

12. Legal Professional Privilege

Contents

Summary	337
A common law right	339
Rationale	339
History and scope	342
Protections from statutory encroachment	343
Australian Constitution	343
Principle of legality	344
International law	344
Bills of rights	345
Justifications for encroachment	345
Open government	346
Assisting investigations	346
Statutory protection	348
Laws that abrogate legal professional privilege	348
Open government and accountability in decision-making	349
Crime and the proceeds of crime	350
Coercive information-gathering powers of government agencies	350
Monitoring and surveillance	352
Other laws	356
Conclusion	357

Summary

12.1 Legal professional privilege is a common law immunity. It allows a person to resist demands to disclose information or produce documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services.

12.2 It ‘exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers’.¹ It has also been said to protect the right to privacy, the dignity of the individual, access to justice and equality before the law.

¹ *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

12.3 A statutory form of the privilege is known as ‘client legal privilege’, and is found in the Uniform Evidence Acts. Client legal privilege is only available to resist disclosure of information in a court. The common law privilege can be claimed in both judicial and non-judicial proceedings.

12.4 Many Commonwealth agencies have coercive information-gathering powers, but almost all of those powers are subject to legal professional privilege. This chapter will focus on the infrequent exceptions to that rule.

12.5 Some statutes concerned with open government and preventing corruption, such as the *Ombudsman Act 1976* (Cth) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth), empower agencies to require persons to reveal privileged communications, but the material is not admissible in proceedings against the person. Two statutes concerned with terrorism and the proceeds of crime abrogate the privilege, but the material is not admissible in proceedings against the person. The *Royal Commissions Act 1902* (Cth) allows a Commission to require a person to provide documents or information over which privilege is claimed, but only for the purpose of determining whether the material is in fact privileged. If it is, it must be returned and no use may be made of it.

12.6 Only one Commonwealth statute has been identified that abrogates the privilege completely. The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) allowed the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions to obtain and use privileged information for both investigation and prosecution. This appears to have been in response to concerns about unwarranted claims of privilege during a special commission of inquiry into the James Hardie companies’ handling of asbestos claims. ASIC’s proceedings against the James Hardie companies concluded in 2012.

12.7 Concerns were expressed to this Inquiry about statutes that require communications between a person and their legal adviser to be monitored: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ(2) and *Criminal Code* s 105.38(1). Both statutes provide that communications that are subject to privilege are not admissible against the person. Legal professional privilege allows a person to resist the compulsory disclosure of communications. It is not clear that it extends to prevent monitoring of communications.

12.8 Similarly, while concerns were expressed to this Inquiry regarding the mandatory data retention scheme in the *Telecommunications (Interception and Access) Act 1979* (Cth), it is not clear that legal professional privilege extends to prevent the surveillance of communications. It also does not extend to prevent the disclosure of the fact that a communication occurred, but only to the content of the communication.

12.9 While laws requiring monitoring of communications between lawyer and client may not limit legal professional privilege, they are not consistent with the underlying rationale for the privilege, that communications between client and lawyer should be confidential. They also interfere with the right to legal assistance and representation, an important fair trial right. They should be further reviewed to consider whether they are proportionate and justified.

12.10 In its 2008 report, *Privilege in Perspective*, the ALRC envisaged that abrogation of legal professional privilege would occur only in exceptional circumstances. This is indeed currently the case in Commonwealth laws. The ALRC recommended that, if the privilege is abrogated, the default position should be that the material should not be admissible against the client.

12.11 This has also been the case in Commonwealth laws, with the single exception of the *James Hardie* legislation.

A common law right

12.12 Legal professional privilege is an important common law right. It allows a person to ‘resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services’.² It has been described as ‘fundamental to the due administration of justice’.³

12.13 This chapter discusses the rationales for the privilege, its history and scope, and the protections that are available from statutory encroachment. It also identifies some laws that encroach on the privilege, and discusses the justifications offered for those encroachments. The common law privilege is less relevant to trial procedures, as the statutory privilege has largely taken its place. Accordingly, this chapter will focus on laws that require production of information or documents to government agencies with coercive information-gathering powers.

Rationale

12.14 The rationale most commonly given for the privilege is an instrumental one—that it serves the administration of justice by encouraging full and frank disclosure by clients to their lawyers.⁴ Without a relationship of confidence and trust between a lawyer and a client, a person may choose not to engage a lawyer, or not to reveal all of the facts to their lawyer. The rationale is set out in detail in *Baker v Campbell*:

It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist ‘a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case’.⁵

2 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9].

3 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

4 *Eso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 35 (Gleeson CJ, Gaudron and Gummow JJ). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.34] regarding instrumental rationales for the privilege.

5 *Baker v Campbell* (1983) 153 CLR 52, 68 (Gibbs CJ).

