



The New South Wales Bar Association

## **New South Wales Bar Association**

**Submission in response to ALRC Issues Paper 33**

# **CLIENT LEGAL PRIVILEGE AND FEDERAL INVESTIGATORY BODIES**

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## **EXECUTIVE SUMMARY**

1. The public policy considerations which underpin client legal privilege are sound.
2. If anything, there is a stronger case for retaining the privilege in the current legal environment. There is such a proliferation of statutes and laws that a citizen (whether corporate or natural person) more than ever needs to be able to get advice in confidence as to his, her or its legal rights, whether before committing to some course of action or after an issue has arisen. The community also has an interest in the citizen being able to get that advice: a citizen fully informed of legal rights is more likely to obey the law or to understand where he, she or it may have breached the law, reducing the need for enquiries by investigative agencies and ultimately reducing the number, length and cost of cases required to be decided before Courts.
3. If the privilege were to be abolished before all, or substantially all, federal investigative agencies, it could effectively result in the entire abrogation of the privilege. A lawyer would have to advise the client before taking instructions that there were such a range of circumstances in which their communications may not be kept confidential that it may be best for the client to assume that the entirety of the communications will be open to later public scrutiny. This will deter clients from seeking and obtaining advice and limit their access to the justice system, and, in exceptional cases, may retard their ability to respond to abuses by the State.
4. Nor is a more limited remedy suitable, such as abolishing the privilege before all, or substantially all, federal administrative agencies, but creating a use immunity. Even with use immunity, the substance of the communication has now been publicly disclosed and can be availed of directly or indirectly against the citizen in a variety of ways.

5. To the extent privilege is thought to have been misused before federal investigative agencies, for example as per the Cole Report, there is no evidence of a widespread problem, certainly not one sufficiently widespread to commend to anyone radical changes to the privilege.
6. The better course is to consider amendments to rules of conduct which govern the claiming of the privilege so as to target abuses (deliberate or otherwise) of the privilege. Those amendments may encompass the federal or state statutes governing the procedures of Courts, Tribunals or investigative bodies, together with the professional bodies themselves considering a clarification of their own rules. Further education is also appropriate.
7. Specifically, to the extent there may be abuse as identified by Commissioner Cole, albeit isolated, it is likely to arise in the following areas:
  - (a) over-claiming – in the sense that the decisions are made to claim privilege on an overly cautious or inexperienced basis leading to some of the claims, upon examination, being found to be unsustainable, but with proceedings delayed in the meantime;
  - (b) lack of transparency in the making of claims – parties not providing a full list with separate identification of the various privilege documents until being pressed to do so, again delaying resolution of proceedings;
  - (c) over-use of masking of documents for privilege;
  - (d) (probably most rarely) warehousing or privileging.
8. Practical reform which would target abuse in the unusual case would be to indicate by appropriate rule(s) that:
  - (a) advice by a practitioner to his or her client in respect of the making or maintaining of a claim to privilege must be supported by reasonable grounds;

- (b) where claims to privilege are made in Court, Tribunal or investigative proceedings, they must be certified by the senior practitioner with carriage of the proceedings as being supported by reasonable grounds;
  - (c) claims for privilege must, so far as they relate to documents brought into existence prior to the commencement of litigation, be individually listed by reference to date, type, author and recipient of the document or, if this information is not available, a sufficient description of the document, and the facts relied upon for the existence of the privilege must be identified as specifically as possible on a document by document basis;
  - (d) where claims for privilege are made by the masking of parts of a document, masking must be limited to those parts of the documents the disclosure of which would result in the substance of the privileged communication being revealed.
9. Apart from any questions of abuse of the privilege, to the extent that there is a concern raised by any federal investigative agencies that the process of making, challenging and determining good faith claims to the privilege is productive of delay, we offer 4 specific comments:
- (a) one means to rapidly determine claims would be to have New South Wales or other barristers act as arbitrator or Court appointed referee to determine the claims;
  - (b) further or alternatively, Courts should be further encouraged to make available on short notice Judges (including where there is a trial, a Judge other than the trial Judge) to determine claims;
  - (c) for constitutional reasons, it is not a safe or satisfactory option to seek to empower the federal investigative agency to act as final decision maker in respect to the claims;

- (d) federal investigative agencies would be aided by the establishment of a set of common protocols governing the process by which claims are to be made and/or tested.

10. The matter can be well summarized colloquially as follows:

“We all agree that truth is an important thing. But things are never that simple. For example, at one end, we all agree that there can be state secrets which we just can’t allow to come out in a Court. At the other end, in our daily lives, we all agree that husbands and wives shouldn’t always be able to be forced to do on each other in a Court. Legal professional privilege lies in between these things, allowing everyone, not just big business, to see lawyers, to check whether what they are doing in a highly regulated world is legal, and to act as good citizens rather than as bad ones. To take away the privilege from citizens – and it belongs to citizens and not to lawyers – is to take away a fundamental right.”

## DETAILED SUBMISSION

“Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. And surely the meanness and the mischief of prying into a man’s confidential communications with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.”

Sir James Knight Bruce V-C, *Pearse v Pearse* (1846) 1 De G & Sm 12, 28-9<sup>1</sup>

“it is open to us to ask whether it is indeed better in the interests of the administration of justice that the privilege should be maintained regardless of consequences.”

AAS Zuckerman<sup>2</sup>

### **A. BACKGROUND**

11. On 30 November 2006, Attorney-General Philip Ruddock announced an inquiry by the Australian Law Reform Commission (**ALRC**) in respect of client legal privilege (**the privilege**) as it relates to the coercive information-gathering powers of Commonwealth investigatory bodies including the Australian Federal Police, the ACCC, ASIC, the Australian Tax Office and the Commonwealth DPP. The ALRC inquiry is to be completed by 3 December 2007. The ALRC published Issues Paper 33 in April 2007.
12. Commissioner Cole’s report of the inquiry into the UN Oil-for-Food programme (**the Cole Inquiry**)<sup>3</sup> appears to have been a catalyst for the ALRC inquiry, which was announced within a week of the release of the report. In the press release announcing the ALRC inquiry, Mr Ruddock noted that the Cole Inquiry

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<sup>1</sup> Cited with approval by Lord Carswell in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, HL at [112]. These dicta are echoed in the decision of Deane J in *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 490

<sup>2</sup> ‘Practice and Procedure’ *The All England Law Reports Annual Review 1995* (Butterworths, London 1996) p 397 at 415, cited in Dr Ronald J Desiatnik *Legal Professional Privilege in Australia* (Second Edition) (LexisNexis Butterworths Australia 2005) at p. 230

<sup>3</sup> See Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (**the Cole Report**) at: <http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report>

“raised important questions in relation to client legal privilege and its impact on Commonwealth investigations.”<sup>4</sup>

13. This submission:

- (a) sets out the background to the Cole Inquiry and the Federal Court proceedings arising therefrom, in relation to the privilege;
- (b) identifies the current scope of the privilege, and the principles and policies that underpin the protection it affords;
- (c) isolates practices and trends that may have brought the role and status of the privilege into question;
- (d) submits that these are an insufficient basis to eliminate or substantially limit the privilege, either generally, or in respect of the coercive information-gathering powers of Commonwealth investigatory bodies. We submit, instead, that various procedural and regulatory steps can and should be taken to address the practices and trends in (c); and
- (e) offers other suggestions to avoid delay caused by the making of such privilege claims.

## **B. EXECUTIVE SUMMARY OF PROPOSALS**

14. For the detailed reasons which emerge below, the NSW Bar Association submits forcefully that client legal privilege should not be abrogated or modified before federal investigative agencies. Instead, the NSW Bar Association submits that the following procedural and regulatory amendments to current practices relating to the privilege should be closely considered by those with power to implement them. That consideration will need the appropriate consultation processes by such persons:

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<sup>4</sup> Media Release by the Attorney-General's Department, Australian Government, "Australian Law Reform Commission to Review Legal Professional Privilege" dated 30 November 2006

- (a) **Amendments to Professional Rules:** amendments could be made to the Revised Professional Conduct and Practice Rules and to the Barristers' Rules in the terms set out at paragraph 69 below;
- (b) **Amendments to Statutory Rules:** further or alternatively to the proposal in (a), cognate amendments could be made, in appropriate terms, to the *Legal Profession Act 2004* (NSW) (with the result, in either event, that the conduct provisions of section 498 of the 2004 Act will apply) – see paragraph 61 below;
- (c) **Amendments to Court Discovery Rules:** the Courts could amend discovery rules such that:
  - (i) Where a party claims that certain documents are privileged from production, the list should specify, to the extent reasonably practical without loss of the privilege:
    - (1) each document brought into existence prior to the commencement of the litigation, individually listed by reference to the date, type, author and recipient of the document, or if this information is not available, a sufficient description of the document; and
    - (2) the facts relied upon for the existence of the privilege be identified as specifically as possible on a document by document basis – see paragraph 81 below;
- (d) **Privilege Education:** Educational materials on several topics – including the making of claims and the masking of documents – be included in upcoming editions of the *Law Society Journal* and *Bar News* – see paragraph 90 below.

