

## RETHINKING THE LEGAL ADVICE PRIVILEGE IN THE PUBLIC SECTOR CONTEXT

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Legal professional privilege, or client legal privilege, is quite a complex matter. There are all sorts of rules covering such matters as: whose privilege it is; what types of communications it applies to; the circumstances where it applies (for example the two heads of the privilege); the pre-conditions for its application (for example confidentiality and the dominant purpose test); and the circumstances where it does not apply or can be waived; where the common law or statutory tests apply, etc.

Before proceeding on, I would ask the reader to write down YES/NO answers against the following questions based on any knowledge and experience the reader may have from either being a client or a lawyer if they have worked in or with the public sector:

1. In the initial consultation between a lawyer and a public official, before the lawyer is briefed or receives instructions, is it standard practice for the lawyer to explain the nature and scope of legal professional privilege?
2. If it isn't standard practice, is it done most of the time?
3. Alternatively, is the giving of such an explanation the exception rather than the rule?
4. If you are a lawyer who has worked in or with the public sector, do you believe that most of the public officials who have sought your legal advice are **aware** of the essential elements of the nature and scope of legal professional privilege?

### ***The two sides to the privilege***

In the public sector accountability context, there are two sides to legal professional privilege:

- on the one side, legal professional privilege is said to assist the administration of justice by allowing communications between public officials and their lawyers to be kept confidential on the assumption that this will promote frankness and candour in communications between those officials and their lawyers, and
- on the other side, the effect of legal professional privilege is to reduce the accountability of public sector agencies and officials by allowing them to keep often vital information from a watchdog or regulatory body or a court.

Keeping relevant information from the other parties to a dispute, from the courts and from regulators and watchdog bodies is only justified if in fact confidentiality of communications between public officials and their lawyers achieves significantly greater frankness and candour than would otherwise be the case.

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***Expansion of the scope of the legal professional privilege***

The view has long been espoused by lawyers and the courts that confidentiality of communications between lawyers and their clients is essential to ensuring the proper administration of justice. This is an article of faith for lawyers – a legal ‘sacred cow’. The legal fraternity is so enamoured of the concept and so certain of its importance that over the years the courts have greatly expanded the scope of legal professional privilege, for example:

- apparently it was originally seen primarily as a protection for attorneys (‘Legal professional privilege was initially protective of attorneys because they were bound by oath to keep their clients’ secrets’<sup>1</sup>). By the late 19<sup>th</sup> Century it was accepted that the client was also protected by the privilege<sup>2</sup>;
- originally the principle ‘was a rule of evidence confined to judicial and quasijudicial proceedings’<sup>3</sup>, but was extended to cover legal advice – the ‘legal advice privilege’ – in the 1830s<sup>4</sup>;
- the privilege was expanded in the 1880s to cover third parties acting as agents of the client seeking advice<sup>5</sup>;
- the privilege originally only covered attorneys external to the client, but was extended to in-house lawyers in the 1980s<sup>6</sup>;
- the privilege was originally subject to a ‘sole purpose’ test, but this was expanded to a dominant purpose test in the late 1990s<sup>7</sup>, a change that has since been reflected in the *Uniform Evidence Acts*;
- the ‘legal advice’ head of the privilege originally only covered direct communications between solicitors and their clients, or the agents of either, but has been extended to non-agent third party authored documentary communications in certain circumstances – referred to in one case as ‘the growing elasticity of the meaning of the term “agent”’<sup>8</sup>;
- the privilege was extended to advice of a non-legal character where that non-legal advice is connected to the giving of legal advice<sup>9</sup>.

***Expansion of the rationale for the legal professional privilege***

The courts have consistently argued that the privilege should not be extended beyond the scope justified by its rationale, for example that ‘the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle’<sup>10</sup>. To ensure this was not a significant impediment, over the years the courts have expanded the rationale for the privilege from a rule of evidence in litigation, to a substantive rule of law – see for example the comments of Lord Taylor of Gosford CJ in *R v Derby Magistrates’ Court ex parte B*<sup>11</sup> that:

Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case; it is the fundamental condition on which the administration of justice as a whole rests.

