WOVG Guidelines for Public Interest Immunity Claims

General Guidance

November 2025

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VICTORIA State Government | Premier and Cabinet

Acknowledgement of Country

The Victorian Government acknowledges Aboriginal and Torres Strait Islander people as the Traditional Custodians of Country.

We respectfully acknowledge all First Peoples of Victoria and celebrate their enduring connection to land, skies and waters. We thank First People for their care of Country and contributions to Victorian communities. We honour and pay our respects to First Peoples' Elders past and present.

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Part I: Overview

(a) About these Guidelines

1. These Guidelines provide guidance for all Victorian government bodies and Victoria Police when deciding whether to make a claim of public interest immunity (**PII**) in respect of a document or other information.

2. A claim of PII may arise in response to a requirement to produce documents or information in a proceeding before a court or tribunal (including any pre-trial steps), a royal commission or an inquiry under the *Inquiries Act 2014* (**Inquiries Act**) or Commonwealth royal commission established under the *Royal Commissions Act 1902* (Cth) (**Commonwealth Royal Commissions Act**).[1]

3. These Guidelines aim to provide general guidance on when PII claims can be made, how decisions about whether to claim PII should be made, and the authorisation processes that should be followed for making PII claims.

4. The general purpose of these Guidelines is to ensure consistency of approach and transparency in decision-making about PII claims.

5. Separate guidelines are available on the Victorian Government website on related subject matters, including Guidelines for Submissions and Responses to Inquiries and Guidelines for Appearing before and Producing Documents to Victorian Inquiries. These Guidelines are not intended to replace or replicate these other sets of Guidelines. To the extent of any inconsistency, these Guidelines should be applied.

(b) Who do these Guidelines apply to?

6. These Guidelines are intended for use by all Victorian government bodies, and Victoria Police.

7. For the purposes of these Guidelines, a **government body** is:

   (a) a Victorian Government public service body[2] or a public entity[3] that is explicitly subject to ministerial direction or control (usually indicated in the documents creating it; for example, its establishing legislation, or relevant Governor in Council documents).

   (b) Victoria Police.

8. A government body does not include exempt bodies[4] or special bodies (other than Victoria Police).[5]

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1 See Inquiries Act ss 18, 65; Commonwealth Royal Commissions Act ss 1B, 2–3.

2 A public service body is a Victorian Government department, an administrative office or the Victorian Public Service Commission: ***Public Administration Act*** *2004* s 4.

3 Broadly, a public entity is an organisation that exercises a public function but is established outside the Victorian Public Service: see Public Administration Act s 5.

4 Exempt bodies are listed in the Public Administration Act s 4 (definition of 'exempt body'), and include, for example, parliamentary committees, local councils and courts.

5 Special bodies are listed in the Public Administration Act s 6, and include, for example, the Independent Broad-based Anti-Corruption Commission and the Office of the Information Commissioner. Although Victoria Police is defined as a special body under the Public Administration Act, these Guidelines are intended to apply to it given the nature of its functions.

(c) When do these Guidelines apply?

9. This section sets out the contexts in which PII may be claimed and to which these Guidelines are intended to apply.

Inquiries

10. These Guidelines are intended to guide decision-making in relation to PII claims in response to notices to produce documents or information, or a requirement to give evidence or answer questions in accordance with a notice to attend, issued by:

    (a) a royal commission or board of inquiry established under the Inquiries Act; and

    (b) a royal commission established under the Commonwealth Royal Commissions Act

    together referred to in these Guidelines as '**Inquiries**'.

11. These Guidelines also address the provision of information or documents voluntarily to a formal review established under the Inquiries Act. Formal reviews do not have power under the Inquiries Act to require the production of documents or information, but a government body may agree to provide documents or information or a certain class of documents or information voluntarily to a formal review.

Proceedings

12. These Guidelines are also intended to guide decision-making in relation to PII claims made in proceedings before Australian courts or tribunals (together referred to in these Guidelines as '**Courts**'), including:

    (a) civil proceedings;

    (b) criminal proceedings; and

    (c) coronial matters;

    together referred to in these Guidelines as '**proceedings**'.

Other contexts in which PII may be claimed to which these Guidelines do not apply

13. PII may also be available as a basis to reasonably refuse production of documents or information in response to summonses and notices issued by regulators, integrity and investigative bodies, however, these are outside the intended scope of these Guidelines. Government bodies should seek legal advice on whether claims of PII may be made in these instances, as this may require consideration of the specific legislation involved in the particular regulatory, integrity or investigative process.

14. These Guidelines do not apply to executive privilege claims before the Victorian Parliament or its committees or claims of executive privilege (or PII) before Commonwealth Parliamentary committees. Guidelines for Appearing before Commonwealth Parliamentary Committees are available on the Victorian Government website.

Part II: Public interest immunity (PII)

15. This section of the Guidelines addresses:

    (a) what is PII;

    (b) the State's duty to assess and make PII claims;

    (c) the public interest in non-disclosure, including the categories of PII and the distinction between contents and class claims; and

    (d) the public interest in disclosure.

(a) What is PII?

16. PII is a common law and statutory rule under which a Court or Inquiry will not order the production or admission into evidence of a document or information, although relevant and otherwise admissible, where the public interest in preserving confidentiality in relation to the material (**public interest in non-disclosure**) outweighs the public interest in producing or admitting the material into evidence (**public interest in disclosure**). PII involves weighing competing public interests in disclosure and non-disclosure of documents or information.

17. Generally speaking, in an Inquiry, PII is determined by the application of common law principles, and in a proceeding, PII is determined by the application of section 130 of the *Evidence Act 2008* (**Evidence Act**) and common law principles.[6] However, there is no difference of any practical significance between the two: the statutory test reflects the common law, and the common law principles inform the application of the statutory test.[7]

18. PII has been described as safeguarding the proper functioning of government or more broadly maintaining social peace and order.[8] Recognised 'categories' of public interest in non-disclosure (described in the Evidence Act as 'matters of state') are described in **Part II(c) Public interest in non-disclosure** below. The public interest in non-disclosure will differ depending on the particular document or information.

19. The public interest in non-disclosure must be balanced against the public interest in disclosure. The public interest in disclosure will differ depending on the particular proceeding or Inquiry: this is described in **Part II(d) Public interest in disclosure** below.

