



## ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION OF PEOPLE WITH A DISABILITY: DISABILITY SERVICE PROVIDERS NOTICE TO PRODUCE FAQ

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In recent times this year, many of you would have received letters from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (**Royal Commission**) advising that they may shortly be issuing notices to produce (**DSP Notice to Produce**). For everyone supporting people with disability, but particularly those charged with the leadership and governance of disability services, this can be a daunting experience.

This is the first in a series of bulletins and other supports which Thomson Geer and Baxter Lawley will be providing to help disability service providers to navigate the Royal Commission over the next few years.

In this first bulletin, we provide a list of FAQ and responses to help you respond to a DSP Notice to Produce. As you would expect, we provide general advice only. Please contact us or your legal advisors for advice specific to your circumstances.

### DO WE HAVE TO RESPOND TO THE DSP NOTICE TO PRODUCE?

- Yes, it seems likely that the DSP Notice to Produce will be issued via a compulsory notice under the *Royal Commissions Act 1902* (Cth). You should seek legal advice if you wish to obtain an extension.

### WHAT HAPPENS IF WE DON'T RESPOND TO A DSP NOTICE TO PRODUCE?

- There are serious consequences if you or your organisation fails to respond to a formal request by the Royal Commission including potential imprisonment.
- It is also worth thinking about how your clients, the media and the Royal Commission itself would see any failure or reluctance to produce. Failure to produce, or even showing great reluctance to produce might suggest that your organisation is showing disregard or contempt for the Royal Commission and for the people with disabilities, particularly those who have been subject to abuse.

### WHO COVERS THE COST OF THE WORK REQUIRED TO RESPOND TO A DSP NOTICE TO PRODUCE?

- In most circumstances, your organisation will be required to bear its own costs of responding to a DSP Notice to Produce. Some organisations may be eligible for legal financial assistance where they would incur serious financial difficulty as a result of responding.
- Your insurance may also respond to indemnify your organisation for some or all of these costs.

## WHAT IS THE PURPOSE OF THE DSP NOTICE TO PRODUCE?

- The Royal Commission has indicated that it wishes to understand the prevalence of, and the factors that may be contributing to, violence, abuse, neglect and exploitation of people with a disability (**VANE**) as well as measures that may be assisting to reduce VANE.
- In short:
  - this information will be part of the foundation from which the Royal Commission will conduct its investigation into the disability services sector and into individual providers; and
  - the Royal Commission will use this information to identify systemic failures across the disability services sector, key themes, case studies, witnesses and 'outliers' (both performing and under-performing).
  - We also expect that the information provided by you in response to a DSP Notice to Produce will be triangulated with information provided about you by government agencies and submissions made by consumers and advocates.

## WHAT WILL THE DSP NOTICE TO PRODUCE COVER?

- The DSP Notices to Produce are likely to focus heavily on data/information at both an 'incident level' and an 'organisation or system level'. That is, the Royal Commission is interested in assessing not only what happened, but your response to what happened (both at an individual level and an organisational level).
- Specifically, the Royal Commission will be seeking the following classes of information (our categorisation):
  - 1. Specific Incidents** concerning violence, abuse, neglect and abuse of people with disability:
    - Complaints and feedback made by clients and their families (or others) about alleged incidents of violence, abuse, neglect and abuse of your clients;
    - Incident reporting by staff involving incidents of violence, abuse, neglect and abuse of your clients. This will include both internal incident reports and external incident reports (eg. to police); and
    - Investigations into the above (including results and responses).
  - 2. Organisational Approach** to preventing, identifying and responding to incidents of violence, abuse, neglect and exploitation of people with disability including:
    - policies, processes and/or procedures including in relation to recruitment, complaints handling, safety and oversight and risk reporting;
    - information about the implementation and evaluation of any measures implemented to reduce the incidence of violence, abuse, neglect and abuse of people with disability.