12.15 In *Carter v Northmore Hale Davey & Leake*, Toohey J emphasised the instrumental nature of the privilege:

Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.⁶

12.16 The ALRC's 2008 *Privilege in Perspective* report identified the following potential benefits arising from the privilege:

- encouraging full and frank disclosure;
- encouraging compliance with the law—because a lawyer in possession of all the facts can more effectively provide appropriate advice;
- discouraging litigation and encouraging settlement—because a fully briefed lawyer can better advise the client about their prospects in court; and
- promoting the efficient operation of the adversarial system—because a party should gather their own evidence, not merely subpoena the work done by another.⁷

12.17 An alternative, rights-based, rationale for the privilege is sometimes offered. The privilege is said to protect individual rights, such as the right to privacy and the right to consult a lawyer.⁸ Justice Kirby has described the privilege as ‘an important human right deserving of special protection’⁹ and, in *Esso Australia Resources v Commissioner of Taxation (Esso)*, he spoke about the fundamental purpose of the privilege:

It arises out of ‘a substantive general principle of the common law and not a mere rule of evidence’. Its objective is ‘of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law’. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as ‘a bulwark against tyranny and oppression’ which is ‘not to be sacrificed even to promote the search for justice or truth in the individual case’.¹⁰

6 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 147. See also Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.43].

7 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.20].

8 See further Jonathon Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 13–35 on instrumental and rights based rationales for the privilege.

9 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [86].

10 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 92 [111] (Kirby J in obiter). Kirby J is quoting Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490. See also Young J in *AWB v Cole* (2006) 152 FCR 382 [37]: ‘the privilege operates to secure a fair civil or criminal trial within our adversarial system’.

12.18 Murphy J in *Baker v Campbell* emphasised the protection of a client's privacy from the intrusion of the state:

The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy.¹¹

12.19 In the same case, Wilson J commented that the 'adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society'.¹²

12.20 As with the privilege against self-incrimination,¹³ legal professional privilege is sometimes said to be a necessary part of an adversarial system of justice.¹⁴ However, this rationale has not featured expressly in recent judgments of Australian courts.

12.21 Regardless of which rationale is adopted, the courts have been clear that the privilege is not to be weighed against other competing rights and interests, such as the public interest in having all relevant information before the court. In *Esso*, the court said

... legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required.¹⁵

12.22 The rationale that is relied upon for the privilege may have consequences when considering justifications for abrogating it. If the privilege is seen as having an instrumental justification, for example, then evidence that the privilege does not in fact contribute to the administration of justice would be relevant.¹⁶ If the predominant justification is the protection of individual liberties and human rights, however, then withholding the privilege from companies and state agencies might be easier to justify.¹⁷

11 *Baker v Campbell* (1983) 153 CLR 52, 89. However, Auburn notes that only two of the seven judges in *Baker v Campbell* adopted a rights-based rationale, and Gibbs CJ explicitly rejected it: Auburn, above n 8, 21.

12 *Baker v Campbell* (1983) 153 CLR 52, 95. See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.35]–[2.61].

13 See Ch 11.

14 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 133, 139 (Deane J); 158 (Gaudron J); Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.22].

15 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35]. See also *Waterford v Commonwealth* (1987) 163 CLR 54, 164–165.

16 See Liam Brown, 'The Justification of Legal Professional Privilege When the Client Is the State' (2010) 84 *Alternative Law Journal* 624, 636–8 for a discussion of the research on the impact of the privilege on client behaviour. Mason J observed in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 26 that 'it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of this public interest is open to question.'

17 Brown, above n 16, 635–6; The claim of the privilege by corporations is discussed at length in *Grant v Downs* (1976) 135 CLR 674, 685–6.

History and scope

12.23 Legal professional privilege has existed for over 400 years in English law.¹⁸ Indeed American legal historian, Professor John Wigmore, described the privilege as ‘the oldest of the privileges for confidential communications’.¹⁹ Despite its age, it has undergone considerable change and development in recent times. The Administrative Review Council noted in 2008 that legal professional privilege continues to be an ‘evolving and often contentious area of the law’.²⁰

12.24 The privilege may have been developed by the courts as a mechanism to underscore the ‘professional obligation of the barrister or attorney to preserve the secrecy of the client’s confidences’.²¹ The privilege is now separate from the lawyer’s duty to maintain confidentiality²² and its name has been described as ‘unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client’s privilege’.²³ The name of the statutory privilege, client legal privilege, reflects the understanding that the privilege is that of the client, and can only be waived by the client. However in this Inquiry, the ALRC has referred to legal professional privilege as this phrase refers specifically to the common law privilege.

12.25 When the principles relating to legal professional privilege were developed, it was confined to legal proceedings, because at that time, there were no powers to compel the giving of information or documents other than those that were available in legal proceedings.²⁴ However, the scope of the common law privilege expanded significantly in the 20th century to take account of new government agencies empowered with coercive information-gathering powers.²⁵ The courts have indicated that the privilege is not merely a rule of evidence—which would only be available in judicial proceedings—but a rule of substantive law.²⁶ It is therefore available to resist a demand for information or documents made by any agency with coercive information-gathering powers.²⁷

12.26 The privilege was limited in its scope by the High Court in the 1976 case of *Grant v Downs*, where it was held that the privilege only protected documents brought into existence for the sole purpose of obtaining legal advice or use in legal

18 *Baker v Campbell* (1983) 153 CLR 52, 84 (Murphy J). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 80–7.

19 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].

20 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 51.

