



PRACTICE GUIDELINE 3

LEAVE TO APPEAR AND WITNESSES

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 general guidance about applications for leave to appear and witnesses before the Royal Commission.
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

When leave to appear may be granted

4. Leave to appear may be granted when an applicant has a direct or substantial interest in the hearing, part of the hearing or the subject of inquiry, and will generally be granted when an applicant:
 - a. has been summonsed to give evidence;
 - b. is the subject of an inquiry to be undertaken; or
 - c. is likely to be the subject of an adverse allegation.
5. Leave to appear before the Royal Commission may, at any time, be varied or withdrawn by the Commissioners, or made subject to altered or additional limitations or conditions.

Part C

Process for applications

6. Hearings enable the Royal Commission to inquire into, and receive evidence concerning, a particular topic falling within the terms of reference.

7. As the Royal Commission determines its program of public hearings, these will be published on its website. Details of upcoming public hearings will include the scope of those public hearings.
8. The Royal Commission's general process for applications for leave to appear is that at the time that the scope of a hearing is published, the Royal Commission invites written applications for leave to appear from people¹ who believe that they have a direct or substantial interest in the scope of a particular public hearing.
9. Applications for leave to appear made by people referred to in paragraph 8 above:
 - a. should be made on the form 'Application for Leave to Appear at a Hearing of the Royal Commission', which will be made available on the Royal Commission's website following the preliminary hearing. This form should be accompanied by a short submission setting out the basis on which it is said the applicant has a direct or substantial interest. The form and the submission should be lodged with the Royal Commission by emailing it to ACRCSolicitor@royalcommission.gov.au by the date required; and
 - b. will either be determined on the papers in advance of each hearing and the outcome of the application will be communicated to the applicant, or the Commissioners may notify the applicant or the applicant's legal representative that they will be required to appear before the Royal Commission on a specified date for further consideration of the application.
10. It will be unlikely that the Royal Commission will grant any person unconditional leave to appear. It is anticipated that most grants of leave to appear will be confined to the hearing of the particular inquiry in which the person has a direct or substantial interest and subject to conditions, such as limiting the particular topics or issues upon which the person may examine or cross-examine a witness.
11. Where a person is granted leave to appear:
 - a. the person to whom leave to appear is granted is entitled to participate in the public hearing concerning the particular inquiry, subject to the Commissioners' control and to such extent as the Commissioners consider appropriate;

¹ A reference to a 'person' or 'people' in this Practice Guideline includes a body politic or body corporate as well as an individual.

- b. the person, or the person's legal representative, may:
 - i. subject to paragraphs 30 and 31 below, apply to have evidence tendered or heard;
 - ii. apply for leave to cross-examine a witness; and
 - iii. make submissions about the findings available to the Royal Commission following the relevant hearing; and
 - c. the Commissioners may determine the nature and extent of any other conditions attaching to any grant of leave taking into account all relevant considerations, including the individual circumstances of the applicant and the contents of the applicant's application for leave.
12. People who have been granted leave to appear and who wish to raise a procedural or legal matter, or wish to make a submission about the determination of their application for leave, should communicate with the Solicitors Assisting the Royal Commission in writing, identifying the issue and providing a brief outline of the submission to be made.
 13. People who have been granted leave to appear before the Royal Commission may be represented by a legal representative at a hearing without the further need for that legal representative to obtain separate authorisation pursuant to s 6FA of the Act.
 14. People may seek leave to appear at any time if something that has occurred during a public hearing leads them to believe that they may have a direct or substantial interest in the subject of inquiry.

Witnesses

Witnesses generally

15. Counsel Assisting and Solicitors Assisting the Royal Commission will:
 - a. identify, contact and call each individual whom they wish to give evidence as a witness before the Royal Commission;
 - b. determine whether an individual, in respect of whom a witness statement has been prepared or received, will be called to give evidence at a hearing;
 - c. determine the order in which witnesses are to give evidence; and
 - d. determine which documents are tendered during public hearings.

16. As a general rule, it is expected that the Commissioners will receive the evidence-in-chief of each witness called in the form of a written statement. When called to give evidence, the witness will be asked to adopt their witness statement as their evidence-in-chief. This may be supplemented by additional evidence-in-chief only by leave of the Commissioners upon proper cause.
17. It is expected that where an individual is legally represented:
 - a. the Solicitors Assisting the Royal Commission will provide an outline of the topics that should be addressed in a proposed witness statement; and
 - b. the witness statement must follow, and address each topic included in the outline.
18. Evidence included in a witness statement which extends beyond the outline that was provided by the Solicitors Assisting may, in the discretion of the Commissioners, be excluded from that witness' evidence-in-chief.
19. Where an individual is not legally represented, Counsel Assisting and the Solicitors Assisting the Royal Commission may assist that individual to prepare that individual's witness statement.
20. Individuals required to give evidence at a hearing may be provided with a 'Summons to Attend and Give Evidence' and appropriate notice of the time that the Royal Commission will call upon the Summons. Individuals unavailable to attend on a particular date should give notice of the date and the cause of the unavailability to the Solicitors Assisting the Royal Commission at the earliest opportunity.
21. Individuals required to give evidence will, in due course, be served with a notice for the production of their witness statement.