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6 Section 130 of the Evidence Act applies in proceedings in Victorian courts, including pre-trial disclosure requirements such as discovery: ss 130, 131A. Section 130 also applies in coronial investigations and inquests: *Coroners Act 2008* (Vic) ss 42A, 58. Special rules apply in merits review proceedings in VCAT: *Victorian Civil and Administrative Tribunal Act 1998* ss 53–6. In federal courts, section 130 of the Evidence Act applies in proceedings, and the common law applies to objections to pre-trial disclosure requirements. Special rules may also apply in Commonwealth Tribunals such as the Administrative Review Tribunal; however, see *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62.

7 ***Ryan*** *v Victoria* [2015] VSCA 353, [58]; *NSW v* ***Public Transport Ticketing*** *Corp* [2011] NSWCA 60, [43], [118]–[119].

8 *R v Young* [1999] 46 NSWLR 681, [130]–[131].

20. Determining the application of PII involves weighing or 'balancing' these competing public interests in disclosure and non-disclosure of documents or information:

    (a) if the public interest in disclosure is outweighed by the public interest in non-disclosure, PII applies and the information or document may not be disclosed;

    (b) if the public interest in disclosure is not outweighed by the public interest in non-disclosure, PII does not apply and the information or document may be disclosed.

(b) State's duty to assess and make PII claims

21. A PII claim is made on behalf of the State and, where PII applies to a document or information, the immunity cannot be waived by the State. Before deciding to make a PII claim in any context, the State has a duty to itself assess whether PII properly applies to the document or information.

    (a) If the State considers that the public interest in disclosure is not outweighed by the public interest in non-disclosure, a PII claim should not be made.

    (b) If the State considers that the public interest in disclosure is outweighed by the public interest in non-disclosure, a PII claim must be made.

    (c) If there is genuine uncertainty about whether or not the public interest in disclosure is outweighed by the public interest in non-disclosure, a PII claim should still be made.

22. When undertaking the PII balancing process or making a PII claim, the State **must not** take into account its forensic advantage or disadvantage in a particular proceeding or Inquiry. That means that in deciding whether or not to claim PII, the State must generally act according to the outcome of its own assessment of PII, regardless of whether this would harm or support the State's arguments in the relevant proceeding or Inquiry.

23. Government bodies should seek legal advice about the application of PII. PII claims should generally only be made after taking legal advice.[9] Where the State is a party to a proceeding, it may be appropriate to engage separate legal representation in relation to a PII claim if there is a potential or actual conflict of interest between the role of the State as a party and the role of the State as guardian of the public interest.[10] Where material subject to a claim of PII is in the hands of a third party, it may be appropriate for the Attorney-General, as First Law Officer, to intervene in respect of a claim.[11]

24. If a PII claim is made, the balancing of public interests will ultimately be determined by the Court or Inquiry. A decision not to make a PII claim would not prevent a Court, Inquiry or another party in a proceeding or Inquiry from raising PII in respect of the document or information.[12] However, where the State or government body is a party to a proceeding or Inquiry, the absence of a PII claim would likely weigh heavily in favour of disclosure when the Court or Inquiry comes to consider the balance of public interests.

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9 Under the Victorian Government Legal Services Panel Deed of Standing Offer for the Provision of Legal Services, PII is a VGSO-exclusive service: see sch 3 item (o)(iv).

10 *Johnson Tiles Pty Ltd v State Electricity Commission of Victoria* [2000] FCA 1510, [11]-[12].

11 *Rogers v Home Secretary* [1973] AC 388, 413.

12 See, eg, Evidence Act s 130(2); *State of Victoria v* ***Seal Rocks*** *Victoria (Australia) Pty Ltd* (2001) 3 VR 1, [16]–[18].

(c) Public interest in non-disclosure

25. In considering the public interest in non-disclosure of a document or information, government bodies should consider:

    a) whether the document or information falls into a recognised category of PII: see **paragraphs 26 to 29** below;

    b) whether the document or information is the subject of a class claim or contents claim: see **paragraphs 30 to 34** below; and

    c) all matters relevant to the public interest in non-disclosure: see **paragraphs 40 to 41** below.

Categories of PII

26. Section 130(4) of the Evidence Act sets out a non-exhaustive list of circumstances in which a document or information may be taken to relate to matters of state, so as to give rise to a public interest in non-disclosure. These circumstances reflect and overlap with the 'categories' of PII developed at common law. Examples of relevant prejudice, damage or harm may be drawn from previously decided cases, whether in accordance with the Evidence Act or common law principles.

27. The recognised 'categories' of PII include where disclosure of the document would:

    (a) **prejudice the security, defence or international relations of Australia**: examples include intelligence relevant to national security[13] and documents that would injure the relationship with foreign officials necessary for foreign policy;[14]

    (b) **damage the relations between the Commonwealth and a State or between two or more States**: examples include high level communications or negotiations between governments, such as communications between the Victorian Government and Commonwealth Government at a ministerial level;[15]

    (c) **prejudice the prevention, investigation or prosecution of an offence, or other proceedings for recovery of civil penalties brought with respect to other contraventions of the law**: examples include the disclosure of undercover police operatives or covert operations[16] and disclosure of the identity of human sources: see further subparagraph (d) below;[17]

    (d) **disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State**: examples include disclosure of the identity of an informer, human source or confidential reporters in child protection cases,[18] or a person providing commercially confidential or personal information as part of a regulatory scheme.[19] The underlying public interest is that, in the

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13 ***Alister*** *v The Queen* (1984) 154 CLR 404, 435.

14 See e.g. ***Kamasaee*** *v Commonwealth of Australia* ***(No 4)*** (2016) 52 VR 368.

15 See e.g. ***Sportsbet*** *Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196, [26].

16 *Young v Quin* (1985) 4 FCR 483, 495; *Ryan* [2015] VSCA 353, [68]–[69].

17 ***Jarvie*** *v Magistrates' Court of Victoria* [1995] 1 VR 84, 99.

18 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59, [9], [12]; *Madafferi v The Queen* (2021) 287 A Crim R 380; *ASIC v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227, [48]–[49]; ***D v National Society*** *for the Prevention of Cruelty to Children* [1978] AC 171.

