

11. Client Legal Privilege

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A common law privilege

11.1 Client legal privilege is an ‘important common law immunity’¹ and a ‘fundamental and general principle of the common law’.² It ‘exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers’.³

11.2 The common law protects confidentiality in a lawyer-client relationship by giving people immunity from laws that might otherwise require them to disclose communications with their lawyer.⁴ This is referred to as client legal privilege⁵ or lawyer-client privilege.⁶

1 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 565.

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

3 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ).

4 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. Generally, there are two types of client legal privilege: advice privilege and litigation privilege. Client legal privilege is also protected by statute. See for example, *Evidence Act 1995* (Cth) ss 118–119.

5 The term ‘client legal privilege’ is used in the *Evidence Act 1995* (NSW) pt 3.10, div 1. For more discussion, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [1.16].

6 Client legal privilege at common law applies to confidential communications between clients, lawyers and in some instances third parties, where the dominant purpose of the communication was to give or receive legal advice. There are two limbs of common law privilege—advice privilege and litigation privilege—although these two have blurred somewhat: Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.28]. The privilege covers civil and criminal matters or proceedings. Communications may be oral or written as long as the communication is necessary for the purpose of carrying on the proceeding for which the legal practitioner is employed: *Gillard v Bates* [1840] 6 M & W 547 (1840) 548. Further, privilege will only attach to

11.3 This chapter discusses the source and rationale of client legal privilege; how this privilege is protected from statutory encroachment; and when laws that abrogate this privilege may be justified.

11.4 The ALRC calls for submissions on two questions about this privilege.

Question 11–1 What general principles or criteria should be applied to help determine whether a law that abrogates client legal privilege is justified?

Question 11–2 Which Commonwealth laws unjustifiably abrogate client legal privilege, and why are these laws unjustified?

11.5 Protecting the confidentiality of communications between lawyers and clients facilitates a relationship of trust and confidence.⁷ A confidential relationship encourages clients to communicate in a frank and honest way with their legal representative. Without that confidence, a person may not use a lawyer at all. The privilege therefore ‘assists and enhances the administration of justice’.⁸ In *Greenough v Gaskell* (1833), Lord Brougham said:

It is out of regard to the interests of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in the matters affecting rights and obligations which form the subject of all judicial proceedings. If a privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half of his case.⁹

11.6 In order for lawyers to provide rigorous and targeted legal advice they need to be made aware of all the facts of their client’s case—facts which a client may only feel comfortable disclosing under the protection of confidentiality.¹⁰

[it is] 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, this privilege is granted to ensure that the client can consult his lawyer with freedom and candor; it being thought that if the privilege did not exist a man would not venture to consult any skilled person.¹¹

communications made by a lawyer whilst acting their professional capacity: *Trade Practices Commission v Sterling* (2004) 36 FLR 357, 245 (Lockhart J). The common law doctrine of client legal privilege applies to ancillary legal procedures like subpoenas, interrogatory applications and discovery. For more, see Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [25255].

7 The Honourable Justice John Gilmour, ‘Legal Professional Privilege: Current Issues and Latest Developments’ (Paper presented at the Law Society of Western Australia, Perth, 13 March 2012) 3. There are a range of rationale for client legal privilege, including instrumental rationales and rights-based rationales. For more on this, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.5]–[2.61].

8 *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ). See also, Sue McNicol, ‘Implications of the Human Right Rationale for Legal Professional Privilege—the Demise of Implied Statutory Abrogation’ in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 1.

9 *Greenough v Gaskell* (1833) ER 39, 621 (Lord Brougham).

10 *Due Barre v Livette* (1791) Peake 109, 110.

11 *Baker v Campbell* (1983) 153 CLR 52, 66 (Gibbs CJ).