Cross-examination

22. Cross-examination of witnesses by a person other than Counsel Assisting the Royal Commission will be by leave only. No general, open-ended leave to examine, cross-examine, or tender evidence will be given to any person.
23. In determining whether a person has a sufficient interest to cross-examine a witness, the Commissioners may call upon the cross-examiner to:
 - a. identify the purpose of the cross-examination;
 - b. set out the issues to be canvassed; and

- c. provide copies of any documents to which they propose to take the witness.
24. The procedure for cross-examination, subject to change where the circumstances require, will generally be as follows::
- a. Repetitive questioning or duplication will not be permitted. Where people represented before the Royal Commission have a common or similar interest in relation to the evidence of a particular witness:
 - i. their representatives should consult with each other and with Counsel Assisting the Royal Commission before the witness is called;
 - ii. agreement should be attempted to be reached between all relevant people about the order and general areas or subjects of cross-examination;
 - iii. if no agreement is reached, the Commissioners will direct the order; and
 - iv. revisiting general areas or subjects covered by earlier cross-examination by people with a common or similar interest will not be permitted.
 - b. Cross-examination will be limited to the matters in issue, and may otherwise be restricted by the Commissioners in accordance with the power conferred by s 6FA of the Act. In particular, the Commissioners may limit the particular topics or issues upon which a person can examine.
 - c. A copy of any document proposed to be put to a witness must be provided to Counsel Assisting the Royal Commission as soon as possible after a decision is made to use the document and in all cases prior to the date of the hearing at which it is intended to be used.
 - d. As the Commissioners are conducting an inquiry, and not a judicial proceeding, cross-examination that raises collateral matters going only to credit will not be permitted.
 - e. Cross-examination will be permitted only to the extent that the Commissioners believe it will assist in their task of investigating and reporting on the subject matter of the terms of reference.
25. The procedure for examination and cross-examination is as follows, which is subject to change only upon a grant of leave by the Commissioners where they consider the circumstances require:

- a. Counsel Assisting the Royal Commission will lead the witness' evidence in chief, typically by adoption by the witness of their statement on oath or affirmation before it is tendered;
- b. Counsel Assisting may then ask questions of the witness after evidence-in-chief has been led;
- c. other people with leave to appear may then, with leave, cross-examine the witness;
- d. the legal representative (if any) for the witness may then re-examine the witness; and
- e. finally, Counsel Assisting the Royal Commission may then ask any final questions arising from the witness' earlier evidence.

Tendering documents other than witness statements

26. Counsel Assisting the Royal Commission, subject to the Commissioners' control, will determine which and when documents are to be tendered.
27. Before the commencement of a public hearing, each person granted leave to appear at that hearing may, in the discretion of Counsel Assisting or the Solicitors Assisting the Royal Commission, be given confidential access to documents that are likely to be tendered as exhibits at the public hearing and which could affect the person's interests.
28. One purpose of providing this access is to enable a person to identify whether any application should be made for a non-publication direction in relation to a document or any part of a document.
29. Additional documents may be tendered by Counsel Assisting the Royal Commission during the course of a public hearing. If a person has a significant interest in the issues to which an additional document being tendered relates, the Royal Commission will provide the person with a copy of the additional document relevant to the issues that may give rise to that significant interest.
30. If a person seeks to have a document placed before a public hearing, the process is that:
 - a. they must notify the Solicitors Assisting the Royal Commission that they wish to have the document placed before the public hearing by providing a copy of the document to the Solicitors Assisting the Royal Commission within a reasonable time before the public hearing, which must be not less than 7 days save for in exceptional circumstances;
 - b. the Commissioners may require the production of other documents; and

- c. Counsel Assisting the Royal Commission will decide whether or not the documents are to be tendered.
31. An application to tender a document may only be made directly to the Commissioners if this process has been completed and Counsel Assisting the Royal Commission has refused to tender a document.

The Honourable Richard Tracey AM RFD QC
Commissioners

Ms Lynelle Briggs AO

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