### C. CLIENT LEGAL PRIVILEGE AND THE COLE INQUIRY

15. During the Cole Inquiry, AWB was required to produce various documents, including documents over which it claimed client legal privilege.
16. The Cole Inquiry adopted the following procedure with respect to privileged documents:
  - (a) where privilege was claimed over part of a document, that part of the document was blanked out and the balance of the document was produced;
  - (b) where privilege was claimed for the whole of a document, the document was not produced; and
  - (c) the claims for privilege were maintained by AWB until a list of all documents not produced could be provided to the Cole Inquiry.
17. In March 2006, a document entitled “Draft statement of contrition – Andrew Lindberg” (**the Lindberg Statement**) was tendered to the inquiry. AWB claimed that the Lindberg Statement was privileged and had been produced inadvertently.
18. Commissioner Cole rejected AWB’s claim for privilege. In doing so, the Commissioner ruled that he had an ancillary or incidental power under the *Royal Commissions Act 1902* (Cth) (**RCA**) to determine the claim for privilege.
19. AWB challenged the Commissioner’s ruling and sought to have its claim upheld in the Federal Court. In *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No. 1)* (**AWB v Cole (No. 1)**),<sup>5</sup> Young J held that the Lindberg Statement was not privileged. As to the Commissioner’s power to determine a claim for privilege, Young J found that the Commissioner had an administrative power, for the purpose of determining his own actions and procedures, to decide a

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<sup>5</sup> [2006] FCA 571

privilege claim.<sup>6</sup> His Honour held that the Commissioner's decision on a privilege claim had no binding or legal effect and that the Commissioner's rejection of such a claim would "crystallise a dispute" and allow a party to apply to the court for declaratory relief in relation to the claim.<sup>7</sup>

20. Commissioner Cole concluded in the Cole Report that Young J's decision regarding the power of a royal commissioner to determine claims for privilege "overruled 104 years of practice".<sup>8</sup> He considered that the decision:

rendered the efficient conduct of a royal commission impossible ...because on each occasion a claim for privilege is raised it would be necessary for the party raising that claim to commence proceedings in the Federal Court seeking a declaration that the claim should be upheld.<sup>9</sup>

21. Federal Parliament subsequently amended the RCA to confer on royal commissioners a power to decide questions of privilege with review of a decision available in the Federal Court.<sup>10</sup> However, s 6AA(1)(a) of the RCA provides that a person may refuse to produce a document that is subject to client legal privilege if a Court has found that the document is subject to client legal privilege. Accordingly, notwithstanding the amendment, a party is not precluded from approaching the Federal Court to determine a claim for privilege.

22. Prior to the passage of the bill amending the RCA, AWB commenced proceedings in the Federal Court for the purposes of determining its outstanding privilege claims. The day after the amendment received royal assent, the Cole Inquiry proposed to deal with AWB's outstanding privilege claims. AWB sought an injunction to restrain Commissioner Cole from exercising his new powers. AWB claimed, *inter alia*, that:

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<sup>6</sup> *AWB v Cole (No. 1)* at [185]

<sup>7</sup> *AWB v Cole (No. 1)* at [187]

<sup>8</sup> The Cole Report at [7.44]

<sup>9</sup> The Cole Report at [7.44]

<sup>10</sup> RCA, s 6AA(1)(b)

- (a) the amending Act was unconstitutional in that it breached Chapter III of the Constitution by conferring a judicial power (being the power to determine questions of client legal privilege) on a body exercising the executive power of the Commonwealth; and
  - (b) in view of the existing Court proceedings, the Commissioner's attempt to exercise the powers conferred by the amending Act constituted a contempt of the Federal Court.
23. An interlocutory injunction restraining the Commissioner from exercising his new powers was granted by consent, the consenting parties being AWB and the Commonwealth.
24. Prior to the Federal Court's hearing of AWB's outstanding privilege claims, AWB produced a further 558 documents to the Cole Inquiry. AWB had previously maintained that these documents were privileged from production.
25. At the commencement of the privilege hearing, about 1450 documents remained in issue. During the course of the hearing, AWB withdrew its claim for privilege over some of the documents and the Commonwealth accepted that others were privileged with the result that the number of contested documents was reduced to 900.
26. In *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No. 5) (AWB v Cole (No. 5))*,<sup>11</sup> Young J upheld AWB's claims for privilege in relation to some of the documents and rejected the claims with respect to others. Commissioner Cole considered that AWB's claims for privilege "delayed completion of hearings for many months".<sup>12</sup>
27. The proceedings brought by AWB for an injunction against Commissioner Cole do not appear to have been finally determined by a court. Accordingly, whether the amendment to the RCA is constitutional remains a live question.

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<sup>11</sup> [2006] FCA 1234

<sup>12</sup> The Cole Report at [7.57]

28. The Cole Report was critical of AWB's conduct with respect to its privilege claims for 2 main reasons:
- (a) AWB commenced proceedings in the Federal Court to have its outstanding privilege claims determined for the purported purpose of avoiding delay in awaiting promulgation of the RCA amendment. However, once the amendment came into force, the Cole Inquiry was able to address AWB's claims for privilege 3 weeks before the Federal Court could do so. Commissioner Cole considered that AWB's "pretence that it was taking the Federal Court proceedings to avoid delay was exposed as a charade" when AWB sought to restrain the Commissioner from exercising his powers under the RCA.<sup>13</sup>
  - (b) AWB demonstrated a lack of frankness and cooperation with the inquiry by first refusing to produce documents on the grounds of client legal privilege and then abandoning many of its claims for privilege.
29. Commissioner Cole noted that royal commissions were "normally established only where a matter of public interest so requires"<sup>14</sup> and that there was a conflict between the public interest in discovery of the truth and the private interest of companies and individuals in maintaining claims for client legal privilege.<sup>15</sup>
30. In view of the fact that there may be circumstances where it is appropriate that the public interest in discovering the truth should prevail over the private interest in maintaining client legal privilege, Commissioner Cole made the following recommendation:

That consideration be given to amending the Royal Commissions Act 1902 to permit the Governor General in Council by Letters Patent to

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<sup>13</sup> The Cole Report at [7.51]

<sup>14</sup> The Cole Report at [7.65]

<sup>15</sup> The Cole Report at [7.66]

determine that in relation to the whole or a particular aspect of matters the subject of inquiry, client legal privilege should not apply.<sup>16</sup>

#### **D. THE NATURE, RATIONALE FOR, AND STATUS, OF THE PRIVILEGE**

31. The function of evidence law is traditionally perceived, at the highest level of generality, as facilitating the discovery of the truth (or otherwise) of facts in issue in a proceeding.<sup>17</sup>
32. However, evidence law permits of various exceptions, “driven by concerns altogether extraneous to fact-finding”<sup>18</sup>, which may militate against accurate fact-finding. As noted by Alex Stein:

These rules and doctrines...determine the outcomes of the clashes between fact-finding and other goals and values that the law upholds and promotes. Resolution of such clashes often results in suppressing fact-finding for the sake of other goals and values. Anglo-American legal systems prefer ignorance to fact-finding where the latter: entails revelation of state secrets or other confidential information; infringes privacy; disrupts matrimonial harmony; forces criminal defendants and suspects into the choice between contempt, perjury, and self-incrimination; discourages potential producers of accidents from taking precautions that might signal an admission of fault; chills peer review and other critical evaluation of professionals; creates a disincentive for benevolent actions interpretable as acknowledgment of responsibility; destabilizes contractual relationships by allowing testimony to substitute or undermine documented agreements; inhibits settlement negotiations and plea-bargain discussions; and these are just representative examples.<sup>19</sup>

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<sup>16</sup> The Cole Report at [7.68]

<sup>17</sup> A Stein *Foundations of Evidence Law* (Oxford University Press New York 2005) chapter 3

<sup>18</sup> A Stein *Foundations of Evidence Law* (Oxford University Press New York 2005) p 25

<sup>19</sup> A Stein *Foundations of Evidence Law* (Oxford University Press New York 2005) p 25; footnotes omitted

33. An evidentiary privilege provides an immunity from the compelled production of certain types of material. It has been judicially described as “a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.”<sup>20</sup>
34. In its current form, client legal privilege protects three subsets of confidential communications made for a prescribed dominant purpose:<sup>21</sup>
- (a) **Advice privilege** protects verbal or written<sup>22</sup> communications<sup>23</sup> between a lawyer<sup>24</sup> and client<sup>25</sup> from disclosure in legal proceedings or otherwise, where such communications are confidential<sup>26</sup> and made for the dominant purpose<sup>27</sup> of requesting or providing legal advice;<sup>28</sup>
  - (b) **Litigation Privilege:**
    - (i) the first species protects verbal or written communications, made or prepared in confidence, for the dominant purpose of use in existing or contemplated proceedings;<sup>29</sup>
    - (ii) the second species protects against the disclosure of confidential communications made between a lawyer or the client and a third

<sup>20</sup> *Perry-Jones v Law Society and Others* [1969] 1 Ch 1 per Diplock LJ at 9, quoted in “The Abrogation of the Privilege Against Self-Incrimination” Report No. 59 of the Queensland Law Reform Commission December 2004 at [1.2] (hereafter **QLRC Report on Self-Incrimination**)

<sup>21</sup> See generally, *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550 per McHugh J. This substantive content also evidences a widening of the privilege’s ambit: see Dr Ronald J Desiatnik *Legal Professional Privilege in Australia* (Second Edition) (LexisNexis Butterworths Australia 2005) at p. 12

<sup>22</sup> See *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (1996) 69 FCR 149 for the recent widening of the concept of “written” to encompass electronic communications

<sup>23</sup> On the nature of a communication, see *Propend* at 552 per McHugh J and *Carmody v Mackellar* (1997) 148 ALR 210 at 229 and *Dalleagles Pty Ltd V Australia Securities Commission* (1991) 4 WAR 325 at 333 per Anderson J.