The expansion of the rationale by the courts to justify the expansion of the scope of the privilege was explicitly recognised in the recent case of *Pratt Holdings Pty Ltd v Commissioner of Taxation* in the Federal Court of Australia:

77...Difficulties in applying the rationale for litigation privilege to the extended doctrine [to the giving of legal advice] have been recognised and resolved by expressing the rationale at a higher level of generality so that it can accommodate both aspects of legal professional privilege. In *Carter v Northmore Hale Davy and Leake* (1995) 183 CLR 121 ('Carter') at 161, McHugh J commented that the rationale behind litigating privilege,

'hardly seems applicable to non-litigious communications between legal adviser and client unless the concepts of 'the legal system' and 'the administration of justice' are given extended and artificial meanings.'

His Honour continued however,

'Now that this court has held that legal professional privilege is not a rule of evidence but a substantive rule of law, the best explanation of the doctrine is that it is 'a practical guarantee of fundamental, constitutional or human rights'...By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.'

78. **Stated thus, the rationale is capable of justifying both aspects of legal professional privilege...**<sup>12</sup>. (emphasis added)

Interestingly, in one of the recent 'Three Rivers' cases in the UK it was said that the principle of legal professional privilege '...is not based upon the maintenance of confidentiality, although in earlier case-law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidences at priests and doctors, whereas it has been settled in a line of authority stemming from the *Dutches of Kingston's case* (1776) 1 East PC 469 that is confined to legal advisers:...' <sup>13</sup>.

### ***An alternative rationale for the privilege***

An alternative rationale expressed by Deane J in *Baker v Campbell* is that legal professional privilege 'represents some protection of the citizen – particularly the weak, the unintelligent and ill-informed citizen – against the leviathan of the modern state.' While such a rationale may be applicable to some extent for private individuals, it is somewhat problematic in relation to public officials. They are part of that 'leviathan' – they are part of the 'state' apparatus, and are not in the same position as 'weak' or 'powerless' members of the public. And as for 'unintelligent' and 'ill-informed' – I would have thought that rigorous implementation of merit selection principles for more than a generation would have addressed this.

### ***Who can rely on the privilege to avoid disclosure of communications (ie, who is the client)?***

Whenever courts have had cause to consider the question of legal professional privilege, it is almost standard practice that they emphasise that the privilege is that of the client and not the lawyer. Indeed in the *Uniform Evidence Acts* what was known in the common law as 'legal professional privilege' has been renamed 'client legal privilege'. This raises an interesting point in the public sector context as to who or what is the 'client'.

In looking at this question a distinction can be drawn between:

- who is the 'client' for the purpose of identifying communications that are covered by the privilege
- who is the 'client' for the purpose of determining who can assert or waive the privilege, and

- who is the 'client' for the purpose of determining who has access to privileged communications.

While the *Uniform Evidence Acts* may provide that for the purposes of the legal advice privilege the 'client' includes 'an employee or agent of a client' (ss117&118), in a practical sense it is important to consider who actually can rely on the benefits of the privilege. In this context, in the public sector the 'client' for the purposes of deciding who has access to communications between employees and an agency's lawyers would primarily be the organisation itself. While it may also extend to those persons within the organisation who deal with lawyers who have the authority to assert or waive the privilege, it would not include most employees of the agency. In other words, the privilege only protects communications between employees and their agency's lawyers from disclosure to external third parties, not from disclosure within the agency (eg to management).

