would apply to these provisions. This was the conclusion of the Full Federal Court in *Boath* (observing that ‘different issues arise’ in relation to the statute’s coercive powers).⁶⁶ However, as the Court made clear in *Boath*,⁶⁷ there is no reason why the power to inquire conferred by s 1A cannot be broader than the scope of the coercive powers conferred by the Act in aid of such an inquiry.

IV DO THE COMMISSION’S TERMS OF REFERENCE AUTHORISE AN INQUIRY IN RELATION TO ABUSE OCCURRING OUTSIDE AUSTRALIA?

56 The next issue relates to the scope of the Terms of Reference, in particular whether the Terms of Reference authorise the Commission to inquire into ‘institutional responses to

⁶⁴ Explanatory Memorandum, Statute Law (Miscellaneous Amendments) (No 1) Bill 1982 (Cth) at 1.

⁶⁵ *Air-India Wiggins* [1980] 1 WLR 815 at 820-821 per Lord Scarman, approved in *Australian Securities Comm v Bank Leumi Le-Israel* (1995) 134 ALR 101 at 123 per Sackville J.

⁶⁶ *Boath* (1989) 85 ALR 621, 636.

⁶⁷ *Ibid* 635 (observing that at common law the power to inquire ‘lacks means of coercion’ but that ‘nevertheless’, the power extends to extraterritorial matters). The decision in *Boath* also generally supports this position: the Court held that s 5 of the WA Act had extraterritorial application even though the coercive provisions of the statute did not. This is consistent with the ordinary principles applying to the presumption: depending on the context, some statutory provisions may be extraterritorially limited while others may not.

allegations and incidents of child sex abuse’ where than abuse takes place in an institution that is located outside Australia. Further, if the Terms are not so constrained, what is the nature of the limits (if any) on the Commission’s power to inquiry in relation to abuse occurring outside Australia?

A Relevant Law

Interpreting terms of reference

- 57 The courts have confirmed that letters patent establishing a royal commission must be ‘read as a whole’⁶⁸ and ‘in context’.⁶⁹ Where appropriate, that context may require a broad interpretation of the terms of reference. In *Attorney-General (Cth) v Queensland*⁷⁰ French J (as he then was) rejected a narrow interpretation of ‘Aboriginal’ in the Letters Patent establishing the inquiry into Aboriginal Deaths in Custody as this ‘would impose restrictions on the inquiry which its evident purpose and, in that context, the language of the Letters Patent, will not support.’⁷¹
- 58 Similarly, the courts have explained that broadly framed terms of reference essentially give a royal commission a ‘roving’ investigatory power, including a power to undertake ‘fishing expeditions’ that would not be open in judicial proceedings.⁷² According to the much-cited observation of Ellicott J:⁷³

In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it... the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matters of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken.

- 59 Although not directly on point, this explanation of the ‘investigatory character’ of a royal commission suggests that its terms of reference should not be read narrowly so as

⁶⁸ *Ferguson v Cole* [2002] FCA 1411 at [33] per Branson J.

⁶⁹ *Boath v Wyvill* (1989) 85 ALR 621 at 630 per Sheppard, Beaumont and Gummow JJ.

⁷⁰ (1990) 94 ALR 515.

⁷¹ *Ibid* 539.

⁷² *National Crime Authority v AI* (1997) 75 FCR 274 at per Black CJ, Von Doussa and Sundberg JJ.

⁷³ *Ross v Costigan* (1982) 41 ALR 319 at 334-335.

to foreclose lines of investigation that may assist its inquiry, absent express language confining the commission's jurisdiction.

Effect of a preamble

60 As a matter of statutory construction, a preamble forms part of an Act but it is not an enacting provision.⁷⁴ It can be used to construe an Act as it forms part of the statutory context, but it cannot operate to cut down otherwise clear and unambiguous provisions.⁷⁵

61 A similar approach is, we think, to be adopted in relation to a preamble to the terms of reference of a Royal Commission — that is, a preamble can aid in construction of the operative terms of reference but cannot cut down the scope of the terms of reference where they are clear and unambiguous.

62 It is with these principles in mind that we turn to the Commission's Terms of Reference.

B Scope of the Commission's Terms of Reference

Preliminary observations

63 We make the following preliminary observations about the Terms of Reference.

64 The terms of the inquiry are focused and specific: the commission is to inquire into institutional responses to allegations and incidents of sex abuse. The inquiry is not focused on the culpability of perpetrators or abuse outside the institutional context (for example domestic or family abuse).