19 See, eg, *Jacobsen v Rogers* (1995) 182 CLR 572, 589–90.

absence of that protection, sources of information would dry up,[20] or the safety of the source would be imperilled;

(e) **prejudice the proper functioning of the government of a Commonwealth or a State**: examples include documents or information that would reveal the confidential high level deliberative processes of executive government: at its highest, these are the deliberations of Cabinet (as to which, see **paragraph 32 to 38** below); but this category also extends to other documents that concern the framing of government policy at a high level such as minutes of discussions between heads of department, ministerial briefings of a high level and deliberative nature on important matters of policy, and high-level policy documents.[21] This category may also extend to the proper functioning of other aspects of government, including to protect effective policing,[22] investigations into complaints against police officers,[23] and the proper functioning of a secure and safe prison system.[24]

28. The particular damage, harm or prejudice to the public interest likely to be caused by the disclosure of the particular document or information must be identified in specific terms (not in broad or general terms).[25]

29. While the categories of PII are not closed, the limits are strictly drawn with regard to what is necessary "to protect the operation of the instruments of government at the highest level and for the benefit of the public in general".[26] For example, there is no public interest in maintaining the secrecy or confidentiality of a document on the basis that its contents are politically "sensitive" or its disclosure could cause embarrassment or inconvenience or attract criticisms of the government. Nor, without more, is there a public interest in non-disclosure simply because a third party prefers the information not to be disclosed, or to protect the personal details of government employees or third parties.

Class claims and contents claims

30. The public interest in non-disclosure of a document or information may arise because of the specific contents of the document or information (**contents claim**) or because of the type of document or information regardless of its contents[27] (**class claim**).

31. A **contents claim** is where disclosure of the contents of the particular document or information is likely to cause the relevant prejudice, damage or harm described in the recognised categories of PII above.

32. A **class claim** is where disclosure of that class or type of document or information is likely to cause the relevant prejudice, damage or harm, regardless of its contents.

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20 *D v National Society* [1978] AC 171, 218; *Jarvie* [1995] 1 VR 84, 88.
21 ***Sankey*** *v Whitlam* (1978) 142 CLR 1, 99, 39, 41–2.
22 *Ryan* [2015] VSCA 353, [68]–[69], [118]–[122].
23 *Dupont v Chief Commissioner of Police* (2015) 295 FLR 283.
24 *State of Victoria v* ***Brazel*** (2008) 19 VR 553, [23], [25], [27].
25 *Brazel* (2008) 19 VR 553, [68].
26 ***Royal Women's*** *Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, [54], citing *Seal Rocks* (2001) 3 VR 1, [17].
27 *Sankey* (1978) 142 CLR 39.

33. The most common type of **class claim** is a claim over documents that directly or indirectly disclose the deliberations of Cabinet:[28] see **paragraphs 35 to 39** below.

34. Other documents or information may be subject to PII as a class: for example, defence secrets, and matters of international diplomacy including diplomatic cables.[29] Specific legal advice should be sought before making a class claim other than in relation to Cabinet documents.

Cabinet documents

35. 'Cabinet documents' are generally protected as a class, regardless of the contents of the particular document. The public interest in non-disclosure is concerned with ensuring that decision-making and policy development by Cabinet is uninhibited, so as not to prejudice the proper functioning of government.[30]

36. The public interest in non-disclosure arises only if the document or information will reveal (directly or indirectly) the deliberations of Cabinet. The public interest in non-disclosure will be stronger in respect of a document that directly reveals Cabinet's deliberations than a document that does not.[31]

    a) The public interest in non-disclosure will be strongest for Cabinet minutes and other documents that actually record — that is 'directly' reveal — Cabinet deliberations or discussions[32] (including by a committee of Cabinet).[33]

    b) There is also a strong public interest in non-disclosure of documents prepared outside of Cabinet for the purpose of consideration by Cabinet (including Cabinet committees), including but not limited to Cabinet submissions. Such documents may indirectly reveal the deliberations of Cabinet in two ways: *first,* it may be inferred that a document submitted to Cabinet for its consideration was the subject of Cabinet's consideration;[34] and *second*, it may be inferred that a document that was intended to be but was ultimately not submitted to Cabinet was not the subject of Cabinet's consideration.[35]

    c) Further removed are documents or information brought into existence for the purpose of preparing those documents intended for Cabinet's consideration. There will be a public interest in non-disclosure only if the contents of such documents or information indirectly reveal the deliberations or decisions of Cabinet.[36]

37. The mere marking of a document as 'Cabinet in Confidence' is not sufficient; nor can a report be subject to a claim on this basis merely because a copy of it has been provided to Cabinet.

38. As is the case with all PII claims, the strength of the public interest in non-disclosure of Cabinet documents is greater where those documents relate to a topic which is current or controversial, compared with a matter which has 'passed into history'.[37]

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28 See, generally, ***Lanyon*** *Pty Ltd v Commonwealth* (1974) 129 CLR 650, 653; *Commonwealth v* ***Northern Land Council*** (1993) 176 CLR 604, 615–18; *Seal Rocks* [2001] VSC 249, [31].

29 *Sankey* (1978) 142 CLR 39, 58–9; *Kamasaee No 4* [2016] VSC 492, [10].

30 *Northern Land Council* (1993) 176 CLR 604, 615. See also ***Berih*** *v Homes Victoria (No 3)* [2025] VSC 30, [67].

31 *Northern Land Council* (1993) 176 CLR 604, 617–18.

32 *Sankey* (1978) 142 CLR 1, 39.

33 *Seal Rocks* [2001] VSC 249, [21].

34 *Seal Rocks* [2001] VSC 249, [26].

35 ***Kamasaee*** *v Commonwealth of Australia* ***(No 3)*** (2016) 52 VR 322, [9], [48].

36 *Seal Rocks* [2001] VSC 249, [28], [31]–[32], discussing *Lanyon* (1974) 129 CLR 650, 653; *Kamasee No 3* (2016) 52 VR 322, [36]–[43]; *Berih* [2025] VSC 30, [73].

37 *Northern Land Council* (1993) 176 CLR 604, 617–18. See, eg, *Berih* [2025] VSC 30, [74].

39. There is a strong public interest in non-disclosure of Cabinet documents. Accordingly:

    a) In an Inquiry or civil proceeding, the balancing test will ordinarily favour non-disclosure, other than where there are exceptional circumstances (for example, where the material is crucial to a proper determination of the proceedings).[38]

    b) However, in a criminal proceeding, those 'exceptional circumstances' may be established, for example, if there is a reasonable possibility that a document or information will materially assist a defendant's defence: see further **Part II(d) Public interest in disclosure** below.

Matters relevant to the public interest in non-disclosure

40. In identifying and considering the public interest in non-disclosure, government bodies should consider all relevant matters, including:

    a) **the likely effect of adducing evidence of the information or document, and the means available to limit its publication**

    - Consider whether the document or information is 'current and controversial': for instance, information or a document the disclosure of which may have caused prejudice, harm or damage in the past may now be outdated such that there is no longer a public interest in non-disclosure.
    - Consider whether there are any means available to limit the publication of the document or information that would limit any prejudice, harm or damage that could result from its disclosure, such as any applicable confidentiality regimes, undertakings or orders.

    b) **whether the substance of the information or document has already been published**

    - In general, there will no relevant public interest in maintaining the confidentiality or secrecy of a document or information that is already in the public domain.