<sup>24</sup> As to who constitutes a lawyer for these purposes, see *Waterford v Commonwealth* (1987) 163 CLR 54.

<sup>25</sup> As to cases of mistaken belief on the part of a client, see *Cromack v Heathcote* (1820) 129 ER 857 *Calley v Richards* (1854) 52 ER 406

<sup>26</sup> *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988) 14 NSWLR 132 per McLelland J at 133

<sup>27</sup> On dominant purpose, see *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 210 CLR 49 overturning *Grant v Downs* (1976) 135 CLR 674 (the sole purpose test).

<sup>28</sup> As to what constitutes legal advice, see *Waterford v Commonwealth* (1987) 163 CLR 54. This privilege will, parasitically, protect communications which allude to instructions given to a solicitor: *Packer v Deputy Commissioner of Taxation* (1984) 55 ALR 242 at 274 per Sheppardson J

<sup>29</sup> See generally *Southern Equities Corporation Ltd v Western Australian Government Holdings Ltd* (1993) 10 WAR 1 (FC) at 16 per Seaman J

party in respect of, and for the dominant purpose of, existing or reasonably contemplated litigation.<sup>30</sup>

35. As observed by the Supreme Court of the United States, client legal privilege is the “oldest of the privileges for confidential information known to the common law”<sup>31</sup>; its origins dating back at least to the 16<sup>th</sup> century.<sup>32</sup>
36. The rationale for, and status of, the privilege have evolved significantly during the five centuries following its inception.<sup>33</sup>
37. Originally, the privilege was classified merely as a rule of evidence<sup>34</sup> and was justified by an “honour theory”, according to which a solicitor ought not to be required to disclose information communicated to him in confidence.<sup>35</sup>
38. The honour theory was displaced in the 18<sup>th</sup> century,<sup>36</sup> the privilege being ascribed instead to the client, who could waive and/or lose its protection.<sup>37</sup>
39. The primary modern rationale for the doctrine rests in the notion of the rule of law; in particular, that the privilege is the necessary corollary of the right of persons to obtain skilled legal advice, in circumstances in which full disclosure is protected and hence encouraged.<sup>38</sup>

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<sup>30</sup> As to when the privilege, which must be claimed, can be claimed, see Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-6

<sup>31</sup> *Upjohn Company v United States* 449 US 383, 389 (1981); see also *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ

<sup>32</sup> *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504, HL; *Baker v Campbell* (1983) 153 CLR 52 at 84

<sup>33</sup> Chapter 1 of B Thanki QC (ed) *The Law of Privilege* (Oxford University Press Oxford 2006) provides an excellent historical introduction. See also J Auburn *Legal Professional Privilege: Law and Theory* (Hart Publishing Oxford 2000) chapter 1 and Dr Ronald J Desiatnik *Legal Professional Privilege In Australia* (Second Edition) (LexisNexis Butterworths Australia 2005) chapter 2.

<sup>34</sup> *Parry-Jones v Law Society* [1969] 1 Ch 1, 9, CA

<sup>35</sup> *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 504, HL

<sup>36</sup> *Duchess of Kingston's Case* (1776) 20 St Tr 355; *Hill's Trial* (1777) 20 How St Tr 1362

<sup>37</sup> See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* at 570 per Gummow J

<sup>38</sup> *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 212 at 161; *AM & S Europe Ltd v Commission of the European Communities* [1983] 3 WLR 17 at 54; cited with approval in *Baker v Campbell* (1983) 153 CLR 52 at 85 per Murphy J; per Deane J; Lord Hoffman, *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, HL at [7]

40. Similarly, the privilege no longer constitutes a rule of evidence but is considered to be a substantive right<sup>39</sup> (or more precisely, immunity).<sup>40</sup> Even in this regard, the priority of the privilege has evolved. Whereas the substantive immunity was first conceived as correlated to a fundamental constitutional or human right,<sup>41</sup> it has recently been conceptualized as a fundamental human right *per se*.<sup>42</sup> Fundamental citizen's right would be the better language, as the privilege current extends to all citizens, whether natural persons or bodies corporate, and should continue to do so.
41. This evolution - and elevation - of the privilege has occurred across both the common law and civilian traditions. Within the European Community, the European Court of Justice has incorporated the privilege into its case law on the basis that it is fundamental to the legal systems of each of the Member States.<sup>43</sup>
42. Thanki *et al* have recently observed that:

In a sense, the jurisdictions of the common law world have since the 1980s 'reinvented' client legal privilege as a substantive and

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<sup>39</sup> *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, 507-8, HL; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543

<sup>40</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The privilege is an immunity in so far as the privilege entitles a party not to disclose information notwithstanding its relevance to proceedings; it may also be waived or lost. *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 541 per Gummow J

<sup>41</sup> *AM & S Europe Ltd v Commission of the European Communities* [1983] 3 WLR 17 at 54; cited with approval in *Baker v Campbell* (1983) 153 CLR 52 at 85 per Murphy J

<sup>42</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 92 per Kirby J; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 576 per Kirby J.

<sup>43</sup> *Case 155/79 AM&S Europe Ltd v Commission* [1983] 1 QB 878, 949-51. See B Thanki QC (ed) *The Law of Privilege* (Oxford University Press Oxford 2006) at [1.60] – [1.65] for consideration of possible implications of the incorporation of the European Convention on Human Rights into British law (by means of the Human Rights Act 1998) on the "absolute" status of the privilege. The sole, minor, exception to the ambit of the privilege within the European Communities exists in respect of Articles 81 and 82 of the Treaty of Rome (the antitrust provisions). In this regard, communications with lawyers employed by parties to investigations into alleged breaches of the antitrust provisions are not protected by the privilege. See B Thanki QC (ed) *The Law of Privilege* (Oxford University Press Oxford 2006) at [1.59].

fundamental right to limit the power of the state to compel disclosure of privileged documents.<sup>44</sup>

43. Such reinvention is necessarily Janus-faced. One perspective acknowledges the current priority of the doctrine. The other acknowledges the instability such reinvention entails.<sup>45</sup>
44. The instability is mirrored in the rationale(s) underpinning the doctrine. As noted above, the current primary justification rests in the public interest in the application of the rule of law.<sup>46</sup> As Brennan J observed in *Carter v Northmore Hale & Davey Leake*:

The law is administered more frequently and more directly by legal advisers than it is by judges. Client legal privilege ensures that the law's writ can run effectively whenever a legal problem arises or a person seeks to chart a course of conduct in conformity with law.<sup>47</sup>

45. Although ostensibly professionally self-serving, this justification appears more cogent when it is emphasized that the lawyer-client relationship is unique in being *internal to* the functioning of the rule of law. As Dawson J has observed:

The relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance.<sup>48</sup>

46. However, this justification presupposes a balancing exercise between two aspects of the public interest:

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<sup>44</sup> B Thanki QC (ed) *The Law of Privilege* (Oxford University Press Oxford 2006) at [1.05].

<sup>45</sup> In this regard, see Dr Ronald J Desiatnik *Legal Professional Privilege In Australia* (Second Edition) (LexisNexis Butterworths Australia 2005) at 3.

<sup>46</sup> *Grant v Downs* (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ

<sup>47</sup> (1995) 183 CLR 121 at 127 referring to *Waterford v Commonwealth* (1987) 163 CLR 54 at 57 and *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878 at 913

<sup>48</sup> *Baker v Campbell* (1983) 153 CLR 52 at 128. The rationale clearly cannot apply in many cases in respect of third party litigation privilege: in which it cannot (directly) encourage frank communications between a solicitor and his client.

- (a) first, “the public policy that, in the administration of justice and investigative procedures, there should be unfettered access to relevant information”;<sup>49</sup> and
- (b) secondly, “the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.”<sup>50</sup>
47. Justice French has recently described the concept of “the public interest” as a “category of meaningless reference.”<sup>51</sup> Its utility shrinks as its scope expands. Moreover, while the privilege is increasingly understood as the product of, as opposed to a factor within, a process of compromise - “the doctrine...itself represents a balance struck between competing public interests. Given its application no further ‘balancing exercise’ is appropriate.”<sup>52</sup>
48. More pragmatic rationales have been suggested. McHugh J in *Carter v Northmore Hale Davey & Leake*<sup>53</sup> suggests that the privilege provides “a practical guarantee of fundamental, constitutional or human rights”. Similarly Gummow J in *Goldberg v Ng* (1995) 185 CLR 83 at 121 observes that the privilege is “a rule of law, the best explanation of which is that it affords a practical guarantee of fundamental rights”.
49. Each of these rationales not only underlines the fragility of the doctrine, but betrays the central tension underpinning it:<sup>54</sup> “it may seem somewhat paradoxical that ‘the perfect administration of justice’<sup>55</sup> should accord priority to

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<sup>49</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64 per Gleeson CJ and Gaudron and Gummow JJ

<sup>50</sup> *Ibid* at 65 per Gleeson CJ, Gaudron and Gummow JJ

<sup>51</sup> “Authorisation and public benefit – playing with categories of meaningless reference?” Justice R S French, Federal Court of Australia, 4<sup>th</sup> Annual University of South Australia Trade Practices Workshop, 20-21 October 2006, Barossa Valley Resort. See also M Feintuck, *“The Public Interest” In Regulation* (Oxford University Press Oxford 2004) at p. 3: “the public interest will often appear to be an empty vessel, to be filled at different times with different content.”