## HOW ARE 'VIOLENCE', 'ABUSE', 'NEGLECT' AND 'EXPLOITATION' DEFINED? WHAT TYPES OF INCIDENTS ARE COVERED?

- The Royal Commission has issued the following guidance:
  - *Violence and Abuse*: includes assault, sexual assault, constraints, restrictive practices (physical and chemical), forced treatments, forced interventions, humiliation and harassment, financial and economic abuse and significant violations of privacy and dignity on a systemic or individual basis;
  - *Neglect*: includes physical and emotional neglect, passive neglect and wilful deprivation. Neglect can be single significant incident or a systemic issue that involves depriving a person with disability of the basic necessities of life such as foods, drink, shelter, access, mobility, clothing, education, medical care and treatment;
  - *Exploitation*: means the improper use of another person or the improper use or withholding of another person's assets, labour, employment or resources including taking physical, sexual, financial or economic advantage.
- The Royal Commission is unlikely to provide any more specificity into the above terms because it will be looking to understand what the community and disability service providers themselves think these terms mean (ie. in their eyes, when does an act or omission become on involving violence, abuse, neglect and exploitation of a person with disability).
- We recommend that, in your first level review your incidents, you take a common-sense approach that considers, in addition to breaches of standards and legislation, community expectations (ie. the 'pub test' or the 'sniff test'). Once you have pulled incidents together, you can then discuss whether they fall within the scope of the DSP Notice to Produce with your legal advisers.

## WHAT TIME PERIOD IS THE ROYAL COMMISSION LOOKING INTO?

- The Royal Commission has indicated that the first DSP Notice to Produce will focus on documents or information originating or created during the period 1 July 2012 to date.
- If, like many disability service providers, you did not have an electronic record management system during part or all of this period, this will be a major challenge because it will involve finding or recovering from archives all documents and records involving all incidents. A structured and forensic approach driven by tight project management will help you achieve this.

## WHAT ABOUT PRIVACY AND CONFIDENTIALITY?

- There are several aspects of privacy and confidentiality that you will need to consider through the course of the Royal Commission. These will relate to the protection of personal information (client and staff), protection of commercially sensitive information and information covered by legal professional privilege. You should ensure that you obtain legal advice on these issues within the context of any notices from the Royal Commission you receive.
- In the meantime, you should understand that:
  - the Royal Commission may publish information that it receives and also share it with other stakeholders; and
  - production of documents or information which constitutes an 'admission' in relation to specific event may, in some circumstances, void insurance and also create issues in any later litigation arising out of the Royal Commission.
- If you wish to have certain information kept confidential or to remain subject to legal professional privilege then you should obtain legal advice/assistance to apply for orders in respect of this information which will address these concerns.
- De-identified data may be sufficient to respond to a DSP Notice to Produce although this will need to be assessed by reference to the actual notice. De-identification should always be managed carefully to ensure data can be traced back to source information.

## WHAT POWERS DOES THE ROYAL COMMISSION HAVE TO COMPEL EVIDENCE FROM EXECUTIVE AND BOARDS?

- See above. The fact that information is disclosed in a board environment context does not protect it from a requirement to disclose to a Royal Commission. If you wish to have certain information kept confidential or to remain subject to legal professional privilege then you should obtain legal advice/assistance to apply for orders in this respect.

## WHAT TO DO NOW - PREPARATION AND FIRST RESPONSE

- Firstly, keep calm. Few people have experience in responding to a Royal Commission and it can be easy to get caught in the hype and rumours.
- We suggest leaders take a well-considered approach to ensure they use their resources efficiently over the longer term and where possible, to create some positive impact. For example, that the rigour required to provide information requested by the Royal Commission will provide an opportunity to identify the strengths and weaknesses of your records management system, complaints and feedback process, incident reporting and culture. By taking a planned, 'value-add' approach, you can meet your obligations while also leveraging the same work to increase resilience and efficiency, innovate and, ultimately, benefit your current and future clients.
- Following is a list of tasks most organisations should consider undertaking. Even if your organisation has already done these, it is worth reflecting on them again. Effective response will require on-going adjustments and investments over the next three years:
  - *Engage your board:* The board will ultimately be responsible for the way in which your organisation responds to the Royal Commission: from setting the tone in the organisation to signing off on submissions and responses. It is crucial that the whole board fully engages in this task. The board should have the final sign off on all information and submissions provided to the Royal Commission, so ensure you allow enough time for this. The Royal Commission will impose tight time-frames on responses so keep your board advised on progress and deadlines.
  - *Identify your team:* For mid to large sized organisations, you will need to identify responsibilities and tasks of key staff and teams as well as their professional advisers.
  - *Budgeting:* You should prepare a budget for all direct costs and staff time associated with the Royal Commission and this budget should be monitored or managed by the CFO, CEO or other member of the Executive. Also identify the number of hours per week or month you expect key management and staff to be expected to spend undertaking Royal Commission related tasks and how this will be managed.