The existence of client legal privilege is unlikely to increase the likelihood of frankness and candour in communications between employee public officials and their agency's lawyers. Even where such employees are aware of the existence and effect of the privilege, as they cannot rely on the privilege to prevent disclosure of their communications to management, they may have an overriding interest in **not** being frank or candid. After all, what an employee makes known to the agency's lawyers they are also effectively making known to the management of the agency. Information provided by employees to their agency's lawyers could therefore be used in ways that may not be in the interests of those employees (for example used in management or disciplinary action for incompetence, maladministration or misconduct). It is also always possible that the agency may decide to waive privilege over the information provided to the agency's lawyers by its employees, which could be released to regulators, watchdog bodies or other third parties who could potentially use the information in ways that are detrimental to the interests of those employees.

Where employees are unaware of the existence, nature and scope of the privilege, their level of frankness and candour in such communications is unlikely to be affected by the existence (or otherwise) of the privilege.

***Does the privilege work to the detriment of the privilege against self-incrimination?***

On a very practical level it is relevant to note that the circumstances where it would be most important for an employee to be frank and candid with his or her agency's lawyers may well be those where the employee should be able to rely on the privilege against self-incrimination. If employees were to be influenced by client legal privilege to be frank and candid in communications with their agencies' lawyers, they may unknowingly or inadvertently waive their right to refuse to answer questions that may open them up to criminal or civil penalty (including disciplinary action). Alternatively, if they are aware of this possibility, the existence of the privilege is unlikely to induce them to make any self-incriminating disclosure. Of course, in practice it is often hard enough to get employees to admit to any responsibility when things go wrong, let alone make self-incriminating disclosures.

***Is there empirical evidence that the privilege is effective in achieving its objectives?***

It is a very telling point that there does not appear to be any empirical evidence to support the assertion that the privilege has any material effect on frankness and candour in communications between public officials and their agencies' lawyers. If any other profession or calling wanted the courts to recognise an equivalent privilege for their members, they would of course be required to demonstrate, based on incontrovertible evidence that recognising such a privilege would be effective in achieving a valid and overwhelmingly important public interest objective.

Interesting remarks on this issue were made by Mason J (as he then was):

A more persuasive reason for confining [legal professional privilege] is that **it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve.** The strength of this public interest is open to question. **It may be doubted whether it does very much to promote candour on the part of the client to his legal adviser.** Candour on the part of public servants has ceased to be an important buttress to Crown privilege. And, even if the existence of the privilege does encourage the client to make full disclosure to his legal adviser, is that public interest so much stronger than the public interest in having litigation determined in the light of the entirety of the relevant materials? <sup>14</sup> (emphasis added).

Another issue with the privilege was referred to by Gyles J in a 2004 Federal Court case when he referred to 'some of the anomalies in the application of the principle':

58 ... According legal professional privilege to communications relating to legal advice unconnected with litigation is well established but has never been satisfactorily explained. As McHugh J noted in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161, the usual rationale:

'hardly seems applicable to the non-litigious communications between legal adviser and client unless the concepts of "the legal system" and "the administration of justice" are given extended and artificial meanings.'

...

60 ... In many transactions, whether of a business or a private character, a client may consult, in addition to a lawyer, one or more of an accountant, a financial planner, a merchant banker and a financier for advice concerning the preferred structure of the transaction and one or more of those other advisers may bring their own lawyer into the consultations. Often some or all of the advisers and the lawyers will consult at the same time, each considering the same questions. It is not possible to explain rationally why a client's private explanation of its position and its objectives to a lawyer is privileged but precisely the same private explanation to the other advisers working on the same issue is not.

61 It is easy to see how the privilege is necessary to encourage candour on the part of a client who confronts or anticipates litigation to vindicate or defend legal rights as the client may need to disclose facts which are incriminating, discreditable or embarrassing in order to obtain sound advice. It is not so easy to see why a client who wishes to order its affairs to best advantage would need or require any encouragement for candour. Nor is it easy to see what corresponding public interest is served by preserving the secrecy of a client's reasons for a transaction (unless the client chooses to lift the veil) in cases where disclosure would serve the ends of justice or would enable a statutory inquiry to be properly conducted.<sup>15</sup>

This concern is reflected in comments made in another 2004 case before the England and Wales Court of Appeal, where the Master of the Roles made the following remarks:

We have found this area of the law not merely difficult but unsatisfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated, it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege were not available in such circumstances, communications between solicitor and client would be inhibited.<sup>16</sup>

***Is the privilege effective to achieve frankness and candour in communications between clients and lawyers?***

It is open to question whether in fact the privilege is necessary to achieve its primary objective of ensuring frank and candid communications where public sector agencies and public officials are concerned.