21 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J). However Auburn has argued that this is likely to be a misconception: Auburn, above n 8, 3–8.

22 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

23 *Ibid* 85 (Murphy J).

24 *Ibid* 61 (Gibbs CJ).

25 Auburn, above n 8, 13.

26 *Baker v Campbell* (1983) 153 CLR 52; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11]. See also Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 52.

27 *Baker v Campbell* (1983) 153 CLR 52.

proceedings.²⁸ However, in 1991 the High Court rejected the sole purpose test and expanded the scope of the privilege to documents brought into existence for the dominant purpose of seeking legal advice.²⁹ This brought the Australian common law into line with England, New Zealand, Ireland and Canada.³⁰

12.27 The High Court was also influenced by the development of a statutory privilege. In 1985, the ALRC recommended uniform comprehensive laws of evidence, and suggested that a dominant purpose test would strike the correct balance.³¹ Five Australian jurisdictions now have such a statutory privilege, known as client legal privilege. This privilege is relevant only to the admissibility of communications into evidence, and in New South Wales, to pre-trial procedures, but not to non-judicial demands for disclosure.³² In other situations, the common law privilege is available.

12.28 The privilege is not available to protect communications between a client and lawyer in the furtherance of wrongdoing. This limitation is sometimes known as ‘the fraud exception’ and it withdraws protection from communications in furtherance of the commission of a crime or the abuse of a statutory power, or where a claim would frustrate the process of law.³³ It also excludes communications made for illegal or improper purposes, trickery and shams.³⁴ It is ‘sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest’.³⁵

Protections from statutory encroachment

Australian Constitution

12.29 The *Australian Constitution* contains no express provision regarding legal professional privilege. However, the Australian Parliament’s power to make laws of evidence to be applied in Chapter III courts is not unlimited.³⁶ The text and structure of Ch III imply that Parliament cannot make a law requiring the court to exercise judicial power in a way that is inconsistent with the nature of that power.³⁷

12.30 The High Court has yet to consider whether legal professional privilege is protected by any implication arising from Ch III of the *Constitution*.

28 *Grant v Downs* (1976) 135 CLR 674.

29 *Ibid*.

30 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [2].

31 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [11].

32 Sue McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 195–6. In NSW the statutory privilege has been extended to pre-trial procedures in civil matters: *Uniform Civil Procedure Rules* r 5.7. See further Tom Bathurst, ‘Lawyer/Client Privilege’ in *College of Law Judges’ Series* (2015). In its review of the Uniform Evidence Act, the ALRC recommended that the statutory provisions should apply to any compulsory process for disclosure: Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).

33 Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25290].

34 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30, [210]–[233].

35 *Ibid* [215].

36 *Nicholas v The Queen* (1998) 193 CLR 173. See further Enid Campbell, ‘Rules of Evidence and the Constitution’ (2000) 26 *Monash University Law Review* 312.

37 See further Ch 8.

12.31 The Full Federal Court has considered whether the abrogation of the privilege in the context of a royal commission would interfere with the judicial power of the Commonwealth. The court noted that the High Court has repeatedly confirmed that Parliament may abrogate the privilege, at least in the context of executive inquiries.³⁸ The Full Federal Court concluded that, while the High Court has not explicitly mentioned the constitutional question, '[w]e take the High Court's silence on this point as an indication that such an argument has no merit'.³⁹

Principle of legality

12.32 The principle of legality provides some protection to legal professional privilege.⁴⁰ When interpreting a statute, courts will presume that Parliament did not intend to interfere with legal professional privilege, unless this intention was made unambiguously clear.⁴¹ In *Baker v Campbell*, Deane J said:

It is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.⁴²

12.33 Similarly, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, the majority noted:

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.⁴³

International law

12.34 While legal professional privilege is not a human right in itself, the European Court of Justice has recognised the right to confidential communication with a lawyer as 'a fundamental, constitutional or human right, accessory or complementary to other such rights'.⁴⁴

38 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [21] referring to ; *Baker v Campbell* (1983) 153 CLR 52; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

39 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [22]; see also *John Fairfax Publications Pty Limited v A-G (NSW)* (2000) 158 FLR 81, [51].

40 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

41 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [106] (Kirby J); *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447, [37] (Gzell J; Beazley J and Tobias JJA agreeing). Legislative intention to displace the privilege may be clearer where the privilege against self-incrimination is also abrogated: *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

42 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

43 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

44 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 157, [8]. This approach was approved by Murphy J in *Baker v Campbell* (1983) 153 CLR 52, 85.

