

Claims of Legal Professional Privilege

The purpose of this guideline is to ensure the correct process is followed when a claim is made for legal professional privilege (LPP). It is not an inspector's role to determine if LPP exists, this can only be determined in a court of law.

References:

Work Health and Safety Act (SA) (WHS Act) s155, 165 & 171-172

Model Operating Procedures for:

- [Powers of Entry](#)
- [Powers to obtain information under s155 of the WHS Act](#)
- [Powers to require production of documents & answer questions s171](#)

[Compel Script – Guide for Using Powers Under s171](#)

1. The Criteria for LPP

LPP is a right of a lawyer's client to be able to withhold information (any communication) or documents that would reveal **confidential communications** between the lawyer and the client. The criteria for whether a communication is privileged focuses on the purpose for which the communication was made, not the information in the communication.

To meet the requirements to be considered LPP the following three key criteria must be met:

1. there must be a **lawyer client relationship**; and
2. must be claimed for a **confidential communication** between a client and lawyer; or a third party for the benefit of the client; and
3. the **dominant purpose** of the communication being made was for obtaining or giving legal advice, or providing legal services in respect of actual or anticipated legal proceedings.

Communications with Third Parties

Privilege extends to communications with a third party for the benefit of the lawyers' client, provided the dominant purpose for the communication is legal advice and litigation. For example, a confidential opinion from an engineering consultant or a witness statement obtained for the dominant purpose of actual or anticipated legal proceedings would be privileged.

Confidentiality

The communication must be confidential and confidentiality must be preserved. If the communication has been disseminated or made public it would not be confidential and therefore not subject to a LPP claim.

Dominant Purpose

Where a communication was made for more than one purpose, the communication will not be privileged unless the client can demonstrate that the **dominant purpose** was for legal advice or litigation.

2. LPP When Investigating a Matter

A person, in particular a PCBU may seek legal advice from their lawyer immediately after an incident. These communications would be privileged, but are unlikely to be relevant to the conduct of the investigation.

Documents produced by a PCBU following its own investigation will only be privileged if they meet the three criteria for LPP. For example an investigation carried out by a health and safety representative would not be privileged.

Requiring Production of Documents

Pursuant to s155 and s171 (1) (b) the Regulator and an Inspector respectively have the power to require the production of documents, however if a document is covered by LPP it does not have to be produced.

Documents such as contracts, employee records, maintenance records and safe operating procedures will not be privileged, even if they have been given to the PCBU's lawyer for the purpose of providing legal advice. These documents would not be privileged as they were created for their primary function i.e. to document a system or procedure not for legal advice.

3. When a Claim of LPP is Made

An inspector is required to:

- give adequate opportunity for the client or their legal representative to claim LPP;
- record a clear description of the communications that LPP is being claimed for, including the date on which it was made e.g. an email from to dated (enough detail to identify the communication);
- justification for the claim of privilege. All documents must satisfy all three criteria of privilege to justify the non-disclosure; and
- gather any other information to assist with seeking further legal advice if a claim for LPP is valid.

The person claiming privilege:

- **must** make a claim for LPP on individual communications or documents. A blanket claim for a group of documents is not valid;
- **must** supply sufficient information to enable the inspector to seek further legal advice whether the particular communication or document will be privileged; and
- **does not** have to give information that would reveal the content of the document, but should provide sufficient evidence to demonstrate objectively that the claim is valid.

4. Disputes or Uncertainties

Where there is a claim made that a document or communication is subject to LPP, the inspector should:

- ensure a person claiming LPP is aware of the three criteria that must be met;
- ensure their field notes appropriately document the claim for LPP, a description of the document and the reasons claimed for LPP;
- formally documented the requirement to produce documents (WHS Notice to Provide); and
- seek further advice from their Manager and the legal area on the next appropriate step.

Whilst it is not the Inspectors role to determine LPP, if they believe that LPP does not apply to a particular communication they can advise a person of their opinion. It is then the person right to provide the communication or continue to claim privilege until it can be determined by a court law.