41. These matters are specified in section 130(5) of the Evidence Act as matters a court must take into account in considering PII in a proceeding. Those matters are relevant in any consideration of PII in an Inquiry or a proceeding, and whether that claim is to be determined in accordance with the Evidence Act or the common law.

(d) Public interest in disclosure

42. The public interest in disclosure:

    a) in a proceeding — is the administration of justice which requires that parties have access to relevant evidence or that relevant material is admitted into evidence;[39] and

    b) in an Inquiry — is the Inquiry having access to all relevant material to discharge its functions pursuant to its Terms of Reference.

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38 *Sankey* (1978) 142 CLR 1, 43, 58–9, 95–6; *Northern Land Council* (1993) 176 CLR 604, 616.

39 *Alister* (1984) 154 CLR 404, 412.

43. In considering the public interest in disclosure, government bodies should take into account any matter relevant to the public interest in disclosure, including:

a) **the importance of the information or the document in the proceeding**;

- The importance of the information or document is its 'relevance' or 'probative value'. If the information in question is not relevant to the proceeding, there is no public interest in disclosure.[40]
- Government bodies should identify the relevance of the document or information to the proceeding and assess its probative value. The more relevant the document or information is, the higher the public interest in disclosure.

b) **the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding**;

- More weight is accorded to the public interest in disclosure in criminal proceedings than in civil proceedings. This is because of the higher stakes for the determination of the facts in issue, namely, the guilt or innocence of the defendant.[41] By contrast, the vindication of private rights at stake in a civil proceeding will generally be more readily outweighed by an opposing public interest.[42] Accordingly, in a criminal proceeding the public interest in non-disclosure may be outweighed by the public interest in disclosure if there is a reasonable possibility that the disclosure of the document or information will materially assist the defence.[43]
- The subject matter of the proceeding may be relevant to the strength of the public interest in non-disclosure. For instance, where the subject matter of proceedings is the alleged corruption of the processes of government, there may be a strong public interest in disclosure.[44]

c) **if the proceeding is a criminal proceeding**: whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor; and, if it is an accused, whether the direction is to be made subject to the condition that the prosecution be stayed.

44. Those matters are specified in section 130(5) of the Evidence Act as matters the Court must take into account. Government bodies should take into account corresponding matters when considering the public interest in disclosure in an Inquiry: for example, the importance of the information or document to the Terms of Reference of the Inquiry; and the nature and subject matter of the Inquiry.

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40 *Alister* (1984) 154 CLR 404, 412, 414, 438; *Ryan* [2015] VSCA 353, [55].

41 See *Jarvie* [1995] 1 VR 84, 90.

42 *Lanyon Pty Ltd v Commonwealth* (1974) 129 CLR 650, 653; *Commonwealth v; Northern Land Council* (1993) 176 CLR 604, 618; *Alister v The Queen* (1984) 154 CLR 404, 414.

43 *Zirilli v The King* [2023] VSCA 64, [28]–[29].

44 *R v Obeid (No 9)* [2016] NSWSC 520, [35].

Part III: PII – Inquiries

45. Inquiries[45] have broad powers to compel the production of documents and things and the attendance of witnesses[46] for the purposes of their inquiries. The Inquiries Act and the Commonwealth Royal Commissions Act provide that a person (including the State) is not required to produce the document or information or give evidence where there is a reasonable excuse. Under both Acts, a reasonable excuse includes that the document or information is the subject of PII.[47]

46. Typically in an Inquiry, the State will agree a protocol in relation to data, documents and information required to be produced by the State to the Inquiry in response to compulsory notices.[48] Government bodies should follow any protocols that have been established for the particular Inquiry. The contents of an Inquiry's protocol may differ depending on the Inquiry's purpose, for example, whether it has a truth-telling purpose or is intended to report on matters of government policy. Protocols may require that the government body, for example, provide the Inquiry with information about the basis and reasons for the PII claim, or to provide the document to the Inquiry for inspection for the purposes of resolving the claim.

47. If a government body proposes to voluntarily release information or documents that may be subject to PII to an Inquiry, other than in response to a compulsory notice to produce under the Inquiries Act, the body should seek legal advice before doing so.

(a) Assessment of PII claims in an Inquiry

48. When considering whether a document or information required to be provided to an Inquiry is subject to PII, the government body should apply the common law principles set out in **Part II** above. The government body should:

    (a) *First,* identify and consider the public interest in non-disclosure, as explained in **Part II (c) Public interest in non-disclosure** above:

    - Does the document or information fall within a recognised category of PII?: see **paragraphs 25 to 29** above. Identify the public interest in non-disclosure as specifically as possible, and not only in broad or general terms: see **paragraph 28** above**.**
    - Does the document or information fall under a class claim or contents claim?: see **paragraphs 30 to 34** above.
    - In identifying and considering the public interest in non-disclosure, consider all matters relevant to that public interest, including whether the document or information is publicly available, the currency of the document or information, and the means available to limit publication of the document or information: see **paragraphs 40 to 44** above.

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45 That is, as defined in Part 1(c) above, royal commissions and boards of inquiry established under the Inquiries Act and Commonwealth royal commissions. Formal reviews established under the Inquiries Act do not have compulsory powers of this nature.

46 See Inquiries Act ss 17–18, 64.

47 See Inquiries Act ss 18, 65; Royal Commissions Act ss 2–3 1B.

48 See, eg, Protocol between the Yoorrook Justice Commission and the Crown in Right of the State of Victoria in Relation to Data and Documents to Be Provided by the Crown in Right of the State of Victoria; Royal Commission into Victoria's Mental Health System, Practice Direction No 2: Production of Materials and Document Management Protocol.

(b) *Second,* identify and consider the public interest in disclosure, as explained in **Part II(d) Public interest in disclosure** above:

- In an Inquiry, the public interest in disclosure is the public interest in the Inquiry having access to all relevant material to discharge its Terms of Reference: see **paragraph 42** above. This means that an Inquiry's Terms of Reference will be critically important in assessing the weight of the public interest in disclosure. The purpose of the relevant Inquiry and the questions it is seeking to answer must be carefully considered in assessing this question.
- What is the relevance of the document or information?: **see paragraph 44** above. The government body should identify the relevance of the document or information to the subject or problem the Inquiry is investigating and assess its probative value in that respect. The more relevant the document or information is to answering a question before the Inquiry, the higher the public interest in disclosure.
- What is the nature and subject matter of the Inquiry and how does this affect the strength of the public interest in disclosure?: see **paragraph 44** above**.**

(c) *Third,* undertake the balancing exercise: does the public interest in non-disclosure outweigh the public interest in disclosure, as explained in **Part II(b) State's duty to assess and make** PII claims above?