12.35 Article 14 of the *International Covenant on Civil and Political Rights* protects the right to a fair trial, including the right to legal assistance. The United Nations' *Basic Principles on the Role of Lawyers* call on governments to respect the confidentiality of 'all communications and consultations between lawyers and their clients'.⁴⁵

12.36 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.⁴⁶ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.⁴⁷

Bills of rights

12.37 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms relevant to legal professional privilege. The Victorian *Charter of Human Rights and Responsibilities* provides that a person has the 'right not to have his or her privacy or correspondence unlawfully or arbitrarily interfered with'⁴⁸ and the right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.⁴⁹ There is also protection for a fair hearing in *Human Rights Act 2004* (ACT).⁵⁰

Justifications for encroachment

12.38 Legal professional privilege is the common law's way of resolving competing public interests: the public interest in the administration of justice, and the public interest in having all relevant evidence before the courts, in the interests of a fair trial.⁵¹

12.39 In *Esso Australia Resources v Commissioner of Taxation*, the High Court noted the 'obvious tension' between the policy behind legal professional privilege and 'the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case':

Where the privilege applies, it inhibits or prevents access to potentially relevant information. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority.⁵²

12.40 ASIC also noted the public interest in having all relevant information 'available to a court and to government agencies conducting investigations'.⁵³

45 United Nations, *Basic Principles on the Role of Lawyers*, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (7 September 1990) Principle 22.

46 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

47 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13a.

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25.

50 *Human Rights Act 2004* (ACT) s 21.

51 *Waterford v Commonwealth* (1987) 163 CLR 54, 64 (Mason and Wilson JJ).

52 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

53 Australian Securities and Investments Commission, *Submission 74*.

12.41 An encroachment of the privilege may be justified when Parliament considers that the common law has not struck the correct balance between the competing public interests in a particular instance. Two competing public interests are discussed below: the public interest in open and accountable government, and the public interest in the efficient and effective investigation of wrongdoing.

Open government

12.42 Moves towards more open government in Australia have included the passage of freedom of information legislation, the establishment of the office of the Commonwealth Ombudsman, protected disclosure legislation and the Australian Government Information Publication Scheme.⁵⁴ Some of these schemes require government agencies to make information available, for example, to an Ombudsman. Such activities may be inhibited by the strict application of legal professional privilege.

12.43 Legal advice to government is one example where legislatures may be justified in limiting or abrogating the privilege in the public interest of transparency and open government. Liam Brown has argued that the privilege is ‘difficult to rationalise when the client is the state’, and that a better position would be to require governments to justify the need for secrecy on a case by case basis.⁵⁵ Abrogating legal professional privilege for communications between lawyers and government representatives involved in proceedings relating to public misfeasance, for instance, may be in the interests of open and representative government. Several states in the United States have abolished legal professional privilege for state governments.⁵⁶

Assisting investigations

12.44 Abrogation of legal professional privilege may sometimes be justified where the law is aimed at improving regulatory or investigative processes.

12.45 Some Commonwealth agencies possess coercive information-gathering powers to investigate complaints or instigate inquiries. It might be argued that the privilege should be abrogated when it creates an intolerable interference with these activities. ASIC has argued that the privilege may prevent or delay access to

material that may otherwise facilitate an expeditious and thorough investigation, the results of which would inform subsequent, likely more speedy, action, to be taken by ASIC. Litigating claims of client legal privilege, if necessary, is also costly.⁵⁷

12.46 In its *Privilege in Perspective* report, the ALRC recommended that

in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, where the Australian Parliament believes that exceptional circumstances exist to warrant a departure from the standard position, it can legislate to abrogate

54 *Government accountability—Commonwealth Ombudsman* <<http://www.ombudsman.gov.au>>.

55 Brown, above n 16.

56 Ibid 638.

57 Australian Securities and Investments Commission, *Submission 74*.

client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.⁵⁸

12.47 This recommendation was qualified by consideration of the following factors:

- (a) the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation;
- (b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially,
- (c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation.⁵⁹

12.48 The recommendations in that report serve as a useful guide for legislatures considering abrogating legal professional privilege. They are consistent with the proportionality approach taken in this Inquiry and discussed in Chapter 2. That is, an important common law right such as legal professional privilege should only be limited by statute when the limitation has a legitimate objective, is suitable and necessary to meet that objective, and when the public interest pursued by the law outweighs the public interest in preserving the right.

12.49 The Administrative Review Council's 2008 report into the *Coercive Information-Gathering Powers of Government Agencies* supported the ALRC's recommendations. The Council wrote that abrogation of the privilege should occur

only rarely, in circumstances that are clearly defined, compelling and limited in scope—for example, for limited purposes associated with the conduct of a royal commission.⁶⁰

Unfounded claims

12.50 The privilege has the potential to hinder access by Commonwealth regulatory agencies to material that is *not* privileged. At common law a court may inspect documents over which privilege is claimed, to determine whether the claim is well founded.⁶¹ However it does not appear that Commonwealth agencies, even those with coercive information-gathering powers, have the power to inspect documents over which privilege is claimed.⁶² There is a risk that improper claims could be made. Over-claiming may cause considerable delay and expense if agencies are required to go to

58 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

59 Ibid.

60 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 57.

61 *Grant v Downs* (1976) 135 CLR 674, 688.

