



Abuse in Care

Royal Commission of Inquiry

UNDER

THE INQUIRIES ACT 2013

**IN THE MATTER OF The Royal
Commission of Inquiry into
Historical Abuse in State Care and
in the Care of Faith-based
Institutions**

PRACTICE NOTE 5 – PRIVILEGE CLAIMS

Dated: 02 September 2020

Introduction

1. Evidence is received by the Inquiry in response to Notices to Produce served upon evidence providers pursuant to s 20 of the Inquiries Act 2013 (“the Act”). In certain instances, evidence providers may wish to assert privilege over evidence requested by the Inquiry by way of a Notice to Produce.
2. This Practice Note sets out the procedure the Inquiry will use to examine and determine claims of privilege over evidence requested by the Inquiry pursuant to s 20 of the Act.
3. The procedure will enable the basis for claims of privilege to be examined in a timely and efficient manner, with a single consistent process in place for all evidence providers.

Definitions

4. The following definitions apply:

“Evidence provider”: any person, group, institution or organisation that has given evidence or information to the Inquiry.

“Disclosure”: the making available of relevant evidence or other information to particular people or organisations (e.g. the Inquiry disclosing evidence to core participants).

“Publication”: the process of making available evidence or information on the Inquiry website or any other method or platform (including by way of an interim or final report) which is accessible by members of the public.

“Evidence”: any information of any description, however held in paper, electronic or any other format, to include, but not be limited to witness statements, affidavits, reports, reviews, minutes, governing/corporate documents, legislation, any correspondence, content from any website, guides or codes of conduct, policy documents, articles, any recording made visually or audibly, and any other physically held evidence.

Legislative Framework

5. Under s 14 of the Act, the Inquiry has broad powers to set its own procedure.
6. Where participants seek to withhold evidence that is requested by the Inquiry on grounds of privilege, s 20(c) of the Act enables the Inquiry to examine any document or thing so that it may assess the merits of such privilege claims. The Inquiry may establish the process or procedure to do this as it sees fit, as long as that process or procedure is consistent with the Act and the Inquiry’s Terms of Reference.
7. Under s 20(c), the Inquiry may determine if there is a justifiable reason for maintaining the privilege claimed, or it may appoint an independent person or body to make that determination.

Procedure for Examination of Claims of Privilege

8. The Inquiry invites all evidence providers to consider waiving privilege over evidence requested by the Inquiry, taking into account the public interest and the purpose of the terms of reference.

9. The following procedure will apply where evidence providers wish to assert privilege over some or all of the evidence supplied. This procedure will enable the Inquiry to examine the basis for claims of privilege in a manner that is consistent with the Act and that is effective, efficient and fair.
10. The Inquiry has two options for evidence providers to claim privilege over material which is sought by way of a section 20 notice or other means:

Option 1

- a) The evidence provider will submit evidence in unredacted form for examination, including evidence over which privilege is claimed in either whole or part. The Inquiry will identify any evidence it seeks to use in its investigations, public hearings, round tables or any other areas and seek waivers of privilege over that material should claims of privilege be asserted, whereby the Inquiry may:
 - i. Accept the privilege claim(s) which will engage paragraph 12 below; or
 - ii. Request explanation or justification by the evidence provider for the claim of privilege; and/or
 - iii. Request waivers over one or more documents or parts thereof examined so that they may be submitted to the Inquiry as formal evidence; and/or
 - iv. Determine that a claim of privilege is not valid.

Option 2

- b) The evidence provider will provide the Inquiry with an index identifying any document or thing over which privilege is claimed (whether in part or in whole) and identifying the type of privilege being claimed. The index must set out the following information:
 - i. Name of the document;
 - ii. Date of the document;
 - iii. A brief description of the document and the nature of the claimed privilege.

Upon considering the index, the Inquiry may:

- iv. Note the privilege claim(s) without any further action; or
- v. Request explanation or justification by the evidence provider for the claim of privilege; and/or
- vi. Seek the production of one or more documents or parts thereof identified in the index in unredacted form so that it may examine the evidence in order to determine if the evidence provider has a justifiable reason in maintaining the privilege; and/or
- vii. Request waivers over one or more documents or parts thereof identified in the index or documents examined under para 10(a) so that they may be submitted to the Inquiry as formal evidence; and/or

viii. Determine that a claim of privilege is not valid.

11. Should the Inquiry make a preliminary assessment that a claim of privilege is not valid, it will notify the evidence provider and allow an opportunity for any further submissions before making a final decision on the privilege claim.
12. If there is a justifiable reason for maintaining the claim of privilege over a document or thing, the Inquiry will not use, take into account or share that privileged information in that document in any way. For clarity, the privileged information will not be considered as part of the Inquiry's evidential material nor used to further any investigation. It will be stored securely and separately from other evidential material, and clearly distinguished as privileged material.

Produced by:
**The Royal Commission of Inquiry into Historical Abuse in
State Care and in the Care of Faith-based Institutions**

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Signed: Judge Coral Shaw
Chair

Dated: 2 September 2020