65 However, within this specific remit, the terms of reference are otherwise broad:

(a) The preamble recites a wide range of relevant matters, including Australia's international obligations to protect children from child abuse; the fact that all forms of child abuse are a crime under Australian law; and the importance that claims of systematic failures by institutions be explored in order to identify best practices and respond appropriately in the future.

(b) The critical terms are broadly defined. Significantly for present purposes, the terms are not limited by reference to territory. Thus 'child' is defined to mean a child within the meaning of the Convention of the Rights of the Child;

⁷⁴ *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 at 475.

⁷⁵ See eg *Wacando v Commonwealth* (1981) 148 CLR 1 at 15-16 per Gibbs J, 23 per Mason J.

‘government’ is defined as a government of the Commonwealth, State or Territory and includes any non-government institution that undertakes or has undertaken activities on behalf of a government; ‘institution’ means ‘any public or private body, agency, association, club, institution, organisation, or any other entity or group of entities of any kind ... and however described’ (but does not include families). An ‘official’ of an institution is also broadly defined and includes member, officer, employee, contractor or volunteer of the institution or a related entity.

- (c) Similarly, child abuse is defined to occur in an ‘institutional context’ in a broad range of situations. Most significantly these situations are not limited to abuse occurring on the premises of the institution. For example, abuse occurs in an institutional context in circumstances where the institution is responsible for adults having contact with children and where the institution ‘has created, facilitated or in any way contributed to’ the risk that of abuse or the ‘conditions giving rise to that risk’.

66 Finally, the terms of reference must be read in light of s 1A of the RC Act. That is, the terms of reference only authorise an inquiry into a particular matter where a relevant Australian nexus exists (that is, the inquiry ‘relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth’ or the equivalent purposes of the Australian States).

The Terms of Reference are not limited to abuse occurring within Australia

67 In this context, we consider that the better view is that within the specific and focused remit of the inquiry (namely institutional responses to child sex abuse) the terms of the inquiry are otherwise as intended to be as broad as possible. Put differently, the restrictions on the scope of inquiry are specified in the terms of reference themselves read in the context of s 1A; there is no warrant for imposing any additional territorial restrictions. In the words of the Dixon J, it is not appropriate to apply the presumption because this is a case where ‘some other restriction is supplied by context or subject matter’.⁷⁶ (That ‘restriction’ being institutional responses to child sex abuse (as defined) with a relevant Australian nexus, as discussed below).

⁷⁶ *Wangai-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601.

68 Accordingly, we consider that the terms of reference are not limited to inquiring into sex abuse that occurred within Australia or to sex abuse that occurred within an institution located in Australia. The terms ‘institution’ and/or ‘child’ should not be read down to mean only an institution and/or child within Australia. The focus of the inquiry is government and institutional responses to allegations of sex abuse. It would be unduly limiting if that response could only be investigated in the context of abuse occurring within Australia. Our view is supported by the following:

- (a) First, an interpretation that limited the inquiry to sex abuse occurring within Australia is inconsistent with the broad scope of the Terms of Reference, including the preamble, the operative terms and the definitions. For example, the preamble refers to the rights of all children and all forms of sexual abuse; these concepts are not territorially limited. Similarly, the preamble refers to child sex abuse being a crime under Australian law; in this respect it is significant that the Australian criminal law applies to child sex abuse that occurs outside Australia where perpetrated by an Australian citizen or permanent resident.⁷⁷ (The significance of the reference to ‘an Australian institution’ in recital 7 of the preamble is addressed below, but in summary we do not consider that this reference indicates an intention to limit the scope of the inquiry to abuse occurring within the territory of Australia). Further, as explained above, the definitions of the critical terms are defined broadly and are not limited by reference to territory (including ‘child’, ‘institution’ and ‘official’ of an institution).
- (b) Second, the definition of ‘institutional context’, that is the specification of when child abuse happens in an institutional context, is particularly important; the scope of the inquiry hinges on this definition. As explained further below, the definition makes clear that it is the institution’s responsibility for the abuse, not the geographical location of the abuse, that is of central relevance. An interpretation that would read down ‘institutional context’ by reference to territoriality (ie the location of the abuse or the institution) is inconsistent with this broad and carefully constructed definition.
- (c) Third, the purpose and object of the inquiry would be frustrated if the Commission were limited to investigating institutional responses to abuse that