<sup>52</sup> *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 563 per Gummow J and Kirby J at 583

<sup>53</sup> (1995) 183 CLR 144 at 161

<sup>54</sup> *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 552 per McHugh J

<sup>55</sup> *Bullivant v Attorney-General for Victoria* [1901] AC 196 at 200 per the Earl of Halsbury LC

confidentiality of disclosures over the interests of a fair trial, particularly where an accused is in jeopardy in a criminal trial for a serious offence.”<sup>56</sup>

50. The privilege is also sometimes justified by reference to imparities in the relationship between the citizen and the state. In *Baker v Campbell* (1983) 153 CLR 52 at 120 Justice Deane J observes that, “[the] general principle represents some protection of the citizen...against the leviathan of the modern state.” Justice Wilson observes in similar terms that, “[t]he multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest.”

It is important to consider current developments within this context: client legal privilege is a fundamental - if fragile and underdetermined - premise of most modern, developed legal systems.

#### **E. THE LEGISLATIVE AND REGULATORY LANDSCAPE**

51. Four statutory regimes which are most likely<sup>57</sup> to fall within the ambit of amendments to the coercive information-gathering powers of Commonwealth investigatory bodies including the Australian Federal Police, the ACCC, ASIC, the Australian Tax Office and the Commonwealth DPP are:

- (a) The Australian Security and Investment Commission’s (**ASIC**) powers under the *Australian Securities and Investments Commission Act 1989* (Cth), in particular the compulsion powers conferred on ASIC under sections 30, 31, 32A and 33 of the 1989 Act (by reference also to sections 13-15 of the 1989 act);
- (b) The National Crime Authority’s (**NCA**) powers under the *National Crimes Authority Act 1984* (Cth), in particular the summons and documentary compulsion powers under sections 28 and 29 of the 1984 Act;

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<sup>56</sup> *Carter v Northmore Hale Davey & Leake* 183 CLR 121 at 154 per Deane J

<sup>57</sup> ALRC Issues Paper Chapter 3

- (c) The Australian Competition and Consumer Commission's (**ACCC**) powers under the *Trade Practices Act 1974* (Cth), in particular under the provisions of section 155 of the 1974 Act;
  - (d) The Australian Taxation Offices (ATO) powers under the *Income Tax Assessment Act 1936* (Cth), in particular under the investigation powers conferred by sections 263 and 264 of the 1936 Act.
52. The ALRC's consideration also extends to amendments to legislation relating to the establishment of Royal Commissions and Special Commissions of Inquiry<sup>58</sup>.

#### **F. A PROBLEMATIC PROTECTION?**

53. Beyond the observations in the Cole Report, concerns relating more generally to processes of discovery and documentary evidence have also possibly provoked renewed concern with the privilege (for example, the circumstances surrounding *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197).
54. We outline below various practices that may compound these concerns, in an attempt to identify the nature of the problems relating to privilege. Having done so, we suggest means by which problems may be addressed.
55. It is the thesis of this submission that:
- (a) the rationales for the privilege discussed in Part D above are and remain cogent, even more so as the law becomes ever more complex;
  - (b) the concerns identified by Commissioner Cole do not reflect either a problem conceptually intrinsic to the privilege *per se* or a pervasive practical misuse of the privilege sufficient to justify its substantial curtailment or abolition. Rather, the issues arise from isolated

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<sup>58</sup> ALRC Issues Paper, pages 134 – 137.

overambitious claims, which are more effectively addressed through education and procedural amendment to the manner in which claims are made;

- (c) to remove the privilege entirely in respect of Commonwealth bodies of enquiry would effectively be to abolish the privilege; and
- (d) while one alternative may be to abolish the privilege within certain domains and establish a use immunity (and/or a derivative use immunity), the constraints which this step would place upon the lawyer-client relationship would be administratively onerous and would compromise the nexus of trust on which such relationships are based.

**(a) Designating decision-makers in respect of privilege claims**

56. Privilege is an interlocutory matter. Although fundamentally related to the basic role of the court as a forum in which to ascertain truth, its interlocutory status can diminish its perceived importance in the conduct of litigation. This is particularly so within the context of large litigation conducted by large law firms, where this fact - and the exigencies of time and costs-management - can lead to delegation of decision-making in respect of privilege claims to junior solicitors. This, in turn, often leads to expansive privilege claims, arising from both caution and inexperience.

57. This practice could be cured by creating a requirement that the solicitor on the record for any proceeding (or other senior solicitor with carriage and control of the matter) certify, at the time of making a (single or cumulative) claim to privilege that:

- (a) each privilege claim is supported by reasonable grounds; and

- (b) to the extent possible, and without disclosing privileged information, the grounds for each claim have been identified.<sup>59</sup>
58. Such a certificate could be analogous in form and status to certificates given by a practitioner under section 347(b) of the *Legal Profession Act 2004* (NSW) (**the 2004 Act**), warranting reasonable prospects of success in respect of proceedings.
59. Pursuant to section 347(a) of the 2004 Act, the provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct (within the meaning of sections 496-498 of the 2004 Act) by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.
60. An analogous obligation in respect of the making of privilege claims could be inserted into the 2004 Act, court rules or professional rules.
61. The ALRC may consider making recommendations to the NSW (and other state) governments to achieve the necessary legislative change.
62. Alternatively, it is arguable that a cognate requirement is already incumbent upon legal professionals within New South Wales.
63. Section 56 of the *Civil Procedure Act 2005* (“Overriding Purpose”) provides:
- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings [**the overriding purpose**]

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<sup>59</sup> It is important to recall in this context that the privilege attaches to a communication *per se*, and not its documentary or other manifestation, with the result that the fact that a document exists is not in itself privileged: *Geneva Finance Ltd (receiver and manager appointed) v Boys* (unreported, Supreme Court of Western Australia 19 December 2001) at [28] per McLure J

- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.<sup>60</sup>
64. Accordingly, pursuant to section 56, a litigant is under a primary statutory duty to the Court to assist it in pursuing the overriding purpose. A legal professional, in turn, is under a primary statutory duty to ensure that he or she does not cause his or her client litigant to breach this duty.
65. Making claims in respect of client legal privilege in an expedient, reflective and restrained manner can be conceptualized as a way of fulfilling the obligations imposed by secs. 56(3) and (4). Correlatively, delay and obfuscation in the making and presentation of such claims would constitute a breach of the obligation, which would be relevant, *inter alia*, to the exercise of the Court's discretion as to awards of costs (sec. 56(5)).
66. Within New South Wales, professional rules (as made under sections 702 and 703 of the 2004 Act) are rendered binding upon Australian legal practitioners and Australian-registered foreign lawyers to whom they apply by virtue of section 711(1) of the Act. By virtue of section 498(1)(a) of the Act, conduct consisting of a contravention of the Act, the regulations or the legal profession

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<sup>60</sup> Discussed at: Second Reading Speech (Legislative Assembly) The Hon Bob Debus Wednesday 6 April 2005; Second Reading Speech (Legislative Council) The Hon. Henry Tsang Tuesday 24 May 2005; Explanatory Notes clause 56

rules may constitute unsatisfactory professional conduct or professional misconduct, which may, depending upon gravity, warrant removal from the roll in a disciplinary proceeding.

67. Notwithstanding the existing section 56 of the *Civil Procedure Act 2005*, and the possibility of legislative strengthening of the *2004 Act*, the NSW Bar Association considers that both the NSW Law Society and the NSW Bar Association could set in the train the necessary processes of consultation to bring about amendments to their respective rules to deal with this issue; specifically, a separate professional rule stipulating obligations in respect of privilege claims which would provide greater clarity as to the specific content of a practitioner's duty to the court, and would focus for practitioners the serious and substantive nature of a claim to privilege.
68. Such a rule could take the following form:

**A. For solicitors:**

**Revised Professional Conduct and Practice Rules 1995, Rule A.15AA:**

- (a) A practitioner must ensure that any advice which he or she gives to his or her client in respect of making or maintaining a claim of client legal privilege in respect of a communication, and any such claim made or maintained, is supported by reasonable grounds.
- (b) When making or maintaining a claim to client legal privilege on behalf of a client, the senior practitioner who is responsible for the provision of the service or a principal of the practice must certify that each claim is supported by reasonable ground(s) and, to the extent possible, must identify the ground(s) for each claim.
- (c) In determining whether a claim to client legal privilege is supported by reasonable ground(s), a practitioner must have regard to the content of the document, the existence or otherwise of any contemporaneous

records made by the author of the communication to the effect that it is considered to be privileged, and any factual matters bearing upon the creation of the communication, including the purpose(s) of the author and recipient or both.

- (d) In making partial claims of privilege in respect of communications in or recorded in a document, a practitioner must mask only those portions of the document the disclosure of which would result in the substance of privileged communications being revealed.
- (e) For the purposes of this Rule, “client legal privilege” has the meanings ascribed to that term at sections 117 - 119 of the *Evidence Act 1995* (NSW), as amended from time to time; and other terms as defined in the *Legal Profession Act 2004* (NSW), as amended from time to time have the same meanings in this rule.