62 *AWB Limited v Cole* (2006) 152 FCR 382, [59]. One exception is the *Royal Commissions Act 1902* (Cth) which was amended to allow a Commissioner to inspect documents following the *AWB v Cole* decision.

the courts to test claims of privilege.⁶³ Practices such as ‘blanket claims’ and over-claiming were discussed in the ALRC’s 2008 *Privilege in Perspective* report and procedural reforms were recommended to address this issue.⁶⁴ Such reforms could sometimes avoid the need to abrogate the privilege. ASIC supported the implementation of such mechanisms.⁶⁵

12.51 To date, only the *Royal Commissions Act 1902* (Cth) has been amended to allow the Commissioner to inspect documents for the purpose of determining whether the document is privileged. This amendment occurred in 2006, following the decision of Young J in *AWB Ltd v Cole (No 5)*.⁶⁶ The Law Council of Australia (Law Council) has questioned whether this amendment was sufficiently justified, and suggested that it would have been preferable to abrogate the privilege for the AWB inquiry rather than more generally.⁶⁷

Statutory protection

12.52 Most laws that abrogate legal professional privilege provide that the privileged material is not admissible in evidence against the person (except for proceedings relating to a failure to comply with a direction to provide information or documents, or proceedings for giving false or misleading information).⁶⁸ The protection afforded by such provisions may justify the abrogation of the privilege, by ensuring that the privilege is impaired as little as possible.⁶⁹

12.53 The Law Council suggested that where the privilege is abrogated, use and derivative immunity should ordinarily apply to documents or communications revealing the content of legal advice, in order ‘to minimise harm to the administration of justice and individual rights’.⁷⁰ This Inquiry has not identified any statutes that abrogate the privilege and provide derivative use immunity—use immunity is the norm.

Laws that abrogate legal professional privilege

12.54 Commonwealth laws that abrogate legal professional privilege are rare. For example, this Inquiry has identified five that could be broadly described as concerning open government and two concerning crime and the proceeds of crime. Despite the large number of Commonwealth agencies with coercive information-gathering powers, none has the power to require the production of privileged material. The one exception in Commonwealth law, and it is of historic relevance only, was the power of ASIC to

63 Australian Securities and Investments Commission, *Submission 74*. See also Auditor-General, ‘Administration of Project Wickenby’ (Audit Report 25, 2012) 185 regarding the cost of disputed claims of privilege.

64 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Ch 8.

65 Australian Securities and Investments Commission, *Submission 74*.

66 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30.

67 Law Council of Australia, *Submission 75*.

68 *Ombudsman Act 1976* (Cth) s 9.

69 See the discussion of proportionality in Ch 2.

70 Law Council of Australia, *Submission 75*.

require the production of privileged material in the James Hardie asbestos investigation and prosecution.

12.55 Stakeholders also raised concerns about laws that affect the right to confidential legal advice: mandatory data retention laws; and statutory access to communications between lawyers and individuals suspected of terrorism-related offences. It is not clear that these laws encroach upon legal professional privilege, but they do represent an infringement on the right to confidential legal advice.

Open government and accountability in decision-making

12.56 Documents over which legal professional privilege could be claimed do not have to be produced under the *Freedom of Information Act 1982* (Cth).⁷¹ However there are some Commonwealth laws that abrogate legal professional privilege by compelling individuals to produce evidence or information to government oversight bodies such as the Commonwealth Ombudsman. The purpose of these laws is to strengthen oversight and promote transparency in government decision-making. The following laws abrogate legal professional privilege, but provide that the privileged material is not admissible against the person:

- *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii)—the Ombudsman may require a person to furnish information or produce documents, and legal professional privilege cannot be used as an excuse to avoid producing those documents. The information or document is not admissible in evidence against the person who produced it, and the statute does not affect any claim of privilege that anyone may make: ss 7A(1B), (1E), 8(2B), (2E), 9(5A).
- *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii)—legal professional privilege is not an excuse for not disclosing information to the Commonwealth Ombudsman regarding the inspection of a prescribed Commonwealth agency's records. Information, answers or documents given are not admissible except for prosecutions for unauthorised disclosures under s 3ZZHA or pt 7 of the *Criminal Code* (Cth).
- *Crimes Act* s 15HV—legal professional privilege is not an excuse for not giving information, answering a question or giving access to a document to the Commonwealth Ombudsman regarding controlled operations. Privileged material is not admissible except for prosecutions for unauthorised disclosures, and the statute does not affect claims for legal professional privilege that anyone may make: s 15HV(2), (5).
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)—where a person is summoned to give evidence at a hearing before the Commissioner, they are not excused from answering a question or producing a document or information on public interest grounds that it would disclose a communication between an officer of a Commonwealth body and another person that is

71 *Freedom of Information Act 1982* (Cth) s 42.

protected by legal professional privilege. The privilege may still be claimed in other proceedings.

- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18—a person is not excused from giving information, producing a document or answering a question on the basis that it would disclose legal advice given to a Minister or a Commonwealth agency, but the material is not admissible in evidence against the person (with some exceptions).