⁷⁷ See eg *Criminal Code Act 1995* (Cth), Div 272; *XYZ v Commonwealth* (2006) 227 CLR 532.

occurred within Australia. Consider the examples of an Australian high school overseas trip, a day care centre at an Australian consulate or a youth trip to the Vatican organised by an Australian Catholic organisation. It would be contrary to the broad remit of the Commission if the Terms of Reference were interpreted so as to preclude the Commission from inquiring into responses to allegations of abuse occurring in these situations, especially if some of the officials ultimately responsible for responding to such allegations were located in Australia. Indeed, it is possible that the fact that abuse takes place outside Australia is a factor that heightens the risk of abuse occurring or otherwise constitutes a specific ‘impediment’ to achieving best practices in reporting, responding to or investigating such abuse (cf clause c of the Terms of Reference); in this context, it would be contrary to the intention of the Terms of Reference if such factors were relied on as a reason to exclude the Commission’s jurisdiction.

- (d) Fourth, this interpretation is consistent with the principles set out above providing that terms of reference should be interpreted in context and an otherwise broad remit should be not be interpreted in a way that unduly limits a commission’s investigative powers.
- (e) Fifth, some support for this interpretation is provided by clause 1, which directs the commission to ‘establish appropriate arrangements in relation to current and previous inquiries in Australia *and elsewhere*’ (emphasis added). The reference to inquiries that have taken place outside Australia suggests that the executive contemplated that the Commission’s inquiry might extend to extraterritorial matters.

69 We have considered the fact that recital seven of the preamble refers to abuse within an ‘Australian institution’ — namely, that ‘it is important that those sexually abused as a child in an Australian institution can share their experiences to assist with healing and inform the development of strategies and reforms that your inquiry will seek to identify’. In our view, the reference to an ‘Australian institution’ in this recital, viewed in the context of the Terms of Reference as a whole, is not sufficient to limit the Commission’s jurisdiction to institutional responses to child abuse that occurred within Australia. The other 25 or so references to ‘institution’ in the Terms of Reference (including in the operative provisions and the definition of ‘institution’ itself) are not so limited.

70 In addition, the meaning of ‘Australian institution’ in this recital is itself ambiguous. This phrase could refer to an institution located within Australia, an institution that is controlled or otherwise operated by an Australian entity, or an institution that has some other relevant connection to Australia. The meaning must be established by reading the Terms of Reference in context. As explained above and below, we consider that a narrow interpretation of this phrase is not supported by the language, context or purpose of the Terms of Reference.

The required Australian nexus is a question of fact and degree

71 If the inquiry is not limited to investigating the institutional response to abuse that occurred within Australia, the question that then arises is what are the limits of the Terms of Reference? Put differently, what is the nature of the connection with Australia (if any) that is required?

72 The scope of the Commission’s inquiry is not ‘at large’. The inquiry must have some connection to Australia, even assuming the Terms of Reference are otherwise satisfied. This follows from s 1A of the RC Act, which requires that the inquiry ‘relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.’

73 Whether a particular matter for inquiry by the Commission satisfies this Australian nexus will be a question of fact and degree, to be determined in the context of the Terms of Reference.

74 In our view, the relevant nexus should be considered in light of the Commission’s core remit: inquiring into institutional responses to allegations and incidents of child sex abuse, which includes considerations of governmental responses to such incidents and allegations (see in particular clauses (a)-(d) of the Terms of Reference, which make specific reference to governmental responses). Where an Australian government or entity is relevantly in a position to ‘respond’ to child sex abuse in an institutional context (as that term is used in the Terms of References),⁷⁸ the nexus will be satisfied. Thus where an Australian government or entity controls an institution or is otherwise

⁷⁸ According to the Terms of Reference, ‘responding’ to abuse has a broad compass. It includes encouraging the reporting of incidents, responding to reports or allegations of incidents, reducing impediments to the reporting of abuse, investigating abuse and alleviating the impact of past and future abuse, including by through processes for referral for investigation, prosecution and support services.

involved in its management or operations such that it is in a position to ‘respond’ to abuse (whether as a matter of fact or because in the Commission’s view it ought to be in such a position), the Commission will have jurisdiction.