**B. For barristers:**

**Revised Bar Rule 42B**

- (a) A barrister must be satisfied that any advice which he or she gives to his or her client or instructing solicitor in respect of making or maintaining a claim of client legal privilege in respect of a communication, and any such claim maintained by the barrister, is supported by reasonable grounds.
- (b) In determining whether a claim to client legal privilege is supported by reasonable ground(s), a barrister must have regard to the content of the document, the existence or otherwise of any contemporaneous records made by the author of the communication to the effect that it is considered to be privileged, and any factual matters bearing upon the creation of the communication, including the purpose(s) of the author and recipient or both.

(c) For the purposes of this Rule, “client legal privilege” has the meanings ascribed to that term at sections 117 - 119 of the *Evidence Act 1995* (NSW), as amended from time to time.

**[The position of barristers taking direct access briefs may require further consideration.]**

69. Professional rules of this kind are likely to focus the minds of key decision-makers, throughout the entire process of bringing privileged communications into existence and making claims during discovery and related processes, upon the existence of, and basis for, privilege claims.
70. As noted above, each of the Law Society (should it embrace the proposed rule) and the NSW Bar Association will need to go through an appropriate process of consultation before such rule changes could be implemented.
71. The ALRC may care to support this rule change if it thinks it sound.

**(b) Transparency in the making of claims**

72. In litigation, claims relating to privilege most commonly arise during discovery.
73. In New South Wales, a party must provide discovery by serving on the opposing party a list of all documents (other than “excluded documents”).<sup>61</sup> “Excluded documents” are defined as any of the following documents:
  - (a) any document filed in the proceedings;
  - (b) any document served on the opposing party;

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<sup>61</sup> *Uniform Civil Procedure Rules (UCPR)*, r 21.3. Part 21 of the UCPR does not apply to proceedings in the Small Claims division of the Local Court and the Dust Diseases Tribunal

- (c) any document that wholly came into existence after the commencement of the proceedings;
  - (d) any additional copy of a document included in the list of documents that is identical to the document in the list; and
  - (e) any document comprising an original written communication sent by the party giving discovery prior to the date of commencement of the proceedings of which a copy is included in the list of documents.<sup>62</sup>
74. A document that is claimed to be privileged is not an “excluded document”. As a result, the discovery list must include all documents over which a claim for privilege is made.
75. The discovery list must be organised in accordance with r 21.3(2) of the UCPR. In particular, the list must identify any document that is claimed to be a privileged document, and specify the circumstances under which privilege is claimed to arise.
76. In our experience, it is often the case (although perhaps diminishingly so), that a party providing discovery does not, unless vigorously pressed to do so, separately identify each individual document over which a claim for privilege is made. Rule 21.3(2) of the UCPR allows the list to include a brief description of groups of documents by reference to the nature of the document and the date. The UCPR discovery list precedent (Form 10) also requires the number of documents in the group to be specified. The practice of grouping privileged documents and describing them generally by reference to the nature of the group of documents (for example, “correspondence between lawyer X and client Y”) is particularly prevalent where there is a large number of privileged documents.

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<sup>62</sup> UCPR, r 21.1(1). The court may declare that any of the above documents is not an “excluded document” for the purposes of the proceedings.

77. The discovery list must be accompanied by a supporting affidavit and, if the party giving discovery has a solicitor, a solicitor's certificate of advice.<sup>63</sup> The deponent of the affidavit must state, in respect of any document that is claimed to be a privileged document, the facts relied upon as establishing the existence of the privilege.<sup>64</sup>
78. The position in the Federal Court is similar.<sup>65</sup> A party giving discovery in the Federal Court must include all documents over which privilege is claimed in the discovery list. The list must specify each document individually or by group.<sup>66</sup> In our experience, typically, a party does not list privileged documents individually, unless vigorously pressed to do so. Where the party claims a document is privileged, the party must sufficiently state the grounds of the privilege in the list.<sup>67</sup>
79. While the requirement that a party specify the grounds for a claim for privilege may appear to adequately expose the basis of the privilege claim for testing and may also provide the necessary discipline for a claimant, we consider that the utility of this requirement may be undermined to the extent that documents over which a claim for privilege is made are not listed individually.
80. In order to address this issue, the Bar Association proposes (with the support of the Law Society if it agrees) to recommend to the rules committee of the Supreme Court and the Federal Court that the court rules be amended to require that, to the extent reasonably practical without loss of the privilege:
- (a) each document brought into existence prior to the commencement of the litigation be individually listed by reference to the date, type, author and recipient of the document, or if this information is not available, a sufficient description of the document; and

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<sup>63</sup> UCPR, r 21.4(1)

<sup>64</sup> UCPR, r 21.4(2)

<sup>65</sup> See Federal Court Rules (**FCR**), O 15.

<sup>66</sup> FCR, O 15, r 6(3)

<sup>67</sup> FCR, O 15 r 6(4).

- (b) the facts relied upon for the existence of the privilege be identified as specifically as possible consistently with the privilege on a document by document basis.

A certification requirement as per the rule proposed in paragraph 69 above could also be considered by the Courts.

81. The ALRC may care to support these Court rule changes if it considers them sound.

**(c) Masking of part-privileged documents**

82. Privilege attaches not to documents (or other records of a communication) but to a communication *per se*,<sup>68</sup> including documents or parts of documents which constitute secondary evidence of privileged communications,<sup>69</sup> of from which the substance of such communications can be inferred.

83. Where a communication is brought into existence for the dominant purpose of providing legal advice, “the fact that it contains extraneous matter will not deny to it the protection of the privilege.”<sup>70</sup> In such circumstances, the party producing a document (or other record of a communication) is required to mask those portions of the document that directly or indirectly communicate privileged information, while allowing inspection of the remaining portions of the document.

84. The availability of masking indicates that judicial consideration has settled on an atomistic conception of communication. One document may comprise many different communications, each of which must be analyzed as to whether it attracts the privilege. Communications which do not attract the privilege do not enjoy it merely by virtue of being included in a document which contains

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<sup>68</sup> *Ex parte Campbell* (1870) LR 5 Ch App 703; *Re Furney* (1964) 20 ABC 155

<sup>69</sup> *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217 at [20]; *Three Rivers 5* [19], [26]

<sup>70</sup> *Waterford v Commonwealth* 163 CLR 54 at 66 per Wilson and Mason JJ

privileged communications. This conception necessarily contracts the ambit of privilege claims.<sup>71</sup>

85. Masking most frequently occurs not in respect of primary privilege claims, but in respect of secondary, or derivative claims: a summary of legal advice in one sentence in a 10-page board paper; extracts of a conversation with a solicitor in a client's longer file note etc.
86. The legitimacy of claims in respect of masked portions is, to some extent, policed by the relatively recent development allowing court scrutiny of privilege claims,<sup>72</sup> typically in the event of a challenge and where the challenging party satisfies the court that there is adequate basis for inspection.<sup>73</sup>
87. Over-masking is likely to be the product either of an attempt to widen a privilege claim inappropriately or of a caution bred of a lack of understanding about how appropriately to mask a document.
88. The former potential source of over-masking can, as suggested above, be specifically addressed in the context of a new professional rule for solicitors (see Proposed Rule A.15AA(d) above). In the event that the proposals set out above were adopted - that the solicitor with substantial carriage of the matter always exercises responsibility for ultimate decisions in respect of privilege, and that this responsibility be articulated in professional or statutory rules – it is likely that the already contracting field of the privilege would be further reduced.
89. Education is crucial in addressing the latter potential source of over-masking. To this end, guidelines as to appropriate masking (and indeed appropriate making of claims) could be published in the *Law Society Journal* and *Bar News* in order to inculcate improved masking practices.

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<sup>71</sup> A conception which denied a claim of privilege to material which was accompanied by extraneous material would be a conception which effectively abrogated the privilege.

<sup>72</sup> *Grant v Downs* (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ; cf *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359 at 367 per Giles J

<sup>73</sup> See, generally, *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134 at 146 per Jenkins J

90. Again the ALRC may consider supporting such rule changes and further education if it thinks it sound.

**(d) Warehousing and privileging**

91. “Warehousing” is the act of placing prejudicial documents in the hands of third parties and beyond the power of a party to litigation on the understanding that such documents may be retrieved by the party “by the grace and favour of the third party”.<sup>74</sup>

92. “Privileging” is the act of placing prejudicial documents “in the hands of lawyers under cover of spurious requests for legal advice so as to permit a claim for privilege.”<sup>75</sup> This may be done by labelling otherwise non-privileged documents “for the purpose of legal advice” and providing the documents to a lawyer purportedly for the purpose of seeking legal advice.

93. The purpose of warehousing and privileging is to enable a party to place prejudicial documents beyond the reach of litigants.

94. There is no evidence available to the NSW Bar Association to suggest the widespread use of warehousing or privileging.