- If the government body considers, on the information available to it, that the public interest in disclosure outweighs the public interest in non-disclosure, a PII claim should not be made.
- If the government body considers, on the information available to it, that the public interest in non-disclosure outweighs the public interest in disclosure, the government body must make a PII claim.
- For **Cabinet documents** the balancing test will ordinarily favour non-disclosure, other than where there are exceptional circumstances: see **paragraph 39** above**.**
- Where there is genuine uncertainty about the balance of public interests, including because the State does not have sufficient information available to it to balance the competing public interests, a PII claim should be made.

(d) *Fourth,* seek approval for the proposed approach, following the relevant authorisation policy established in accordance with these Guidelines (see **Part III(b) Authorisation policies for PII claims** below). The government body's proposed approach in relation to claiming PII, including any legal advice concerning the assessment of the claim, should be appropriately documented for the purpose of the authorisation pathway: see **paragraph 54** below.

49. A PII claim should always be limited strictly to those parts of the document or that information that would cause the relevant prejudice to the public interest if disclosed. If PII only attaches to some parts of a document, and other parts are still relevant to the Inquiry, parts over which PII is claimed should be redacted, and the remainder of the document or information disclosed to the Inquiry.

50. Where a PII claim cannot be made, but the government body has concerns about the disclosure of the information, it may be appropriate to consider other kinds of orders or ways of providing the information to the Inquiry such as:

a) a pseudonym order to protect the disclosure of a person's identity; or

b) an order restricting or prohibiting publication, or specific arrangements that documents be subject to restrictions as to their use and access.[49]

(b) Authorisation policies for PII claims in Inquiries

51. It is standard practice for government bodies responding to an Inquiry to establish an appropriate authorisation policy for PII decisions for the particular Inquiry, which makes clear who has responsibility for authorising PII claims over documents and information.

52. The authorisation policy for an Inquiry should be approved by Cabinet or Cabinet subcommittee, and the approved authorisation policy should be followed by government bodies responding to the Inquiry. If you need guidance, please liaise with DPC's Office of the General Counsel at legal.admin@dpc.vic.gov.au.

53. Where an Inquiry is expected to involve requirements to provide large amounts of documents or information in very short timeframes, and may involve documents or information that could be subject to PII, it is advisable to consider the appropriate authorisation policy at the earliest stage possible.

54. The authorisation policy should describe:

a) **Who has responsibility for authorising PII claims**: The person responsible for authorising a PII claim should be the person who is best placed to assess, and if necessary, attest to the public interest in maintaining the confidentiality or secrecy of the relevant document or information compared to the public interest in its disclosure.

- Cabinet can authorise different decision-makers to approve particular PII claims in an Inquiry. For example, Cabinet might authorise a Cabinet subcommittee to approve decisions about some types of PII claims, while the responsible portfolio Minister or public sector body Head is authorised to approve decisions about other types of PII claims.
- The appropriate decision-maker is likely to differ depending on the relevant public interest in non-disclosure: for instance, a Cabinet subcommittee may be best placed to assess the public interest in the non-disclosure of Cabinet documents, while a Minister may be best placed to assess the public interest in non-disclosure of a document which may prejudice international relations.
- The person best placed to assess and give evidence about the public interest in non-disclosure will ordinarily be the person who authorises the PII claim, but that will not always be the case. In some instances, the authoriser of the PII claim (such as Cabinet or a Minister) may rely on the advice of another person who has knowledge of the documents in question and of the basis on which it is said that disclosure of the document would harm the public interest. In those circumstances, if it becomes necessary to give evidence about the basis for a claim, it may be appropriate for the person who assessed the claim and advised the decision-maker to do so.

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[49] For example, in Victoria, Inquiries have powers to prohibit or restrict the publication of any information derived from a proceeding on various grounds under sections 17–18 of the *Open Courts Act 2013*; royal commissions and boards of inquiry have similar powers under sections 26 and 73 of the Inquiries Act.

b) **How the person who has responsibility for authorising PII claims is to make those decisions**: The authorisation process should explain that the person responsible for authorising a PII claim will:

- consider the government body's assessment and any relevant legal advice in accordance with the principles in **Part II: Public interest immunity (PII)** above, following the process in **Part III(a) Assessment of PII claims in an Inquiry** above;
- where that person does not have a close appreciation of the public interest in the disclosure of the documents, rely on the views of the relevant Departmental officer or lawyers conducting the Inquiry to identify and assess the public interest in disclosure, in accordance with the principles in **Part II(d) Public interest in disclosure** above.

c) **What information is required to be provided by the government body to the person who has responsibility for authorising PII claims**: The authorisation policy should describe how the government body will inform the person responsible for authorising a PII claim of their assessment (including any relevant legal advice informing that assessment) of the public interests in disclosure and non-disclosure, where the balance of those public interests lies, and whether there are other means available to limit publication of the document or information, in accordance with the process in **Part III(a) Assessment of PII claims in an Inquiry** above.

d) **How to document the authorisation:** The decision of the person responsible for authorising the PII claim and the reasons for that decision should be documented along with any instructions given to lawyers or relevant officers responsible for making the claim. The person authorising the PII claim should be aware that it may ultimately be necessary for them to give evidence in support of the claim or for their decision to inform evidence given by the government body making the claim: see **Part III(c) Determination of PII claims** below).

55. When establishing the authorisation policy for an Inquiry, government bodies should consider:

(a) **The nature of the Inquiry:** Authorisation policies should consider the nature of the Inquiry, which may be relevant to the kinds of PII claims likely to arise, the public interest in non-disclosure, and who is the relevant person to authorise PII claims. Any relevant protocols for the Inquiry should be taken into account: see paragraph 46 above.

(b) **Potential for production of duplicate PII documents**: Authorisation policies should account for any risk of duplication of work and potentially inconsistent instructions where duplicate material may be produced by different areas — for example, because there are several public sector bodies who are likely to produce duplicate material.

(c) **Likely nature, volume and complexity of PII claims**: The likely nature and complexity of PII claims will affect who is the most appropriate person to assess the public interest in non-disclosure: see **paragraph 54(a)** above.