75 The definition of ‘institutional context’ is significant in this respect. As explained above, it provides that abuse will occur in an institutional context where the institution is, in effect, in some way responsible for the conditions giving rise to the risk of abuse. In this context, there will also be a relevant nexus with Australia where an Australian government or entity has the relevant ‘responsibility’ for the conditions at the institution giving rise to the risk of abuse (because, for example, that entity has ‘created, facilitated, or in any way contributed to’ that risk). The greater the relevant degree of control that an Australian entity has over an institution such that it is in a position to relevantly ‘respond’ to abuse and/or the greater the degree of ‘responsibility’ an Australian entity has in relation to the conditions in the institution giving rise to the risk of abuse, the stronger the nexus with Australia will be. However, in our view a strong nexus is not required — all that is required is a sufficient nexus. A remote or insubstantial nexus would likely not be sufficient.

76 In this sense, it might be said that the Terms of Reference limit the power of the Commission to inquire into responses to abuse to the Australian institutional context, but only in so far as a broad interpretation is given to the concept of ‘Australian institutional context’ consistent with the Commission’s remit.

V IS THE COMMISSION AUTHORISED TO INQUIRE INTO THE CENTRE?

77 The next question is whether the Commission can investigate institutional responses to allegations and incidents of child sex abuse at the Centre. In particular, we have been asked to advise on whether the Commission can investigate the actions of Commonwealth employees or contractors engaged by the Commonwealth at the Centre and/or the role, responsibility and response of the Commonwealth in relation to allegations and incidents of child sex abuse at the Centre.

78 In our view the Commission has jurisdiction to investigate these matters. The relevant nexus is established on a number of bases.

79 In substance, the Commonwealth exercises a significant degree of control over the Centre. Pursuant to the MOU and as a matter of fact, it wholly funds the Centre and has

a joint role in the governance of the Centre. It is involved in the management of the Centre's day-to-day operations. The Department has a significant presence in Nauru and critical services are provided to the Centre pursuant to service agreements between the Commonwealth and Australian contractors. Most significantly, as set out in paragraphs 30 to and 33 above, the Department has itself recognised that it has a critical role to play in responding to allegations of child sex abuse at the Centre. In particular, as set out above, the Department has stated that:

- (a) service providers are required to report allegations and incidents of child sex abuse to the Department;
- (b) it is 'committed to improving the mechanisms in place to capture all allegations, with a view to encouraging reporting, and enhancing the effectiveness of current reporting systems to ensure information is readily accessible and accurate';
- (c) it is 'committed to identifying opportunities for improvement to process, practice, policy and cultural norms in response to incidents involving children in regional processing centres';
- (d) it has established a section with the Department's Child Protection and Wellbeing Branch 'which actively supports the implementation of practices that better protect and care for children, including ensuring that child protection is given due recognition in regional processing arrangements', and that this section will engage with Nauru and services providers 'to develop a child protection framework that upholds child protection in the Regional Processing Centre ...'.

80 Accordingly, we consider that the Commonwealth is in a position to relevantly 'respond' to allegations of child sex abuse at the Centre within the meaning of the Terms of Reference. The required Australian nexus is satisfied on this basis.

81 In addition, the Commonwealth and its service providers are relevantly 'responsible' for the conditions giving rise to the risk of abuse in the Centre. Arguably, the Commonwealth has 'created' the risk by causing the Centre to be established. This is so even if Nauru also caused the Centre to be established — responsibility for the purposes of establishing the relevant connection need not be sole responsibility. Further, and perhaps more importantly, the Commonwealth has contributed to the circumstances giving rise to the risk of child sex abuse at the Centre in light of its ongoing governance and management role, its role in providing and administering service agreements for the

benefit of the Centre, and its role in relation to developing and implementing policies and procedures for responding to child sex abuse. The relevant Australian nexus is satisfied on this basis as well (and again, it does not matter that Nauru shares some or all of the responsibility for governance and management).

- 82 The Commission therefore has jurisdiction to investigate the Commonwealth's response to incidents and allegations of child sex abuse at the Centre, including the role and responsibility of the Commonwealth in relation to such abuse. This jurisdiction would extend to investigating the actions of Department employees at the Centre, as well as contractors engaged by the Commonwealth at the Centre.
- 83 We make two further observations.
- 84 First, the Commission would be limited in the use of its coercive powers in relation to any such inquiry. It could compel witness and documents from the Commonwealth and Australian contractors. However, it could not otherwise exercise its coercive powers in relation to persons or documents in Nauru.
- 85 Second, we have not been asked whether the jurisdiction of the Commission might extend to investigating the actions of the Nauruan government or non-Australian entities or persons. We do not express a view on this issue.

Date: 14 July 2015



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