- *Information collection and management:* This will represent a major part of your workload and should be undertaken forensically and with strong project management to ensure you are using your valuable resources efficiently and effectively and also that you are able to take advantage of this opportunity to value-add to your organisation (eg. improving your quality, complaints and CRM systems). The Royal Commission has very specific requirements in relation to document production (including as to coding and the preservation of meta-data) and we do recommend that you invest in seeking legal advice to ensure that the information collected will meet your current and possible future obligations to respond to the Royal Commission.
- *Review & Analysis:* Review the information collected to determine the 'ins/outs' for the purposes of responding to the Royal Commission. At this stage, it is crucial that information which you intend to produce to the Royal Commission is appropriate (eg. within scope), articulated correctly and vetted for privacy, confidentiality and legal professional privilege issues. This is also the stage at which your organisation will be able to identify the 'value-adds' referred to above.
- *Storage & Preparation for Production:* All relevant documents and information should be stored in a central location ready for production if required. Documents should be stored and catalogued well so they align with the structure used by the Royal Commission and avoid delay in coding and uploading to the Royal Commission website.
- *Communications:* Develop your communications strategy, considering all stakeholder groups, including current and past clients, client families and carers, staff, partners, the disability sector community and the general public. We will talk more of this in our next bulletin.
- *Insurance:* Check your insurance to determine the extent of any coverage.

## HOW CAN WE HELP YOU?

- Thomson Geer is a national full service law firm with significant experience in royal commissions including the Aged Care Royal Commission where it acted for more than 20 providers. Thomson Geer understands that disability service providers still have clients to care for and services to run, even in the midst of a Royal Commission. Thomson Geer's expertise and experience will allow its disability service provider clients to respond accurately and comprehensively to the Royal Commission while minimising cost, time and stress for their organisations.
- Baxter Lawley provides advice and support to human services providers across Australia. We have particular expertise in supporting disability services providers. In regard to the Royal Commission, we help with the following:
  - Developing your strategy and plans for response so you stay in control.
  - Defining your Royal Commission budget so you can manage your resources to achieve a cost effective response.
  - Identifying and briefing the Royal Commission teams and external supports.
  - Advise on HRM and communications strategy to manage staff culture and your reputation.
  - Reviewing your clinical and other governance systems and complaints systems.
- Thomson Geer and Baxter Lawley's combined expertise means that we can help disability service providers respond to the Royal Commission in a way which maximises cost and time efficiencies as well as opportunities to leverage Royal Commission work to increase their resilience and efficiency, to innovate and, ultimately, to benefit their current and future clients. We set out below, the ways in which we can help you implement the 'Next Steps' we identified above. Of course, the extent to which you will need our assistance will be determined by your resourcing and internal capability. We can adapt our scopes to meet your needs. We can also flex our scopes as your needs change over the next three years.

Next Step	To the extent required, we can help you with the following:
Engage your board:	Thomson Geer and Baxter Lawley can brief your board on the practical and legal aspects of responding to the Royal Commission and assist with the development of a Board Royal Commission strategy.
Identify your team:	Thomson Geer and Baxter Lawley can assist you to identify and brief your Royal Commission team (internal and external) and provide advice on the development of a response strategy.  Depending on your existing capability, Thomson Geer can project manage part or all of your response to the Royal Commission from document collection through to submission.
Information collection and management:	Thomson Geer has a number of tools and solutions which can be leveraged in this process including in relation to: <ul style="list-style-type: none"> <li>• Document collection</li> <li>• Data management and analysis</li> <li>• Document storage and production</li> </ul>
Review and analysis:	Thomson Geer can review the information collected and submissions prepared to determine the 'ins/outs' for the purposes of responding to the Royal Commission.  Baxter Lawley can review the information collected to identify the 'value-adds' for your organisation (maximising opportunities, addressing weaknesses etc).
Production and submissions:	Thomson Geer has the capability to upload and code information and documentation to a document management system which aligns with that used by the Royal Commission. This will allow efficient and timely uploads to the Royal Commission system (maximising your use of time provided by the Royal Commission to respond).
Communications:	Baxter Lawley can assist you to develop your communications strategy, considering all stakeholder groups.
Insurance:	Thomson Geer can review your insurance to determine the extent of any coverage.
Budgeting:	Baxter Lawley can assist you to prepare and monitor a budget for all direct costs and staff time associated with the Royal Commission.

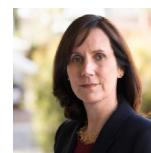
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