It can be strongly argued that client legal privilege should not be necessary to ensure frankness and candour in communications between public officials and their agency's lawyers. For example:

- courts across the common law world have made it plain that in most circumstances public officials are expected to be frank and candid in their official communications, with or without the benefit of confidentiality;
- codes of conduct require public officials to be frank and candid in their official communications (which includes communications with any lawyer employed or engaged by their employer);
- legislation such as the *State Records Act 1998* (NSW), as well as principles of good administrative practice, require public officials to make full and accurate records (which also implies a statutory duty to be frank and candid in written communications);
- employees owe the common law obligation of fidelity to their public sector employer, which includes a duty to provide their agency with all relevant information (and, by implication, a duty to be frank and candid with any lawyer employed or engaged by their agency);
- employees also have extensive protections from personal liability under legislation such as the *Employee's Liability Act 1991*(NSW), as well as the principle of vicarious liability, and
- public officials often have statutory protection from liability for actions done in good faith for the purpose of exercising statutory functions.

The current situation therefore appears to be that:

- on the one hand the courts generally assume that public officials are expected to be full and frank in their communications with each other without the need for secrecy (other than in relation to high level decision-making and policy-making), and
- on the other hand the courts have effectively held that for public officials to be frank and candid in their communications with lawyers (who may also be public officials) they need the additional inducement of secrecy.

In other words, while public officials are expected to be frank and candid in their communications with each other, whether or not these communications may later be disclosed, apparently this may not be a reasonable expectation if one of them is a lawyer!

***Does the complexity of the rules undermine the achievement of the objectives of the privilege?***

Another problem is the complexity of the various rules and issues associated with the privilege. As Kirby J said in a 1997 High Court case:

The doctrine's practical object is thus to remove from the client's concerns an apprehension that matters communicated to the lawyer for the purpose of securing such advice might thereafter be used against the interests of the client. If that were a possibility **and the rule were not simple and clear in its operation**, clients might not frankly and fully communicate their problems to lawyers and produce all documents and other evidence relevant to the provision of proper legal advice...the boundaries of the doctrine of legal professional privilege must take into account **the fundamental assumption of the system** that parties should ordinarily be able to communicate with their lawyers without fear that the confidentiality of their communication will be invaded **except in clear, limited and defined circumstances**.<sup>17</sup> (emphasis added)

The fundamental problem which appears to undermine this 'fundamental assumption of the system' is that the rule is not 'simple and clear' and the circumstances in which the confidentiality of their communications can be invaded are not 'clear, limited and defined'.

If anyone actually needs convincing on this point then they haven't read much of the case law. Examples of the issues that import complexity and confusion into the issue include: the continuing applicability of both statute and common law tests, depending on the circumstances; the use of two separate descriptors, ie, 'legal professional privilege' and 'client legal privilege'; the privilege only applying to 'communications' not documents per se; the position of copy documents; the dominant purpose test; who is actually the 'client'; the position of documents authored by agents and non-agent third parties<sup>18</sup>; the need for employed solicitors to have appropriate independence in their provision of legal advice<sup>19</sup>; the circumstances where the privilege can be waived, both explicit and implied; certain statutory provisions that remove the privilege; the recent apparent divergence between English and Australian authority on certain issues, etc.