- If PII claims are likely to include **Cabinet documents** the authorisation policy must include that:
    - A PII claim will generally be made in respect of Cabinet documents, including Cabinet submissions and minutes, as a class claim, unless a decision is made by Cabinet, the Premier or the Premier's delegate not to make a PII claim.
    - A PII claim will generally be made in respect of the Cabinet documents, including Cabinet submissions and minutes, of a former government. If there is consideration of not making a PII claim in respect of Cabinet documents of a former government the relevant government body should contact the DPC Office of the General Counsel.

(d) **Timing**: The timetabling of the Inquiry should be considered, to ensure decisions about PII claims are authorised within the required timeframes. Government bodies should consider the likely stages of the Inquiry at which PII claims might be made and how this affects the appropriate authorisation policy (for example, if PII claims may need to be made during the hearing of oral evidence).

56. If you need guidance with establishing an authorisation pathway, please liaise with DPC's Office of the General Counsel at legal.admin@dpc.vic.gov.au.

(c) Determination of PII claims

57. Ordinarily in an Inquiry, the Inquiry will determine any PII claim. The process for determining the PII claim may be informed by any applicable Protocol: **paragraph 46** above.

58. It is possible that the question of whether PII applies to a document or information required to be produced to an Inquiry will ultimately be determined by a Court: as to which, see **Part IV** below. How this might arise will depend upon the particular Inquiry. For instance:

    a) In Victorian Inquiries, where a chairperson is satisfied that a person has, without reasonable excuse, failed to produce documents or to attend to give evidence, the chairperson may apply to the Supreme Court for an order to comply with the notice to produce or attend.[50] In addition, a chairperson may refer a question of law arising in an Inquiry to the Supreme Court for decision.[51] A government body should only apply to the chairperson to refer a question of law concerning PII to the Supreme Court as an option of last resort due to time and costs involved, and this should only occur after consultation with the Attorney-General (via the Department of Justice and Community Safety's Office of the General Counsel).

    b) In Commonwealth Inquiries, it is an offence to fail to produce a document or thing, or give information or a statement as required by a notice issued under the Commonwealth Royal Commissions Act, punishable by up to two years' imprisonment,[52] and proceedings in respect of those offences may be brought in the Federal Court by the Attorney-General or Commonwealth Director of Public Prosecutions, or by any person in any court of summary jurisdiction.[53] As neither of those offences apply if the person had a reasonable excuse to not comply with a notice,[54] the question whether PII applies to the relevant document or information will be relevant in any court proceeding resulting from non-compliance.

(d) Formal reviews

59. A formal review established under the Inquiries Act has no power to compel production of documents or attendance of witnesses. There are also no provisions in the Inquiries Act for failing to comply with a formal review's request. Consequently, when a formal review requests documents from a government body, the government body should consider what information it can lawfully provide to the formal review.

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50 Inquiries Act ss 23, 70.
51 Inquiries Act ss 41, 81.
52 Royal Commissions Act ss 3(4), (6A).
53 Royal Commissions Act s 10.
54 Royal Commissions Act ss 3(5), (6B).

60. Government bodies should follow the common law principles summarised in **Part II: Public interest immunity (PII)** above, following the process in **Part III(a) Assessment of PII claims in an Inquiry** above, before providing documents or information to a formal review that may be the subject of PII. Before doing so, the government body should consider whether there are any other confidentiality issues, such as statutory secrecy provisions or privacy obligations, preventing the body from making voluntary production.

61. Where a government body proposes to provide documents or information, including making a submission to a formal review for which there is no authorisation policy approved by Cabinet, the authorisation approach set out in the Guidelines for Submissions and Responses to Inquiries should be followed.

62. If you need guidance with providing documents or information to a formal review, please liaise with DPC's Office of the General Counsel at legal.admin@dpc.vic.gov.au.

Part IV: PII – Proceedings

63. PII issues may arise in many different circumstances in proceedings, including:

    (a) When a government body is a party to a proceeding or is providing instructions on behalf of the State when it is party to a proceeding.

    (b) When a government body or officer receives a summons or like coercive process to produce a document or give other evidence in a proceeding to which it is not a party.

64. PII issues could arise at any stage of a proceeding, including in discovery, responding to a subpoena, the preparation of affidavits, the admission of evidence, or in the course of a witness giving oral evidence or a party making submissions.

65. Consequently, PII issues may arise in circumstances ranging from when a government body has significant knowledge and involvement in a proceeding to where it has no knowledge or very little knowledge of the proceeding.

66. Government bodies should seek legal advice before making a PII claim in a proceeding. This legal advice will inform the government body whether to make a PII claim.

67. For further information on PII in proceedings generally, please contact the Office of the General Counsel, Department of Justice and Community Safety at ogc@justice.vic.gov.au.

(a) Assessment of PII claims in proceedings

68. When considering whether a document or information required to be provided in a proceeding is subject to PII, the government body should apply section 130 of the Evidence Act and the relevant common law principles set out in **Part II: Public interest immunity (PII)** above.[55] The government body should:

    (a) *First,* identify and consider the public interest in non-disclosure, as explained in **Part II(c) Public interest in non-disclosure** above:

    - Does the document or information fall within a recognised category of PII: see **paragraphs 25 to 29** above?
    - Does the document or information fall under a class claim or contents claim: see **paragraphs 30 to 34** above?
    - Identify the public interest in non-disclosure as specifically as possible, and not only in broad or general terms: see **paragraph 28** above**.**

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55 As noted in Part I above, section 130 of the Evidence Act applies in proceedings in Victorian courts, including pre-trial disclosure requirements such as discovery: ss 130, 131A. Section 130 also applies in coronial investigations and inquests: *Coroners Act 2008* ss 42A, 58. Special rules apply in merits review proceedings in VCAT: *Victorian Civil and Administrative Tribunal Act 1998* ss 53–6. In federal courts, section 130 of the Evidence Act applies in proceedings, and the common law applies to objections to pre-trial disclosure requirements. Special rules may also apply in Commonwealth tribunals such as the Administrative Review Tribunal; but see *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62.

- In identifying and considering the public interest in non-disclosure, consider all matters relevant to that public interest, including whether the document or information is publicly available, the currency of the document or information, and the means available to limit publication of the document or information: see **paragraphs 40 to 44** above.

(b) *Second,* identify and consider the public interest in disclosure, as explained in **Part II(d) Public interest in disclosure** above.

- In a proceeding, the public interest in disclosure is furthering the administration of justice which requires that parties have access to relevant evidence or that relevant material is admitted into evidence: see **paragraph 42(a)** above. This means that the nature of the proceeding will be critically important in assessing the weight of the public interest in disclosure.
- What is the relevance and importance of the document or information?: see **paragraph 44** above**.** Government bodies should identify the relevance of the document or information to the proceeding and assess its probative value in that respect. The more relevant the document or information is to a fact in issue in the proceeding, the higher the public interest in disclosure.
- What is the nature and subject matter of the proceeding and how does this affect the public interest in disclosure?: **see paragraph 43** above. Is the proceeding a civil or criminal proceeding? If criminal, is the party seeking to rely on the material the defence or the prosecution?

