



PRACTICE GUIDELINE 2

LEGAL PROFESSIONAL PRIVILEGE

Part A

Introductory matters

1. This Practice Guideline relates to the conduct of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**). It should be read in conjunction with the *Royal Commissions Act 1902* (Cth) (**Act**), the terms of reference contained in the Letters Patent establishing the Royal Commission dated 6 December 2018 and Practice Guideline 1.
2. This Practice Guideline sets out the way in which the Royal Commission will receive and consider a claim of legal professional privilege made under s 6AA(1) of the Act.¹
3. Where the Royal Commission considers it appropriate, this Practice Guideline and any future practice guidelines may at any time be varied, changed or replaced.

Part B

Procedure for making a claim

4. Where a person² is required to produce a document under s 2 of the Act, the procedure for making a claim of legal professional privilege in respect of any such document is contained in s 6AA(1) of the Act.
5. The effect of s 6AA(1) of the Act is that an assertion that a document is subject to legal professional privilege will not be a 'reasonable excuse' for refusing or failing to produce the document for the purposes of s 3(2B) or s 3(5) of the Act, unless:
 - a. a court has found the document (or the relevant part of the document) to be subject to legal professional privilege; or
 - b. a claim that the document (or the relevant part of the document) is subject to legal professional privilege has been made to the member or members of the Royal Commission who required production of the document within the following timeframes as applicable:

¹ For the technical requirements for electronic production of documents over which a claim of legal professional privilege is made, refer to the [Document Management Protocol](#).

² A reference to a 'person' in this Practice Guideline includes a body politic or body corporate as well as an individual.

- i. within the time that the Commissioner(s), in requiring production of the document, allowed for its production; or
 - ii. within such further time as the Commissioner(s) allowed for production of the document.
6. If a person is seeking to rely on paragraphs 5(a) or (b) above as the basis for not producing a document, the person, or the legal practitioner acting on the person's behalf, must do the following, as applicable:
 - a. in respect of paragraph 5(a), inform the Solicitors Assisting the Royal Commission of the intention to claim privilege, as soon as practicable, and provide the Solicitors Assisting the Royal Commission with a copy of the judgment or order of the court recording the finding that is relied upon and any relevant evidence to confirm that there has been no waiver or loss of privilege since the finding was made; or
 - b. in respect of paragraph 5(b), provide written notice of the claim to the Solicitors Assisting the Royal Commission within the time provided under paragraph 5(b)(i) or (ii) above, as relevant, together with any evidence and written submissions relied on in support of the claim.

When to produce a document subject to a claim

7. If a person satisfies paragraph 5(a) above, and the Commissioner(s) have not determined that legal professional privilege has been waived as a result of matters subsequent to the matters considered by the court:
 - a. where the whole document has been found by a court to be subject to legal professional privilege, that document does not need to be produced to the Royal Commission in the first instance;
 - b. where part or parts of the document have been found by a court to be subject to legal professional privilege, those parts of the document should be redacted, and the document should be produced to the Royal Commission in redacted form in the first instance.
8. If a person satisfies paragraph 5(b) above, and the Commissioners are yet to determine the claim:
 - a. where the claim is made over the whole document, that document does not need to be produced to the Royal Commission in the first instance;

- b. where the claim is made over part or parts of the document, those parts of the document should be redacted, and the document should be produced to the Royal Commission in redacted form in the first instance.
9. If a document is produced to the Royal Commission in redacted form (in accordance with paragraph 7(b) or 8(b) above), an unredacted version of the document must be retained in case of any call for production in accordance with paragraph 10(a) below.

Commissioner(s) may require production of document to determine claim

10. For the purpose of deciding whether to accept or reject a claim of legal professional privilege made in accordance with paragraph 5(b) above, the Commissioner(s) may:
- a. by written notice served on a person, require the person to produce the document the subject of the claim for inspection;³ and
 - b. exercise their powers to summon witnesses and take evidence under s 2 of the Act.⁴
11. Where a document has been produced for inspection in accordance with paragraph 10(a) above:
- a. if the Commissioner(s) decide to accept the claim, the Commissioner(s) will return the document to the person and will disregard the whole, or the relevant part, of the document for the purposes of any report or decision that the Royal Commission makes;⁵ and
 - b. if the Commissioner(s) decide to reject the claim, the Commissioners may retain the document and use it for the purposes of the inquiry.⁶
12. A person will commit an offence⁷ under the Act in respect of a claim of legal professional privilege in the following circumstances:
- a. under s 6AB(1) of the Act, where the person had refused or failed to produce a document required to be produced by a summons or notice issued under s 2 of the Act, and the Commissioners decided under s 6AA(2) of the Act to reject a claim of legal professional privilege (in respect of the whole or the relevant part of the document), and,

³ See s 6AA(3) of the Act.

⁴ See s 6AA(6) of the Act.

⁵ See s 6AA(4) of the Act.

⁶ See s 6AA(5) of the Act.

⁷ The provisions relevant to the defences to these offences are variously contained in s 6AB(4) to (7) of the Act.

after that decision, the person refuses or fails to produce the document as the Commissioners require under s 2 of the Act; and

- b. under s 6AB(2) of the Act, if the person refuses or fails to produce a document that the person was required, under s 6AA(3) of the Act, to produce for inspection.

The Honourable Richard Tracey AM RFD QC
Commissioners

Ms Lynelle Briggs AO

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