95. During the Cole Inquiry, a related issue arose, which is not strictly warehousing or privileging per se. AWB initially claimed privilege over advices it received from counsel and briefs provided to counsel for the purpose of the advice. AWB eventually abandoned its claims for privilege over some of the advices and briefs. Commissioner Cole was particularly critical of AWB’s insistence that the documents contained in the briefs were privileged, stating that:

Whatever may be said about client legal privilege flowing from the skill of compiling a brief, it is plain that the original documents copied in the brief were all material to this Inquiry, would have had to be produced in

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<sup>74</sup> *Re Mowbray; Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15 (*Brambles v BATAS*) at [12]

<sup>75</sup> *Brambles v BATAS* at [12]

response to notices, and would, after the expenditure of significant time and money, be complied by the Inquiry to give a chronological picture of the involvement of AWB and its officers in the payment of monies by way of trucking fees.<sup>76</sup>

96. The warehousing issue is, to some extent, addressed by the fact that a party's discovery obligation in litigation extends to documents in the "possession, custody or power" of the party giving discovery. Accordingly, the following types of documents are discoverable notwithstanding that they are not in the possession of the party giving discovery:
- (a) documents in the possession of a party's agent;
  - (b) documents which the party has a right to obtain from another person; and
  - (c) documents which the party would be likely to obtain if it made a request to the owner of the documents.
97. Rule 21.3(2)(a) of the UCPR also deals, to some extent, with the warehousing issue. That provision requires the list of discovery documents to be divided into 2 parts:
- (a) Part 1 must include documents in the possession of the party giving discovery; and
  - (b) Part 2 must set out documents that are not, but that within the last 6 months prior to the commencement of the proceedings have been, in the possession of the party giving discovery.
98. Accordingly, to the extent that a party has "warehoused" documents in the 6 months before proceedings were commenced, it must already provide a list of those documents. This procedure may assist the party receiving discovery to make further inquiries as to the existence or otherwise of the documents.

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<sup>76</sup> The Cole Report at [7.64]

99. As to privileging, client legal privilege attaches to a copy of a non-privileged document in the possession of a lawyer if the copies were made for the dominant purpose of obtaining or giving legal advice or for the dominant purpose of litigation.<sup>77</sup> However, if a party copied a non-privileged document with the intention of destroying the original and placed the copy in a lawyer's possession for the dominant purpose of obtaining legal advice or for litigation, client legal privilege would not attach to the copy document.<sup>78</sup>
100. The crime/fraud exception<sup>79</sup> to client legal privilege would also strike at any warehousing or privileging that may improperly occur.
101. Accordingly, we recommend that no further changes are required in the area of warehousing and privileging other than the new proposed rules set out above.
102. As to the conduct of AWB referred to above, it is obviously desirable for a party who intends to abandon a claim to privilege to do so as early as possible. However, it is difficult to see what further recommendations may be made to address that issue.

**(e) Legal advice privilege – what is legal advice?**

103. *Waterford v Commonwealth* established, in the context of the provision of legal advice to Government agencies, that a distinction exists between legal advice intended to form the basis of an administrative decision to be made in the performance of some public duty (which relates to the executive function of government) and legal advice which will enjoy the protection of the privilege.
104. Were a similar dichotomy to be ventured in the context of commercial legal advice, it is likely to distinguish between legal advice and strategic advice, with the latter falling beyond the protection of the privilege, unless parasitically

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<sup>77</sup> *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (**Propend**). This case was decided before *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 and accordingly referred to the sole purpose test

<sup>78</sup> *Propend* at 546 per McHugh J and at 570 per Gummow J

<sup>79</sup> *Evidence Act 1995 (NSW)* s 125.

protected as otherwise disclosing the substance of the legal advice given. Recent developments in the law of privilege, however, have not recognized this potential divergence between types of advice.

105. The House of Lords in *Three Rivers District Council (No. 6)* [2005] 1 AC 610, HL, determined that legal advice covers advice as to what should prudently and sensibly be done by a client within a legal context, including the presentation of the case to an inquiry by someone whose conduct might be criticized by it. A “legal context” will typically require that the advice sought from a solicitor relates to the rights, liabilities, obligations or remedies of the client either under private or public law. It will also typically be necessary that “the occasion on which the communication takes place” and “the purpose for which it takes place” is such as “to make it reasonable to expect the privilege to apply.”<sup>80</sup>

106. These developments leave the law in an uncertain and slightly circular state; potentially returning the decision-maker, at the end of the process of analysis, to a series of policy considerations.<sup>81</sup> Notwithstanding this, we do not consider that there can be any helpful *ex ante* mapping of the boundaries of legal advice. Judicial scrutiny of claims under challenge will exercise adequate constraint, and courts are best placed to evaluate, in a context-sensitive manner, the legitimacy of claims.

## **G. THE RISK OF ABOLITION: NOT WISELY BUT TOO WELL**

107. We have addressed above:

- (a) the current rationales on the basis of which retention of the privilege is justified; and
- (b) the practices and trends which may attract criticism to the privilege, but can be addressed by amended or clarified rules or education.

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<sup>80</sup> Baroness Hale at [62]

<sup>81</sup> Cf in the context of ascribing liability in tort law, Denning MR *Spartan Steel & Alloys Ltd v Martin & Co* [1973] QB 27 at 36

108. In this Part, we identify further concerns regarding the recommendations made within the Cole Report, and possible implications thereof. We suggest that a patchwork quilt approach to limiting the availability or use of the privilege risks eliminating it entirely, and conclude that the appropriate cure for a mischief which resides in dilatory practices is a practical one.

**(a) Government- and Forum-Specific Prescription**

“all human affairs...may by possibility become the subject of judicial enquiry.”

Lord Brougham LC, *Greenough v Gaskell* (1833) 1 M & K 98, 103<sup>82</sup>

109. As noted above, the ALRC has been requested to conduct an inquiry in respect of client legal privilege as it relates to the coercive information-gathering powers of Commonwealth investigatory bodies *including* the Australian Federal Police, the ACCC, ASIC, the Australian Tax Office and the Commonwealth DPP. Given the impetus for reform contained in the Cole Report, it can be anticipated that such consideration will extend to amendments to legislation relating to the establishment of Royal Commissions and Special Commissions of Inquiry. The ALRC Issues Paper has identified a range of other federal investigatory bodies where the privilege may be claimed<sup>83</sup>. The specificity of the proposal (be it specificity of entity (Government bodies) or of forum (Royal Commissions etc)) raises various concerns.

**(i) Government-specificity**

For whosoever entereth into another's dominion, is subject to all the laws thereof; unless he have a privilege by the amity of the sovereign, or by special licence.

T Hobbes, *Leviathan*<sup>84</sup>

“[the] general principle [of client legal privilege] represents some protection of the citizen...against the leviathan of the modern state.”

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<sup>82</sup> Cited in B Thanki QC (ed) *The Law of Privilege* (Oxford University Press Oxford 2006) at [1.12]

<sup>83</sup> ALRC Issues Paper 33 Chapter 3.

<sup>84</sup> Edited and abridged with an introduction by John Plamenatz (Fontana, London 1962) Chapter XXI, “Of the Liberty of Subjects” t p 213

Deane J in *Baker v Campbell* (1983) 153 CLR 52 at 120

The individual a hundred years ago hardly needed to know that the central government existed...By the turn of the century the position was not much changed. Today, however, the individual citizen submits himself to the guidance of the state at all times. His schooling is enforced; his physical well-being can be looked after in a comprehensive health service; he may be helped by government agencies to find and train for a job; he is obliged while in employment to insure against sickness, accident and unemployment...In these and many other ways unknown to his counterpart a century ago, he is brought into close and regular contact with the government and its agencies.

Report of the Royal Commission on the Constitution (1973)<sup>85</sup>

110. We noted above that one of the rationales for the privilege is to maintain some parity between the individual *qua* citizen and the state *qua* prosecutor. The proposal to qualify the privilege only in respect of the coercive information-gathering powers of Commonwealth investigatory bodies directly undercuts this rationale. We submit that so direct a challenge to an established basis of the privilege must discharge a substantial justificatory onus; in particular in respect of the issue of why Commonwealth investigatory bodies should be the sole beneficiaries of the loosening of the immunity when they typically enjoy uniquely broad enforcement resources and machinery.

**(ii) Forum-Specificity**

111. When considering the abrogation of the privilege against self-incrimination, the Queensland Law Reform Commission observed the following:

The relevant issue is not the type of forum where a person is to be required to give information but, rather, whether the criteria that the Commission believes must be met in order to justify abrogation have in fact been satisfied. This would involve, for example, a consideration of the importance of the public interest to which the information in

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<sup>85</sup> Report of the Royal Commission on the Constitution, 1969-1973, CMND. 5460 (London; HMSO 1973), para. 232, cited in M Loughlin *The Idea of Public Law* (Oxford University Press Oxford 2003) at page 11

question relates and whether abrogation could reasonably be expected to advance or protect that public interest. Other factors, such as alternative sources of information, the provision of an immunity and the existence of procedural safeguards, would also be relevant.<sup>86</sup>

112. The logic of this observation is compellingly simple. Abrogation of privileges which have, with their evolution, assumed the status of fundamental human rights<sup>87</sup> should be effected, if at all, by principles of universal application, settled in advance by a considered weighing of competing values and public interests. They should not be settled interstitially, in a forum-specific or *ad hoc* manner, in response to isolated public events. The latter course carries the considerable risk of death by a thousand paper cuts.