(c) *Third,* undertake the balancing exercise: does the public interest in non-disclosure outweigh the public interest in disclosure, as explained in **Part II(b) (b) State's duty to assess and make PII claims** above?

- If the government body considers, on the information available to it, that the public interest in disclosure outweighs the public interest in non-disclosure, a PII claim should not be made.
- If the government body considers, on the information available to it, that the public interest in non-disclosure outweighs the public interest in disclosure, the government body should make a PII claim.
    - For **Cabinet documents** the balancing test will ordinarily favour non-disclosure, other than where there are exceptional circumstances (such as where, in criminal proceedings, the document or information will be of substantial assistance for a defendant's defence): see **paragraph 39** above**.**
- Where there is genuine uncertainty about the balance of public interests, including because the State does not have sufficient information available to it to balance the competing public interests, a PII claim should be made.

(d) *Fourth,* seek approval for the proposed approach in relation to claiming PII, following the relevant authorisation policy established in accordance with these Guidelines (see **Part IV(b) Authorisation policies for PII claims in proceedings** below**.** The government body's proposed approach in relation to claiming PII, including any legal advice concerning the assessment of the claim, should be appropriately documented for the purpose of the authorisation policy: see **paragraph 73** below.

69. A PII claim should always be limited strictly to those parts of the document or that information that would cause the relevant prejudice to the public interest if disclosed. If PII only attaches to some parts of a document, and other parts are still relevant to the proceeding, only the parts over which PII is claimed should be redacted, and the remainder of the document or information disclosed.

70. Where a PII claim should not be made, but the government body has concerns about the disclosure of the information, it may be appropriate to consider applying to the Court for other kinds of orders, such as:

    - a pseudonym order to protect the disclosure of a person's identity; or
    - an order that the documents or information will be subject to confidentiality restrictions as to their use and access,[56] or a suppression order.[57]

(b) Authorisation policies for PII claims in proceedings

71. Government bodies are involved in a wide range of proceedings, so it is appropriate for those bodies to establish an appropriate, documented policy for authorising instructions to lawyers on PII claims or authorising relevant officers (eg police prosecutors) to make PII claims for each of the different kinds of proceeding that they commonly encounter (if applicable) and for specific 'State significant litigation'.

    a) For State significant litigation (for example class actions, precedent judicial review litigation with whole-of-government implications etc) it may be necessary for the government body (or interdepartmental committee, where established) to create a specific authorisation policy for PII claims in that litigation.

    b) For other proceedings (including criminal proceedings), government bodies should have a documented general PII authorisation policy for making PII claims for proceedings of that kind.

72. Where a government body expects a proceeding to involve responding to requirements to provide large amounts of documents or information in very short timeframes, and may involve documents or information that could be subject to PII, it is advisable to consider the appropriate authorisation policy at the earliest stage possible.

73. The authorisation policy should describe:

    a) **Who has responsibility for authorising PII claims**: The person responsible for authorising a PII claim should be the person who is best placed to assess, and if necessary, attest to the public interest in maintaining the confidentiality or secrecy of the relevant document or information compared to the public interest in its disclosure.

        - The appropriate person may be a Minister, Secretary or senior executive with an appropriate level of authority and relevant expertise.
        - The appropriate person is likely to differ depending on the public interest in non-disclosure: for instance, a Cabinet subcommittee may be best placed to assess the public interest in the non-disclosure of Cabinet documents, while a Minister may be best placed to assess the public interest in non-disclosure of a document which may prejudice international relations.
        - The person best placed to assess and give evidence about the public interest in non-disclosure will ordinarily be the person who authorises the PII claim, but that will not always be the case. In some instances, the authoriser of the PII claim (such as Cabinet or a Minister) may rely on the advice of another person who has knowledge of the documents in question

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56 Victorian Courts may make orders as appropriate in relation to the filing of documents to ensure their confidentiality: see, eg, Supreme Court (General Civil Procedure) Rules 2015 r 28A.06.

57 Victorian Courts may make orders prohibiting or restricting the publication of information derived from a proceeding on various grounds under sections 17–18 of the *Open Courts Act 2013*.

and of the basis on which it is said that disclosure of the document would harm the public interest. In those circumstances, if it becomes necessary to give evidence about the basis for a claim, it may be appropriate for the person who assessed the claim and advised the decision-maker to do so.

- Applicable statutory provisions or protocols may affect who has responsibility for authorising PII claims: see **paragraph 74(f)** below**.**
- If PII claims of a similar nature and complexity are commonly required to be considered, it may be appropriate for the relevant prosecutor or General Counsel to authorise those claims. In the case of more complex and uncommon PII claims, ministerial, secretarial or senior executive authorisation may be more appropriate depending on the type of claim.

b) **How the person who has responsibility for authorising PII claims is to make those decisions**: The authorisation policy should explain that the person responsible for authorising a PII claim will:

- assess the public interest in disclosure and non-disclosure in accordance with the principles in **Part II: Public interest immunity (PII)**, following the process in **Part IV(a) Assessment of PII claims in proceedings** above, in accordance with legal advice; or
- where the person authorising a PII claim does not have a close appreciation of the public interest in the disclosure of the documents, rely on the views of the relevant Departmental officer or lawyers conducting the proceeding to identify and assess the public interest in disclosure in accordance with the principles in **Part II(d) Public interest in disclosure** above**.**

c) **What information is required to be provided by the government body to the person who has responsibility for authorising PII claims**: The authorisation policy should describe how the government body will inform the person responsible for authorising a PII claim of their assessment of the public interests in disclosure and non-disclosure (including any relevant legal advice) and where the balance of those public interests lie, in accordance with the process in **Part IV(a) Assessment of PII claims in proceedings** above.

d) **How to document the authorisation:** The decision of the person responsible for authorising the PII claim and the reasons for that decision should be documented, along with the instructions given to lawyers or relevant officers responsible for making the claim. It may be necessary for the person authorising the PII claim to give evidence in support of the claim, or for their decision to inform the evidence given by the government body making the claim: see **Part IV(c) Establishing a PII claim in a proceeding** above.

