Human right or handbrake on the truth?

Client legal privilege and federal investigatory bodies

By Rosalind Croucher

'Privilege' is a word that smacks of elitism, exclusivity and cliques. Put the word in the same sentence with lawyers (as in 'legal professional privilege') and it is not surprising that you generate a reaction.

But 'legal professional privilege' is not really about lawyers at all, or only consequentially so. It is about *clients* and their right to get advice from a lawyer with some sense of confidence that their communications will be private ones and protected even from being revealed in court. This is why the 'privilege' is better described as 'client legal privilege', which is how it is referred to now in the uniform Evidence Acts and by the ALRC in its Issues Paper 33, released on 23 April, *Client Legal Privilege and Federal Investigatory Bodies*.

Background to the Inquiry

On 29 November last year, the Australian Attorney-General, the Hon Philip Ruddock, asked the ALRC to inquire into privilege in the context of federal investigatory bodies with coercive information-gathering powers, prompted in part by the public furore surrounding the investigation into the Australian Wheat Board and the 'Oil-for-Food' program. Extensive claims to privilege by the Wheat Board delayed the investigation by nearly a year, enraged Royal Commissioner Terence Cole, and led to the amendment of the *Royal Commissions Act 1902* (Cth).

We live in an increasingly regulated environment. There are now over 40 federal bodies that have coercive information-gathering powers. They are involved in a wide range of areas—criminal law enforcement; financial markets; revenue; intelligence and security; public administration; building and construction; social security; health and aged care; human rights; privacy; border control and immigration; communications; environment; energy; transport—and the list goes on. How can one know how to comply with the burgeoning field of regulation *except* by seeking legal advice? Why shouldn't you be able to keep your communications about such things not only confidential, but also 'privileged'?

The legislation that has established each of the federal bodies does not take a simple 'one size fits all' approach to privilege. Client legal privilege *may* be modified or abrogated by legislation, but because it is seen as such an important common law right it can only be taken away by clear words to that effect. Not many federal statutes expressly do so. One example of abrogation is through specific legislation, like the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), where Parliament intervened directly to assist the Australian Securities and Investments Commission (ASIC) in its investigation of the James Hardie group of companies through abrogation of client legal privilege in relation to certain material for the purposes of the investigation and related proceedings.

Why was privilege abrogated in such a case? Because Parliament considered that one 'public interest' outweighed another—the public interest in the effective enforcement of corporate regulation, in the context of the difficulties faced by the victims of asbestos disease as compared with the public interest in the administration of justice reflected by everyone's (and every corporation's) right to seek legal advice and to have certain communications with a lawyer kept confidential.

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Arguments for and against

There are many issues surrounding client legal privilege. It has been described by the High Court in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) as 'an important common law right'—and some even argue that it is a 'human right'.[1]

> '[Client legal privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.'[2]

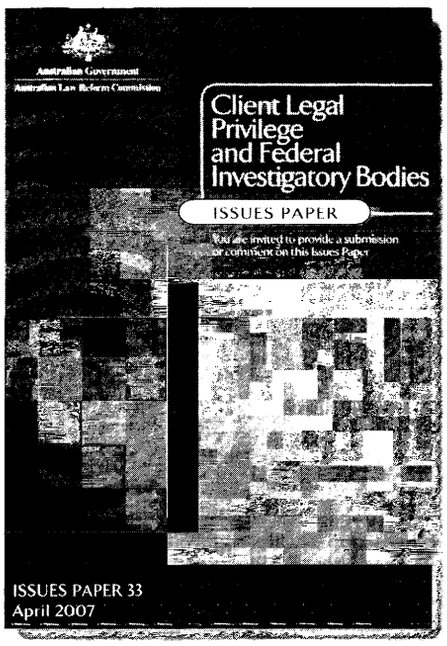
But there are those who see client legal privilege as a handbrake on finding the truth. The great English law reformer Jeremy Bentham (1748–1832) was a staunch critic of privilege (and of lawyers in general). He argued that the happiness of society (the object of utilitarianism, of which he was a proponent) was increased by conviction and punishment, not by the suppression of evidence.

The Client Legal Privilege Inquiry

The ALRC's Inquiry into Client Legal Privilege and Federal Investigatory Bodies has been directed to consider whether it is desirable to:

- modify or abrogate the privilege in order to achieve a more effective performance of Commonwealth investigatory functions;
- clarify all existing federal provisions that modify or remove the privilege, with a view to harmonising them across the Commonwealth statute book; and
- introduce or clarify other statutory safeguards where the privilege has been modified or abrogated, with a view to harmonising them across the Commonwealth statute book.

Issues Paper 33 poses 31 questions, which have formed the basis for discussions with key stakeholders—including members of the judiciary, the legal profession, Commonwealth bodies, individuals and organisations.



Submissions and feedback on the Issues Paper will be fed into a Discussion Paper on the Inquiry, due to be released in late August/early September 2007, which will contain detailed proposals for reform. The release of the Discussion Paper will be followed by a further round of consultation ahead of the drafting of the final report, due to be delivered to the federal Attorney-General in December this year.

If you would like to be notified when the Discussion Paper is released—and receive a free copy on CD or in hard copy—please register your interest online, or contact the ALRC.

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> 'Disclosure of all legally-operative facts, facts investitive or divestitive of right, of all facts on which right depends,—such, without any exception, ought to be, such, with a few inconsistent exceptions, actually is, the object of the law. ... If falsehood is not favoured by the law, why should concealment? ... Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.'[3]

There are many themes, such as these, that can be found in the discussions about client legal privilege over time. The pre-eminent theme, or rationale, is that the protection of the confidential communications in the lawyer-client relationship facilitates the administration of justice and the liberty of citizens against the state. As Deane J commented in *Baker v Campbell:*

> '[The principle of client legal privilege] represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.'[4]

Questions for discussion

In its Issues Paper, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), the ALRC poses 31 questions that seek to prompt a wide range of responses on such key matters as how does the privilege serve the administration of justice in today's highly regulated environment? What kind of competing interests are involved? How does it work in practice? What are the best contemporary rationales for it? Should Royal Commissions be in a different position than regulatory bodies like ASIC and the Australian Taxation Office? Should you be able to claim privilege in relation to legal advice given to you by another professional, for example, your accountant? Should privilege be absolute?

The ALRC is seeking wide input in response to these questions as part of its deliberations that will lead up to the report on client legal privilege to the Attorney-General in December 2007. The release of Issues Paper 33 is followed by an intensive round of consultations with a view to releasing the next stage of the ALRC's work as a Discussion Paper in late August.

Endnotes

1. *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [86] (Kirby J).
2. *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913, Advocate-General Slynn.
3. J Bentham, *Rationale of Judicial Evidence* (1827), Book IX, Chap V, 302, at 311, 312.
4. *Baker v Campbell* (1983) 153 CLR 52, 120.

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