### ***Do lawyers have a conflict of interests in relation to the privilege?***

When considering the privilege, courts commonly talk about the rationale for the privilege being the benefits that accrue to the system of justice, never to the obvious and significant commercial and professional benefits that accrue to lawyers from the privilege. For example:

- there are significant tactical advantages that can be achieved in court proceedings, or in client involvement with regulators or watchdog bodies – particularly when the main aim is to win or avoid liability;
- significant professional/commercial advantages accrue to lawyers who are able to offer clients the benefit of confidential advice (including in relation to actual or anticipated legal proceedings the advice of third party experts) which quite clearly would increase the demand for their services, particularly in areas where other professionals offer services, eg, commerce, taxation, planning and environment appeals, etc;
- nobody likes external scrutiny, from a client's perspective, the more they can involve their lawyers in relation to contentious, sensitive, embarrassing, etc issues, the better;
- on a personal level, lawyers avoid having to defend their advice/views before watchdog bodies or in courts.

I think it is fair to say that in fact lawyers have a significant conflict in relation to the whole issue of whether client legal privilege effectively achieves a valid public interest objective. This is a conflict which lawyers as a profession do not appear to be aware of.

This is a problem given that it is lawyers, and only lawyers, who put forward the arguments, make judicial decisions and draft legislation about the scope of the privilege.

### ***Client knowledge and awareness of the privilege***

One final point. I assume that there would be broad agreement with the proposition that in practice at least the legal advice head of the privilege would only work as intended if the client is aware of its existence and, at least in general terms, what it protects and what it doesn't protect. So with that in mind, think about your responses to my earlier questions about levels of awareness of the existence of the privilege and the scope of the privilege.

In my view it is past time that serious thought be given to whether the legal advice head of client professional privilege is effective in practice in achieving its stated objectives or rationale in the public sector context.

#### Endnotes

- 1 *Waldron v Ward* (1654) Style 450, 82 ER 853; *Preston v Carr* (1826) 1 Y & J 175 at 178-9.; *Minet v Morgan* (1873) LR 8 Ch App 361.
- 2 per Stone J, [2004] FCAFC 122 at 70
- 3 per Wilson J in *Baker v Campbell* (1983) 153 CLR 52)
- 4 see *Greenough v Gaskell* (1833) 1 My.&K.98
- 5 *Wheeler v Marchant* (1881) 17 CH D675
- 6 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54
- 7 *Esso Australia Resources Limited v Federal Commissioner of Taxation of the Commonwealth of Australia* (1999) 201CLR 49
- 8 see Finn J in *Pratt Holdings Pty Limited v The Commissioner of Taxation* [2004] FCAFC 122 at 41 & 50
- 9 see *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550 and Taylor J in *Babel v Air India* [1988] 1 CL317, at 330
- 10 see Wigmore *Evidence* Volume 8 para 2291 McNaughton rev. 1961, and Lord Edmund-Davies in *Waugh v The British Railways Board* [1980] AC 529 at 543
- 11 1996] AC 487 (at p 509)
- 12 per Stone J, [2004] FCAFC 122, at paras 77-78
- 13 see *Three Rivers District Council & ors v Governor and Company of The Bank of England* [2004] UK HL 48, at 86
- 14 *O'Reilly and others v Commissioner of State Bank of Victoria and others* (1982) 44 ALR 27, at p 42
- 15 *Kennedy v Wallace* [2004] FCA 332 (23 March 2004)
- 16 Lord Phillips of Worth Matravers in *Three Rivers District Council v Governor and Company of the Bank of England* (No. 6) [2004] QB 916, at para 39
- 17 *The Commissioner, Australian Federal Police & Anor v Propend Finance Pty Limited & Ors* [1997] HCA3
- 18 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122
- 19 *Commonwealth of Australia & Air Marshall McCormack in his Capacity as Chief of Air Force v Vance* [2005] ACTCA 35 (23 August 2005); *The Attorney-General for the Northern Territory of Australia v Kearney* (1985) 158 CLR 500, and *McKinnon and Secretary, Department of Foreign Affairs and Trade* [2004] AATA 1365, at 51.