74. When considering and developing the appropriate authorisation policy, government bodies should consider the following in relation to the proceeding or type of proceeding:

a) **Nature and volume of the type of proceeding:** Authorisation policies should consider the nature of the proceeding or type of proceeding, which may be relevant to the kinds of PII claims likely to arise, the public interest in non-disclosure, and who is the relevant person to authorise PII claims.

b) **Potential for production of duplicate PII documents:** Authorisation policies, particularly for State significant litigation should account for any risk of duplication of work and potentially inconsistent instructions where duplicate material may be produced by different areas — for example, because there are several public sector bodies who are likely to produce duplicate material.

c) **Likely nature, volume and complexity of PII claims**: The likely nature, volume and complexity of PII claims will affect who is the most appropriate person to properly assess the public interest in non-disclosure: see **paragraph 73(a)** above.

- If PII claims are likely to include **Cabinet documents** a government body's PII authorisation policy must include that:

  (i) A PII claim will generally be made in respect of Cabinet documents, including Cabinet submissions and minutes, as a class claim, unless a decision is made by Cabinet, the Premier or the Premier's delegate not to make a PII claim.

  (ii) A PII claim will generally be made in respect of the Cabinet documents, including Cabinet submissions and minutes, of a former government. If there is consideration of not making a PII claim in respect of Cabinet documents of a former government the relevant government body should contact the DPC Office of the General Counsel.

d) **Timing**: consider the timetabling of the proceeding, or proceedings of that kind, to ensure decisions about PII claims are authorised within the required timeframes. Government bodies should consider the likely stages of the proceeding at which PII claims might be made and how this affects the appropriate authorisation policy (for example, if PII claims may need to be made during the hearing of oral evidence). Any authorisation policy should be sufficiently flexible to ensure that decisions about whether or not to claim PII, and the preparation of evidence in support of any claims, can be made in a timely manner without unduly delaying the conduct of the proceeding.

e) **Any applicable statutory provisions or other applicable policies**: Government bodies should consider any relevant statutory provisions, directions or policies that affect who can make decisions about PII claims or how those claims are made, for example:

- In merits review proceedings before VCAT, the rules of PII are excluded and replaced by a procedure for the Premier to certify that disclosure of Cabinet deliberations would be contrary to the public interest; and for the Attorney-General to certify that the disclosure of other matters that could form the basis for a PII claim, should not be disclosed.[1] Government bodies should follow the same principles and processes set out above in determining whether the Premier or Attorney-General should certify there is a public interest in non-disclosure.

- If the relevant government body is the Victorian Police, consider how the authorisation policy will interact with the *Protocol for engagement and resolution of complex issues arising from disclosure obligations and public interest immunity claims between the OPP, Victoria Police and VGSO*.

f) **The State's obligations as a litigant**: In developing the authorisation policy take into consideration the government body's obligations as a model litigant, and its obligations under the *Civil Procedure Act 2010* (where applicable) and *Criminal Procedure Act 2009* (where applicable). For example, PII claims must be made on a proper basis and in a timely way, consistent with these obligations.

75. Subject to the arrangements in the relevant government body and the type of proceeding, instructions to make a claim of PII should ordinarily only be made after legal advice has been obtained. The PII authorisation policy should ordinarily set out that legal advice will be obtained prior to making a claim of PII, although this may depend on the nature of the proceedings.

76. In cases where there is doubt as to the appropriate PII authorisation policy for particular proceedings, government bodies should consult with the relevant agency's General Counsel, who can advise on the appropriate PII policy and, if necessary, the appropriate approach to making a claim of PII.

(c) Establishing a PII claim in a proceeding

77. It is a matter for the relevant Court to determine whether PII applies.

78. The State bears the onus of establishing the public interest in non-disclosure.[58] This requires establishing that there is a real risk or significant risk of the relevant prejudice, damage or harm to the public interest that would be caused by disclosure, but it is not necessary to establish that such prejudice, damage or harm is more probable than not.[59]

79. Government bodies will often be required to provide evidence to the Court to support the PII claim, usually in the form of an affidavit. The affidavit should be prepared with the assistance of a lawyer.

80. The deponent should be the person best placed to give evidence about the public interest in non-disclosure: that will ordinarily be the person who has authorised the PII claim in accordance with the authorisation process in **Part IV(b) Authorisation policies for PII claims in proceedings** above. In some instances, it may be another person who has knowledge of the documents in question, the use to which they have been put in the past and the basis on which disclosure of the document would harm the public interest.

81. Although a Court will generally 'accord weight to an assertion by an authorised representative of government that the public interest would be at risk in the event of disclosure',[60] the claim must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information.[61]

82. The affidavit and documents over which PII is claimed may be provided to the Court in both an open and closed form. The closed affidavit and documents are generally made available only to the Court determining whether PII should be upheld.[62] Courts may inspect documents in order to determine a claim, although it would not ordinarily inspect Cabinet documents in civil proceedings.[63] Courts may provide for the appointment of contradictors, and, rarely, the disclosure of confidential evidence and documents to a non-State party's lawyers, in order to have assistance in determining a claim.[64]

83. The deponent should be aware that they may be subject to cross-examination about the contents of the affidavit, although cross-examination is uncommon and the State will ordinarily have a strong argument to resist cross-examination because of the risk of revealing the confidential information in the course of cross examination.[65] Cross-examination may be permitted: for example, where there are concerns about the reliability of the claim,[66] or where the evidence in support of the claim is vague and unsatisfactory.[67]

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58 See, eg, *Royal Women's* (2006) 15 VR 22, [35], [39]; *Brazel* (2008) 19 VR 553, [46]; *Deputy Commissioner of Taxation v Law Institute of Victoria* [2010] 27 VR 51, [53].

59 *Kamasaee No 4* [2016] VSC 492, [11]–[14], cited with approval in *R v Peters (a Pseudonym)* [2018] VSCA 115, [48].

60 *Sankey* (1978) 142 CLR 39, 44–5, 59–60, 96. See also *Ryan* [2015] VSCA 353, [57]; *Ahmet v Chief Commission of Police* [2014] VSCA 265, [22]; *Zarro v Australian Securities Commission* (1992) 36 FCR 40, 50–1.

61 *Brazel* (2008) 19 VR 553, [68].

62 *State of Victoria v* ***Orman*** [2024] VSCA 190, [32].

63 See Evidence Act s 130(3); *Northern Land Council* (1993) 176 CLR 604, 616, 618.

64 *Orman* [2024] VSCA 190, [49]ff.

65 See *Holloway* (2016) 50 VR 417, [133]. See also *Hilton v Wells* (1985) 59 ALR 281, 288.

66 *Australian Securities Commission v Zarro & Ors (No 2)* (1992) 34 FCR 427, 431.

67 *Holloway* [2016] VSC 317, [132]–[140].

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