11.7 In *Esso Australia Resources v Commissioner of Taxation* (1999), Kirby J 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’.¹²

11.8 Client legal privilege quite clearly interacts with other rights and privileges at common law, including the right to a fair trial.¹³ It has also been described as a human right,¹⁴ derived from the right to privacy and the right to protection from the state. In *Baker v Campbell* (1983), Deane J said that it ‘represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state’.¹⁵

11.9 American legal historian, Professor John Wigmore, described the privilege as ‘the oldest of the privileges for confidential communications’.¹⁶

11.10 The privilege dates from Elizabethan times¹⁷ when it was 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’.¹⁸ The privilege developed significantly in the 18th and 19th centuries when it was considered to be an evidentiary rule.¹⁹

Protections from statutory encroachments

Australian Constitution

11.11 The *Australian Constitution* does not expressly protect client legal privilege, nor has it been found to protect the privilege by implication.

Principle of legality

11.12 The principle of legality provides some protection to client legal privilege.²⁰ When interpreting a statute, courts will presume that Parliament did not intend to

12 *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.

13 The right to a fair trial is discussed in Ch 8.

14 For an explanation on the rights-based rationales for client legal privilege, see, eg, Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.35]–[2.61].

15 *Baker v Campbell* (1983) 153 CLR 52, 120.

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

17 Heydon, above n 6 [25215]. See also, Max Radin, ‘The Privilege of Confidential Communication Between Lawyer and Client’ (1928) 16 *California Law Review* 487.

18 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J).

19 *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581 (Kirby J).

20 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

interfere with client legal privilege, unless this intention was made unambiguously clear.²¹ In *Baker v Campbell* (1983), 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.²²

International law

11.13 Article 14 of the ICCPR protects the right to a fair and public trial but also a limited right to privacy in relation to proceedings.²³ This suggests communications between client and lawyer should be treated as confidential.

11.14 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.²⁴ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.²⁵

Bills of rights

11.15 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. 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’²⁶ and the right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.²⁷ The ACT’s *Human Rights Act* provides protection for a fair hearing.²⁸

Justifications for encroachments

11.16 The High Court has spoken of the ‘obvious tension’ between the policy behind client legal 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. For the law, in the interests of

21 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106] (Kirby J); *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447, [37] (Gzell J, Beazley 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 of New South Wales v Yuill* (1991) 172 CLR 319.

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

23 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

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

25 *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 1.

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

27 *Ibid* ss 24–25.

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

the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.²⁹

11.17 Jeremy Bentham was critical of the privilege, arguing that removing it would result ‘in a guilty person not being able to derive quite so much assistance from his law advisor’, assuming that it is mainly the guilty who need protection from the law.³⁰ A corollary of Bentham’s argument is that client legal privilege may be used to shield vexatious or frivolous claims.

11.18 Claims to privilege may delay investigations. One example is a claim for privilege attached to communications which were the subject of a warrant executed by ASIC in an investigation in November 2003.³¹ The privilege claim was the subject of a federal court hearing which was dismissed at first instance and on appeal. As a consequence, the documents were only made accessible to ASIC in December 2004, a year after the original warrant was executed.

11.19 Similarly, claims for privilege may frustrate proceedings where a party seeks ‘blanket’ privilege on all communications with their lawyer, irrespective of whether they are relevant or useful to a particular matter. In one case, an unsuccessful claim for a blanket privilege may have partly caused a six year delay in a police investigation.³²

11.20 The capacity of some federal investigative bodies such as ASIC, the ACCC and the ATO to conduct investigations may be limited by the application of client legal privilege.³³

11.21 It may also be appropriate for the privilege to be limited or even abrogated in the context of specific investigations.³⁴ This may be particularly important in the case of ad-hoc investigative bodies like Royal Commissions or special investigations where time and resources are finite.³⁵

11.22 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.³⁶

29 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 64–65 [35] (Gleeson CJ, Gaudron and Gummow JJ).

30 Jeremy Bentham, *Rationale of Judicial Evidence* (1827) vol VII, 474.

31 See *Kennedy v Wallace & Ors* (2004) 208 ALR 424.

32 See *Hart v Commissioner of Australian Federal Police* (2002) 196 ALR 1, [25]–[35].

33 This view was advanced by Kirby J in *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581. In that case, Kirby J explained that: ‘it has been suggested that a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into “disrepute”, principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters’.

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

35 *Ibid* Rec 6–2.

36 *Canada Act 1982 c 11, Sch B Pt 1* (‘Canadian Charter of Rights and Freedoms’) s 1. See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

11.23 Some laws that abrogate client legal privilege may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.