113. It may be argued against this - for example in the context of Royal Commissions and Public Inquiries - that the appointment of certain inquiries, and hence the *fora* in which they are heard - already presuppose a countervailing public interest in the pursuit of truth. For example, it could be argued that the mere fact that such an enquiry is called is usually responsive to considerable public concern about a certain event or topic (for example, the Special Commission of Enquiry into James Hardie or the HIH Royal Commission). As Sherman observes, such commissions are typically appointed to investigate “controversial...issues”.<sup>88</sup>

114. This assumption, however, would be deeply flawed. Royal Commissions and Special Commissions of Inquiry are discretionary creatures of executive government, not triggered by, or subject to, independent constitutional or legislative requirements. As Scott Prasser observes:

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<sup>86</sup> QLRC Report on Self-Incrimination at [8.11]

<sup>87</sup> In the context of self-incrimination, see: *Accident and Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420; *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 218 per Murphy J at 311; *Environment protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 508

<sup>88</sup> T Sherman *Executive Inquiries in Australia: Some Proposals for Reform*, Centre for International and Public Law, Faculty of Law, Australian National University, Law and Policy Papers, Paper No. 8, Canberra, 1997, p. 6, quoted in S Prasser *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths Australia 2006) at [8.4]

the executive government origin of public enquiries and their ad hoc quality poses special problems in explaining why, and predicting when, an inquiry will be appointed. A significant difficulty is that full access to all of the reasons for appointing a particular inquiry is not available to the public. Further, public inquiries are usually appointed under a range of motivations, including short-term political expediency entwined with the obtaining of more expert advice or expediting and even promoting community participation.<sup>89</sup>

115. Writing before his appointment to the bench, Justice Sackville expressed a related concern in respect of the 1982 amendments to the *Royal Commissions Act 1902* (Cth), which gave commissions expanded powers to fine witnesses and to force them to provide evidence, including self-incriminating evidence. He observed that these changes:

undercut protections against the intrusion of the state that many consider to be of fundamental importance to the administration of justice (and)...the expanding powers and functions of royal commission in Australia provide cause for serious concern...that investigative royal commissions constitute a serious and continuing threat to civil liberties in Australia.<sup>90</sup>

116. Accordingly, any incursions upon client legal privilege should progress in a principled, *ex ante* manner, and not in a forum-specific, *ad hoc* manner. Principled limitations should involve a counter-weighting of competing values and public interests in the contemporary context of the privilege, having regard to the ends which the privilege serves.

117. In this context, it should be noted that the New South Wales Bar Association does not agree with the position of ASIC as stated at paragraph 6.51 of the ALRC Issues Paper 33. ASIC apparently claims that, relying upon the authority

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<sup>89</sup> S Prasser *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths Australia 2006) at [1.6]

<sup>90</sup> R Sackville 'Royal Commissions in Australia: What Price Truth?' *Current Affairs Bulletin* (1984) 60 (12) 10-11

of *Yuill* (1991) 172 CLR 319, the ASIC Act has impliedly abrogated client legal privilege. However, the difficulty with ASIC's position is that *Yuill* was decided at a time when client legal privilege was in many quarters understood to be merely a rule of evidence and accordingly available only in judicial or quasi-judicial proceedings. As later explained by the High Court in *Daniels*<sup>91</sup>, a critical plank of the reasoning of the High Court in *Yuill* was that the then Companies Code 1981 fell to be construed against that background understanding that client legal privilege was merely a rule of evidence. Now that it is understood to be a rule of substantive law and an important common law immunity, the provisions of the ASIC Act 2001, even if in similar terms to those in the Companies Code, must be understood to have been enacted against that enhanced or clarified understanding of the basis of privilege. Parliament was given an opportunity in the ASIC Act 2001 to use the necessary clear words to make clear that the privilege – as now understood – was abrogated yet failed to do so. Indeed *Daniels*<sup>92</sup> said it may be that *Yuill* would now be decided differently.

118. Once extreme implication of a forum-specific limitation perhaps best illustrates the concerns underlying this submission.
119. Imagine a future in which particular *fora* suspend the operation of the privilege in particular circumstances. The lawyer interacting with her client at the beginning of a retainer would be ethically required to put her client on notice in respect of the circumstances in which the client's privilege might be lost. Words to the following effect may be necessary:

It is incumbent upon me to inform you that any of our communications which would otherwise enjoy client legal privilege and hence be protected from disclosure in evidence in court or other quasi-judicial proceedings, will not enjoy this immunity in the event that the communication is or becomes relevant to a Royal Commission, Special

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<sup>91</sup> *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 19 – 22 and 35.

<sup>92</sup> *Daniels* at 35.

Commission of Inquiry, or any proceeding involving the coercive information-gathering powers of Commonwealth investigatory bodies including the Australian Federal Police, the ACCC, ASIC, the Australian Tax Office and the Commonwealth DPP. Do you still wish to continue?

120. The client who comprehended this caveat may then enquire as to the potential derivative uses of such evidence once disclosed in these *fora*; in effect, once it has escaped, how does one put the genie back into the bottle?

**(b) Use and Derivative Use Immunity: Tertium Quid?**

121. The response to this possible question may suggest a *tertium quid*: In respect of the coercive information-gathering powers of Commonwealth investigatory bodies including the Australian Federal Police, the ACCC, ASIC, the Australian Tax Office and the Commonwealth DPP suspend the operation of the privilege, but afford a use immunity and/or derivative use immunity in respect of the use of material disclosed, beyond that immediate context. Consider in this context the mechanism provided by section 128 of the *Uniform Evidence Acts*<sup>93</sup>.

122. As noted by the QLRC Report on Self-Incrimination:

[2.47] Legislation that abrogates privilege may restrict the use that may be made of compelled information by conferring a “use” immunity on that information...

[2.48] A use immunity prevents the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide the information.

[2.52] Legislation that abrogates privilege may also go one step further than a mere use immunity and also protect against the use of information obtained as a result of the abrogation to uncover other

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<sup>93</sup> See ALRC Issues Paper 33, Chapter 7.

evidence against the individual who provided the information. This protection is known as a “derivative use” immunity. A derivative use immunity prevents the use of material that has been compulsorily disclosed to “set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.”<sup>94</sup>

123. It has been frequently observed that the protection which a use immunity provides is not the same as the privilege *per se*.<sup>95</sup> Similarly, creating a derivative use immunity raises as yet unresolved issues as to who bears the onus of proof in relation to the derivative nature of the evidence that is sought to be admitted in a proceeding against an individual who has provided compelled information.<sup>96</sup>

124. We submit that:

- (a) an abrogation of the privilege before a range of federal investigative agencies coupled with a use immunity would effectively amount to a destruction of the privilege itself. A lawyer would have to give the client advice as to the likely detriments in a free exchange of information and advice between the lawyer and client (of the type set out in paragraph 119 above) with the result that many clients would simply disavow the seeking of the advice;
- (b) the fact that the privileged communication could still be used in other proceedings and by other parties, once it was publicly disclosed, or that the very same federal investigative agency could still use it as a basis to generate further or other evidence from which a charge could be made against the client, means the client would be most reluctant to engage in

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<sup>94</sup> *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443

<sup>95</sup> See for example, *S Donaghue Royal Commissions and Permanent Commissions of Inquiry* (Butterworths Australia 2001) at [9.7] and *Hamilton v Oades* (1989) 166 CLR 486 per Deane and Gaudron JJ at 503

<sup>96</sup> QLRC Report on Self-Incrimination at [2.54] referring to *J Kluver Report on Review of the Derivative Use Immunity Reforms* (1997) at [3.76] – [3.84]

the full sharing of information characteristic of the lawyer-client relationship;

- (c) a related problem is that, once the client's communication is disclosed, it may be able to be used against the client in proceedings where the client is a witness and not a party and thus unable to assert any use immunity;
- (d) worse still, information would be conveyed to the lawyer, and advice given, in highly qualified or sanitized terms, fearing its public disclosure; this again would strike at the heart of the relationship;
- (e) further, clients or their lawyers may resort to providing advice only orally so that it would be more difficult for the federal investigative agency to later access it – however the inability to record the information or advice in writing will often severely limit the usefulness of the advice;
- (f) further, it has not been established that the addition of a derivative use immunity can overcome the above problems with a mere use immunity or that it is broadly acceptable. Indeed, federal investigative agencies in the past have heavily opposed the offering of a derivative use immunity because they see that it practically impedes their ability to obtain convictions using indirectly the very privileged communications they are prohibited from using directly<sup>97</sup>.

125. Since use and (less often) derivative use immunities frequently apply in the context of the privilege against self-incrimination, it falls to ask why client legal privilege should be more closely protected than any other privilege, particularly one as fundamental as that against self-incrimination. Below, we briefly contrast the differing rationales for, and qualifications on, these two privileges.

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<sup>97</sup> ALRC Issues Papers paragraphs 7.33 – 7.38.

**(c) Digression: self-incrimination and other privileges**

126. The privilege against self-incrimination is a privilege of similar long-standing, believed to have originated in the 17<sup>th</sup> century in England, to mitigate the severity of the *ex officio* oath administered by the Court of Star Chamber and the Court of High Commission.<sup>98</sup>

127. The rationales underpinning the privilege are often classified in binary terms, between “systemic” and “individual” justifications:<sup>99</sup>

**(a) Systemic:**

- (i) **To prevent abuse of power:** once the prosecuting party is entitled to compel the answering of any question, there is little distance to a situation in which the prosecuting party may use such means as are necessary to get the answer it seeks. The privilege creates a proper balance of power between the substantial mechanisms of the state and the rights and interests of citizens;
- (ii) **To prevent conviction founded on a false confession:** the privilege is an important means of ensuring that confessions cannot be improperly obtained for use in evidence against the individual who allegedly confessed;
- (iii) **To protect the accusatorial system of justice:** the privilege ensures that the prosecution bears the undiluted onus of proving guilt beyond reasonable doubt;

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<sup>98</sup> On the history of the privilege, see: QLRC Report on Self-Incrimination chapter 2; B Thanki QC (ed) *The Law of Privilege* chapter 8; Davies, the Hon Justice GL, “The Prohibition against Adverse Inferences from Silence: A Rule without a Rationale?” Part 1(2000) 74 *Australian Law Journal* 26 at 32; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 497-398; RH Helmholz, “Introduction” in RH Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press 1997); John H. Langbein “The Historical Origins of the Privilege Against Self-Incrimination at Common Law”, 92 (1994) *Michigan Law Journal*

<sup>99</sup> QLRC Report on Self-Incrimination [3.11] – [3.52]; D Dolinko, “Is There a Rationale for the Privilege Against Self-Incrimination?” (1986) 33 *UCLA L Rev* 1063

(iv) **To protect the quality of evidence:** the privilege is necessary to maintain the integrity of, and confidence in, evidence obtained in proceedings, by creating incentives and protections for truth-telling;

(b) **Individual:**

(i) **To avoid the “cruel trilemma”:** the trilemma is the unpleasant troika of choices confronting a guilty party: (a) refuse to provide the information requested (thereby risking being found in contempt of court) (b) provide the information (thereby risking a guilty finding); (c) do not tell the truth when questioned (thereby risking punishment for perjury);

(ii) **To protect human dignity and privacy:** the privilege is a human right as opposed to a rule of evidence, ensuring that the prosecution treats the accused as an innocent human being whose rights must be respected.