Crime and the proceeds of crime

12.57 Section 3ZQR of the *Crimes Act 1914* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document, information or other evidence related to a serious terrorism offence. This evidence is inadmissible in future proceedings against the person. The Explanatory Memorandum did not explain why the privilege was abrogated.⁷²

12.58 Section 206 of the *Proceeds of Crime Act 2002* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document. The document is not admissible in evidence in a criminal proceeding against the person, except in proceedings regarding providing false or misleading information. The Explanatory Memorandum did not explain why the privilege was abrogated, or why the statutory protection only extends to criminal proceedings, and not civil proceedings.⁷³

Coercive information-gathering powers of government agencies

12.59 Commonwealth agencies, including the Australian Crime Commission, the Australian Competition and Consumer Commission, the ASIC and the Australian Taxation Office (ATO), have statutory coercive information-gathering powers, enabling them to investigate complaints and initiate inquiries into illegal activities such as corruption. Statutory officers are often empowered to compel witnesses to provide documents, information or evidence. None of these statutes include explicit abrogation of legal professional privilege, and therefore the privilege is preserved.⁷⁴

12.60 There has been some doubt about whether the *Australian Securities and Investments Commission Act 2001* (Cth) abrogates legal professional privilege.⁷⁵ In *Corporate Affairs Commission (NSW) v Yuill*, the High Court held that the compulsory examination powers of the Corporate Affairs Commission of NSW (a precursor to ASIC) abrogated legal professional privilege.⁷⁶ The High Court in *Daniels* cast doubt on *Yuill* but did not overturn it.⁷⁷ Associate Professor Tom Middleton has argued that

72 Explanatory Memorandum Anti-Terrorism Bill (No 2) 2005.

73 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

74 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

75 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 198–206.

76 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

77 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

the issue remains unresolved.⁷⁸ Since 3 December 2007, ASIC has notified persons subject to compulsory powers that they are not required to provide documents or information that are subject to privilege⁷⁹ and its *Information Sheet 165* indicates that a person may withhold information that attracts a valid claim of legal professional privilege.⁸⁰ If a person makes a statement at an examination that discloses information that might attract a claim of privilege, and the person objects to the admission of that evidence, then it is not admissible against them.⁸¹

12.61 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) provided that legal professional privilege may be abrogated in relation to a James Hardie investigation or proceeding, or James Hardie ‘material’. This allowed ASIC and the Commonwealth DPP to obtain and use records produced to the James Hardie Special Commission of Inquiry and produced under ASIC’s information-gathering powers.

12.62 This Act was passed after the report by DF Jackson QC included observations about ‘claims for legal professional privilege that [the witness] knew could not honestly be made’.⁸² The Explanatory Memorandum for the James Hardie (Investigations and Proceedings) Bill 2004 outlined the policy justification for the abrogation of legal professional privilege in that Bill:

Any uncertainty over the power to obtain and use privileged material has the potential to severely inhibit ASIC’s ability to exercise efficiently its information-gathering and investigative powers in relation to the conduct that gave rise to the James Hardie Special Commission of Inquiry.

...

The community must have confidence in the regulation of corporate conduct, financial markets and services. This confidence would be undermined if ASIC was unduly inhibited in its ability to obtain and use material necessary to conduct investigations ... In relation to matters concerning, or arising out of, the James Hardie Special Commission of Inquiry, the Government considers that it is clearly in the public interest that any investigation and subsequent action by ASIC and the DPP be unfettered by claims of legal professional privilege.⁸³

12.63 Section 6 provides that this does not create a general abrogation of legal professional privilege.

78 Thomas Middleton, ‘The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, the ACCC and the ATO—suggested Reforms’ (2008) 30 *Australian Bar Review* 282, 119.

79 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.50].

80 Australian Securities and Investments Commission, *Claims of Legal Professional Privilege*, Information Sheet 165.

81 *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

82 DF Jackson, ‘Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation’ (2004) 419.

83 Explanatory Memorandum, James Hardie (Investigations and Procedures) Bill 2004 (Cth) [4.24].

12.64 The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) drew attention to s 4 of the Bill, noting that it

would abrogate legal professional privilege in relation to a wide range of records and books connected with the Special Commission of Inquiry conducted in New South Wales into the conduct of the James Hardie Group of companies. In his second reading speech the Treasurer acknowledges that 'legal professional privilege is ... an important common law right' that ought to be abrogated only in special circumstances, but goes on to assert that such abrogation is justified 'in order to serve higher public policy interests' such as the 'effective enforcement of corporate regulation'.⁸⁴

12.65 The use of compulsory examination powers by regulatory agencies may result in the inadvertent disclosure of privileged communications, and the subsequent loss of privilege.⁸⁵ AWB Ltd raised this concern when its employees were subject to compulsory examination during the Oil for Food investigation. Subsequent litigation resulted in a settlement in which ASIC agreed to allow AWB access to transcripts of interviews in order to ensure the protection of privileged information.⁸⁶

12.66 The access and information-gathering powers of the ATO are subject to legal professional privilege, so that privileged documents or communications need not be disclosed or produced to the ATO, whether in response to those powers or to an informal request.⁸⁷ The ATO must, in the exercise of its powers, ensure that a reasonable opportunity to claim the privilege is provided.⁸⁸

Monitoring and surveillance

12.67 Stakeholders have raised concerns that laws that allow monitoring of contact between a person and their lawyer, or require the retention of telecommunications metadata to be retained and accessed, encroach upon legal professional privilege.⁸⁹ It is not clear that the common law privilege protects confidential communications from monitoring and surveillance. The privilege is usually described as a right to resist demands for documents or information made by judicial or administrative bodies,⁹⁰

84 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

85 Emily Rumble, 'Conflicting (Public) Interests Affecting Disclosure: Section 19 Examinations, Legal Professional Privilege, and Public Interest Immunity' (2014) 32 *Company and Securities Law Journal* 44.

