PRACTICE GUIDELINE 2

LEGAL PROFESSIONAL PRIVILEGE

Part A

Introductory matters

1. This Practice Guideline (Guideline) relates to the conduct of concurrent Royal Commissions into Violence, Abuse, Neglect and Exploitation of People with Disability established under Letters Patent of the Commonwealth and relevant States\(^1\) (collectively, the Royal Commission). This Guideline 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\(^2\) and all other practice guidelines published by the Royal Commission.

2. This Guideline sets out the way in which the Royal Commission will receive and consider a claim of legal professional privilege made under s 66A(1) of the Act.\(^3\) The Royal Commission reserves the right to dispense with or depart from this Guideline if it is satisfied that legal professional privilege is abrogated or does not excuse production under the laws of the jurisdiction according to which the production of the relevant document has been required.

3. This Guideline may be varied or replaced at any time as the Royal Commission considers appropriate.

---

\(^1\) Letters Patent dated: 4 April 2019 (Cth), 17 April 2019 (NSW), 20 May 2019 (Tas), 4 June 2019 (Vic), 20 June 2019 (SA), 27 June 2019 (Qld) and 20 August 2019 (WA).


\(^3\) For the technical requirements for electronic production of documents over which a claim of legal professional privilege is made, please refer to the Document Management Protocol, set out in Part 4 of the Document Production Guideline. The Royal Commission will separately publish the Document Production Guideline.
Part B
Procedure for making a claim

4. If you⁴ are 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 of the Royal Commission (the Commissioner) who required production of the document within the following timeframes as applicable:

   i. within the time that the Commissioner, in requiring production of the document, allowed for its production; or

   ii. within such further time as the Commissioner allowed for production of the document.

6. If you seek to rely on paragraphs 5(a) or (b) above as the basis for not producing a document, you or your legal practitioner must do the following, as applicable:

   a. in respect of paragraph 5(a), inform the Solicitors Assisting the Royal Commission (Solicitors Assisting) of the intention to claim privilege, as soon as practicable, and provide the Solicitors Assisting 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

---

⁴ A reference to a ‘person’, ‘people’ or ‘you’ in this Practice Guideline includes a body politic or body corporate as well as an individual.
b. in respect of paragraph 5(b), provide written notice of the claim to the Solicitors Assisting 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. If you are unable to or do not wish to provide written notice, or require assistance to do so, please contact the Solicitors Assisting on (02) 7206 5237 (between 9:00am-5:30pm AEDT Monday-Friday except on public holidays).\(^5\)

**When to produce a document subject to a claim**

7. If you satisfy paragraph 5(a) above, and the Commissioner has decided that legal professional privilege has not 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; or

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 you satisfy paragraph 5(b) above, and the Commissioner is yet to decide 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; or

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.

---

\(^5\) If you would like to use the National Relay Service to call us, please phone 133 677.
Commissioner(s) may require production of document to decide 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 may:

   a. by written notice served on a person, require the person to produce the document the subject of the claim for inspection; and

   b. exercise their powers to summon witnesses and take evidence under s 2 of the Act.

11. Where a document has been produced for inspection in accordance with paragraph 10(a) above:

   a. if the Commissioner decides to accept the claim, the Commissioner will return the document to the person and the Royal Commission will disregard the whole, or the relevant part, of the document for the purposes of any report or decision that the Royal Commission makes; and

   b. if the Commissioner decides to reject the claim, the Royal Commission may retain the document and use it for the purposes of the inquiry.

12. A person will commit an offence 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 Commissioner 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, after that decision, the person refuses or fails to produce the document as the Commissioner required under s 2 of the Act; and

---

6 See s 6AA(3) of the Act.
7 See s 6AA(6) of the Act.
8 See s 6AA(4) of the Act.
9 See s 6AA(5) of the Act.
10 The provisions relevant to the defences to these offences are variously contained in s 6AB(4) to (7) of the Act.
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 Ronald Sackville AO QC
Chair

Date Issued: 12 September 2019