128. The rationales informing the two privileges are related but distinct. Their deepest shared core is a concern to protect the citizen – particularly at the point where his liberty or other freedoms are threatened - from the full force and power of the state. However there are significant differences, as developed below.

129. The consequences of abrogation of the privilege against self-incrimination are clear, and are stated by the QLRC Report on Self-Incrimination as follows:

[2.39]...[it] can have serious consequences for an individual who is compelled to provide information tending to prove that the individual has committed an offense or expose the individual to a penalty. The information obtained can lead to a criminal conviction, resulting in a fine or a term of imprisonment, to imposition of a civil or administrative penalty, or to disciplinary measures under a legislative regulatory scheme.

130. These consequences are paradoxically vast and narrow. On a societal level, they are vast in so far as they frame the interaction of citizen and state. On an individual level, they are vast in so far as they may entail that an individual loses his liberty, or be exposed to less extreme but still serious sanctions. They are, however, narrow on both a societal and individual level, in so far as they relate to discrete areas of evidence in the discrete life of one individual.

131. What of the consequences of the abrogation (absolutely or together with a deficient use or derivative use immunity) of client legal privilege?

132. Every practitioner holds concurrent obligations to her client and the court. The duty to the court is a paramount duty of candour and honesty. The duty to the client is a fiduciary duty:

The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.<sup>100</sup>

133. The fiduciary relationship between solicitor and client is legally presumed to be characterized by power and vulnerability; it must therefore be conducted with diligence and trust. The abrogation of client legal privilege strikes at the centre of this trust and at a central relationship in our legal system.

134. Consider again the caveat that we suggested in paragraph 119 above may be required in opening the future solicitor-client relationship. The client may understandably find himself withholding information from his solicitor through a fear of the consequences of full disclosure. As a layperson, he may unwittingly withhold information that is entirely innocent, but nonetheless central to a full

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<sup>100</sup> *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-97 per Mason CJ

exposition of the truth of his circumstances. Paradoxically, a concern for the ultimate truth of relevant facts may infect our legal system, at its starting point, with a lack of candour.

135. Accordingly, we submit that it is of fundamental importance that the lawyer-client relationship be viewed as an intrinsically valuable relationship,<sup>101</sup> integrally informed by the trust which client legal privilege inculcates. Abrogation of privilege strikes at the heart of a relationship which the law fosters.

136. Further, it would be incongruous to eliminate or weaken client legal privilege at a time when privileges which seek to protect the integrity of other relationships involving confidential communications are being strengthened. See for example:

- (a) Chapter 6 Part 5 Division 2 of the *Criminal Procedure Act 1986 (NSW)*, which establishes a sexual assault communications privilege over a counselling communication that is made to or about a victim or alleged victim of a sexual assault offence (note that this privilege is also extended into civil proceedings by reason of *Evidence Act 1995 (NSW)* Part 3.10 Division 1B);
- (b) *Evidence Act 1995 (NSW)* Part 3.10 Division 1A establishes a professional confidential relationship privilege which protects communications made by a person in confidence to another person in the course of a relationship in which the confidant was acting in a professional capacity and the confidant was under an express or implied obligation not to disclose its contents;

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<sup>101</sup> Brian Tamanaha's recent monograph *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press New York 2006) contains an analysis of various ways in which a theoretically and practically instrumental conception of law may jeopardize fundamental premises of the rule of law.

(c) note also current proposals being considered to enact, either at federal or state level, a specific privilege protecting journalists in respect to confidential communications received from sources.

**(d) Corporations should retain the privilege.**

137. The privilege currently is available to all persons, both natural and corporate. This position should not change.

138. First, as seen above, the privilege helps to protect and foster a fiduciary and confidential relationship which is integral to the rule of law. Citizens, whether corporate or natural, are entitled to the benefit of that relationship.

139. Second, it should not be assumed that all corporations have large affairs or that all corporations are confined to business or conversely that all individuals have small or private affairs. There is a wide variety of situations in which citizens, corporate or natural persons, need and seek legal advice. The need for protection of the confidential communications is equally great whatever the size or nature of the legal problem.

140. Third, to abrogate the privilege for corporations would often mean that evidence could be obtained and used adversely to natural persons who are directors, sometimes leading to criminal proceedings and imprisonment of those persons, meaning that the human rights of those individuals were infringed.

141. Fourth, the rationale of this privilege being different and broader than the privilege against self-incrimination – protection of a fiduciary and confidential relationship integral to the rule of law as opposed to the rationales set out in paragraph 127 above – it is readily explicable why this privilege should remain available to corporations, notwithstanding they do not have the other privilege.

## **I. PRACTICAL MEANS TO REDUCE DELAY**

142. Some federal investigative agencies may express concerns that, even where there is no carelessness or absence of good faith in the making of privilege claims, nevertheless their investigative procedures are unduly delayed in the time taken to make, challenge and determine bona fide claims to client legal privilege.

143. The New South Wales Bar Association submits that there are some practical means by which questions of delay can be reduced, short of the unacceptable measure of abrogation or substantial modification of the privilege itself:

(a) NSW (and other) barristers would be available on short notice to act as arbitrator or Court appointed referee to determine privilege claims (and could inspect documents where necessary);

(b) federal and state Courts could be approached to further extend the procedures now being made available whereby Judges can hear and determine claims at short notice (including in the case where there is a trial, a Judge other than the trial Judge who can inspect any necessary documents);

(c) we consider that the constitutional objection which was raised but not determined in the AWB proceedings, that it is inconsistent with Chapter III of the constitution for Parliament to legislate to empower federal investigative agencies to be final determiners of privilege claims, is sufficiently strong for the ALRC not to recommend this as a solution to delay.

144. Further, part of the problem arises because some federal investigative agencies have no clearly stated protocols for dealing with the making, challenging and determining of privilege claims. It would be highly desirable if a set of common protocols were established across all federal investigative agencies so that both the agencies and persons interacting with them would

know precisely how privilege claims were to be made and dealt with. This would reduce delay, reduce cost but also serve to protect the privilege.

145. It is particularly important to have clearly stated, and preferably uniform, protocols, especially because the relevant client entitled to the privilege will often be a person other than the direct subject of the investigation by the federal agency. The privilege holder will often be drawn incidentally into the investigative process and have no clear idea of the nature of the investigation and sometimes no idea that his or her privilege documents are at stake.
146. Thus the common protocols need to include, inter alia, a provision that where it reasonably appears to the responsible officer within the federal investigative agency that client legal privilege may exist in relation to a document or communication coming into the hands of the agency then the agency must take reasonable steps to notify the client (either directly or through an available lawyer for the client) and give that client the opportunity to claim privilege before further inspecting or using the document.

## **J. THE WAY FORWARD**

“Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.”

Justice Oliver Wendell Holmes Jr., *Olmstead v United States* 277 U.S. 438 (1928)

“once any exception to the general rule is allowed, the client’s confidence is necessarily lost.”

Lord Taylor, *R v Derby Magistrates, ex p B* [1996] 1 AC 487 at 508

147. Client legal privilege has evolved from an evidential honour conferred upon practitioners to a fundamental citizen’s right vested in the client. As such, it is a crucial predicate of openness and honesty in the practitioner-client relationship; and hence throughout the entire legal system. That this is so is now orthodoxy in the jurisprudence of the High Court.
148. To abrogate the privilege in respect of the investigatory activities of several Commonwealth agencies would not only strip away a protection from citizens

where it is most acutely needed, but is also likely to begin a slow unraveling of the protection generally. Use or derivative use immunity are no salve for such wound.

149. The recommendations made in this paper seek to recognize and address certain practical deficiencies in the operation of the privilege while preserving its principled core.
150. It follows from the above that the New South Wales Bar Association strongly opposes any suggestions that the privilege be modified or abrogated, either for natural persons or corporations, in any of the manners suggested by the following questions contained in the ALRC Issues Paper 33 List of Questions: 2–3, 6–1, 6–3, 6–5 and 6–6. It also follows that none of the supposed safeguards in the event of abrogation or modification, as contemplated by Questions 7–1 through to 7–5, should be recommended by the ALRC. Professional disciplinary sanctions where improper claims are made – as contemplated by Question 7–6, are appropriate both under the current rules and proposed rules contemplated above.

**NSW Bar Association**

**6 June 2007**