86 Australian Securities and Investments Commission, *ASIC and AWB Reach Settlement of Privilege Claims* Media Release 10-41AD.

87 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [22]. In the exercise of its statutory powers, the ATO must ensure that there is a reasonable opportunity provided to claim legal professional privilege: *Commissioner of Taxation v Citibank* (1989) 85 ALR 588. In relation to legal professional privilege, the Federal Court considered whether s 263 of the *Income Tax Assessment Act 1936* (Cth) overrode legal professional privilege.

88 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [17]; *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537.

89 See, eg, National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

90 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

although it is sometimes conceived more broadly as a protection of the confidentiality of communications between clients and lawyers.⁹¹

12.68 The Full Federal Court appeared to take the latter approach in *Carmody v Mackellar*. It was asked to consider whether the *Telecommunications (Interception) Act 1979* (Cth) empowers a person to issue warrants authorising the interception of communications between lawyer and client. The court assumed that the privilege would protect such communications from interception and held the statute must be construed so as to abrogate the privilege, because it would be unworkable otherwise.⁹²

12.69 Monitoring and surveillance of communications between a person and their lawyer might also be seen as an encroachment on the right to legal representation, as an essential element of legal assistance is that it is confidential. The right to legal representation is an important fair trial right, and is discussed further in Chapter 8.

12.70 The United Nations Human Rights Committee warned against ‘severe restrictions or denial’⁹³ of this right for individuals to communicate confidentially with their lawyers:

Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.⁹⁴

12.71 Some Commonwealth laws require the monitoring of communications between a lawyer and a client.

Monitoring contact under preventative detention orders

12.72 Section 105.38(1) of the *Criminal Code* requires that any contact between a lawyer and a person being detained under a preventative detention order must be capable of being ‘effectively monitored by a police officer’. Communications that are for the purposes listed in s 105.37(1), which include obtaining legal advice about limited matters, are not admissible against the detained person.⁹⁵

12.73 The Law Council submitted that ‘such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice’.⁹⁶

Monitoring contact under questioning or detention warrant

12.74 Section 34ZQ(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) requires that contact between a lawyer and a person who is the subject of a

91 See, eg, Nick Goiran, Michael Burton, ‘Integrity Bodies, Witness Surveillance and Legal Professional Privilege: A Case Study’ (Paper, West Europe Pacific Legal Conference, Paris, France, January 2014). On the other hand, Jonathan Auburn said ‘the privilege is not a branch or variant of any over-arching confidentiality doctrine’: Auburn, above n 8, 1.

92 *Carmody v Mackellar* (1997) 148 ALR 210.

93 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [23].

94 *Ibid* [34].

95 *Criminal Code* s 105.38(5).

96 Law Council of Australia, *Submission 75*.

questioning or detention warrant ‘must be made in a way that can be monitored’. The provision is said not to affect the law relating to legal professional privilege.⁹⁷

12.75 The Explanatory Memorandum to the ASIO Legislation Amendment (Terrorism) Bill 2002 that introduced s 34ZQ(2) did not provide specific justification for the monitoring requirement, other than a general statement that the Bill will ‘assist in the investigation of terrorism offences’.⁹⁸

12.76 The Law Council’s submission to the Independent National Security Legislation Monitor’s Inquiry into questioning and detention warrants commented on the operation of s 34ZQ(2). It expressed concern that persons detained be entitled to a lawyer without that communication being monitored or otherwise restricted. The Law Council stated that, ‘unless detainees can freely access legal advice and communicate confidentially with their lawyer, there are no practical means to challenge any ill-treatment’.⁹⁹

Listening devices and telephone intercepts

12.77 The *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIA Act) and the *Surveillance Devices Act 2004* (Cth) do not explicitly refer to the privilege. As noted above, the court has held that these statutes abrogate the privilege, ‘at least to the extent necessary to permit interception’.¹⁰⁰ Section 79 of the TIA provides that evidence that is otherwise inadmissible is not rendered admissible, thus preserving the privilege in its application to judicial proceedings.

Telecommunications data retention

12.78 The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) amended the TIA Act to introduce a mandatory data retention scheme. The scheme requires service providers to retain some telephone and web data for two years.

12.79 The statement of compatibility with human rights that accompanied the amending Bill acknowledged that the Bill engages and limits the right to privacy. The statement identifies the object of the legislation as being ‘the protection of national security, public safety, [and] addressing crime’.¹⁰¹

97 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZV.

98 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

99 Law Council of Australia, Submission to Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders*, 2012 [141]–[143].

100 *Carmody v Mackellar* (1997) 148 ALR 210; See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.24].

101 Explanatory Memorandum, *Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014* (Cth) [33].

12.80 Several stakeholders raised concerns about whether the legislation abrogated legal professional privilege.¹⁰² The National Association of Community Legal Centres (NACLC), for example, argued that the Bill did not appear to protect communications between client and lawyer and therefore appears to be an unjustifiable encroachment on legal professional privilege.¹⁰³ Australian Lawyers for Human Rights proposed that the Bill include exemptions for lawyer/client communications,¹⁰⁴ and NACLC proposed that consideration be given to requiring agencies to obtain a warrant to access a lawyer's metadata.¹⁰⁵

12.81 In evidence and submissions to the Parliamentary Joint Committee on Intelligence and Security's Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, several stakeholders raised concerns about the potential abrogation of legal professional privilege under that Bill. For instance, the Law Institute of Victoria provided evidence to the Committee that

telecommunications data is capable of revealing substantial information, and this could include information about communications between a lawyer and their client. For example, information exchanged by email or calls about potential witnesses between the lawyer and associates of the client, experts or other relevant parties, could disclose a defence case. A litigation strategy or case theory could be identified based on witnesses or experts contacted by the lawyer.¹⁰⁶

12.82 Similarly, the Law Council submitted to the Committee that, although telecommunications data alone may not reveal the content or substance of lawyer/client communications, it would, at the very least, be able to provide an indication of whether:

- a lawyer has been contacted;
- the identity and location of the lawyer;
- the identity and location of witnesses; [and]
- the number of communications and type of communications between a lawyer and a client, witnesses and the duration of these communications.¹⁰⁷

12.83 In response to such concerns, the Attorney-General's Department noted that, at common law, legal professional privilege attaches to the 'content of privileged

102 Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Law Council of Australia, *Submission 75*; Australian Privacy Foundation, *Submission 71*; National Association of Community Legal Centres, *Submission 66*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*; C Shah, *Submission 16*. A court may construe legislation to infer that the legislature intended to abrogate legal professional privilege where the legislative intention to do so is clear.

103 National Association of Community Legal Centres, *Submission 66*.

104 Australian Lawyers for Human Rights, *Submission 43*.

105 National Association of Community Legal Centres, *Submission 143*.

106 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.194].

107 Law Council of Australia, *Submission No 126 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 20 January 2015.

communications, not to the fact of the existence of a communication between a client and their lawyer'.¹⁰⁸ The Parliamentary Joint Committee on Intelligence and Security relied on the Department's response when concluding that there was no need for 'additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer'.¹⁰⁹

12.84 In a submission to this ALRC inquiry, ASIC suggested that the privilege would not attach to the type of data retained under the data retention laws, citing *Commissioner of Taxation v Coombes* where it was held that the privilege did not attach to a list of names and addresses of clients who had entered into a certain type of transaction.¹¹⁰

Other laws

12.85 The *Judiciary Act 1903* (Cth) s 55ZH provides that where a Legal Services Direction is made by the Attorney-General that requires a person to provide documents or information in relation to the Australian Government Solicitor, a person may not refuse to comply on the basis of legal professional privilege. The privilege will continue to be available in respect of the communication.¹¹¹

12.86 The *Criminal Code* s 390.3(6)(d) provides a defence for criminal association offences where the association is for the sole purpose of providing legal advice or representation. A lawyer bears the evidential burden to prove this defence, and the Law Council argued that this burden may result in the need to disclose information that may otherwise be subject to legal professional privilege.¹¹²

12.87 Uniform evidence legislation, including the *Evidence Act 1995* (Cth) and its equivalents in some states and territories, provides a statutory form of privilege that applies to evidence adduced in court. The statutory privilege is similar in its scope to the common law privilege, with the limitations on the privilege in Uniform Evidence Act ss 121–126 largely reflecting the limits at common law. McNicol has identified some instances in which the scope of the statutory privilege is narrower than that of the common law privilege,¹¹³ and these could be regarded as encroachments on the common law privilege.

108 Attorney-General's Department, Submission No 27 to the Joint Parliamentary Committee on Intelligence and Security, Parliament of Australia, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

109 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.210]–[6.213]. The Senate Standing Committee on the Scrutiny of Bills also raised concerns about the Bill in relation to the right to privacy: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 16 of 2014, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (2014) 213.

110 *Commissioner of Taxation v Coombes* [1999] FCA 842 (25 June 1999).

111 *Judiciary Act 1903* (Cth) s 55ZH(4).

112 Law Council of Australia, *Submission 75*.

113 McNicol, above n 32.

Conclusion

12.88 Commonwealth laws that abrogate legal professional privilege are rare. Some Commonwealth laws allow agencies to require a person to produce privileged documents or information. However, the material produced is not admissible in proceedings against the person. The ALRC does not consider further review of these laws is necessary.

12.89 Some Commonwealth laws allow or require the monitoring of communications between a person and their lawyer. While it is arguable that these laws do not limit legal professional privilege, they do interfere with its underlying rationale, that communications between lawyer and client should be confidential. They may also be characterised as interfering with the right to legal assistance and representation, an important element of the right to a fair trial. The following laws could be further reviewed:

- *Criminal Code* s 105.38(1) which requires contact between a lawyer and a detained person to be capable of being monitored; and
- *ASIO Act* s 34ZQ(2) which requires contact between a lawyer and a person the subject of a questioning or detention warrant to be capable of being monitored.

