13. Client Legal Privilege

Contents

The common law

13.1 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]

1 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
2 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).
3 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

13.2 This chapter is about client legal privilege—also known as legal professional privilege—as defined by the common law.[4] The chapter discusses the source and rationale for client legal privilege; how the privilege is protected from statutory encroachment; and when laws that abrogate the privilege may be justified.

The doctrine

13.3 The settled doctrine on client legal privilege in Australia is set out in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:

> 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.[5]

13.4 The High Court went on to state:

> It is now settled that legal professional privilege is a rule of substantive law which may be availed of by 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, including representation in legal proceedings. It may here be noted that the 'dominant purpose' test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the 'sole purpose' test which had been applied in *Grant v Downs*.
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> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings.[6]

13.5 The privilege applies to a range of legal proceedings and can be claimed at 'interlocutory stages of a civil proceeding, during the course of a civil or criminal trial and in non-judicial proceedings (such as administrative and investigative proceedings or in derogation of a search warrant)'.[7] The onus is on the party asserting the privilege to present the facts that give rise to the claim.

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4 This shift in language reflects 'the nature of the privilege as one belonging to the client, rather than the lawyer': Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [1.16].

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

6 Ibid [9]–[10] (footnotes omitted). See also *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. To successfully claim the privilege, a relationship between a lawyer and their client must be in existence or at the very least, contemplated: *Minter v Priest* [1930] AC 558, 568. There are exceptions to this rule, for instance, a person may claim client legal privilege where they do not have a direct relationship with a lawyer but they have an interest in common with the client, such as in a joint tenancy, see eg, Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 76.

7 McNicol, above n 6, 52.

13.6 Litigation and advice privilege are the two main types of client legal privilege, although the distinction between them is sometimes blurred.[8] The test of whether communications or evidence were brought into existence for the dominant purpose of providing legal advice or for use in litigation, is a question of fact.[9] Third party communications may also be protected by client legal privilege where a communication passes between a third party and a lawyer or their client and that communication was made in contemplation of anticipated litigation.[10]

13.7 A claim for client legal privilege will only be successful if the privilege attaches to certain communications between a lawyer and their client. There are a range of communications such as costs agreements that are not protected by client legal privilege:[11]

> [O]nly those documents which are brought into existence for the dominant purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.[12]

13.8 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.[13] Further, privilege will only attach to communications made by a lawyer while acting in their professional capacity.[14] Client legal privilege must first be claimed before it has any effect and, given that the privilege is a personal right, must be claimed by the person entitled to it.[15] The privilege covers civil and criminal matters or proceedings.

13.9 There are various rules or exceptions to claims for client legal privilege at common law. For instance, a claim for client legal privilege will fail if the communication that is the subject of the claim was made in furtherance of the following:

- the commission of a crime;[16]

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8 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.28]. The *Evidence Act 1995* (Cth) also distinguishes between the two types of privilege: *Evidence Act 1995* (Cth) ss 118–119.

9 *Grant v Downs* (1976) 135 CLR 674. See also JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25240].

10 Heydon, above n 9, [25235].

11 Ibid [25225].

12 Ibid [25220].

13 *Gillard v Bates* (1840) 6 M & W 547 548.

14 *Trade Practices Commission v Sterling* (2004) 36 FLR 357, 245 (Lockhart J).

15 Ronald Desiatnik, *Legal Professional Privilege in Australia* (Lexis Nexis Butterworths, 2nd ed, 2005) 74. See also Heydon, above n 9, [25240]. Section 132 of the *Evidence Act 1995* (Cth) requires courts to satisfy themselves that a witness is aware of their right under s 118 to object to the adducing of evidence that may disclose the content of a confidential communication which is otherwise the subject of client legal privilege.

16 *R v Cox & Railton* (1884) 14 QBD 153. See also that 'if a client applies to a lawyer for advice intended to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which the advice is wanted, the communication between the two is not privileged': Heydon, above n 9, [25290].

- the abuse of a statutory power;[17] or
- if the claim frustrates a legal process.[18]

Rationales

13.10 In the ALRC's 2008 *Privilege in Perspective* report, a number of rationales were identified for the privilege, including instrumental rationales, so as encouraging full and frank disclosure of evidence and information, encouraging compliance with regulatory bodies, discouraging litigation or encouraging settlement, and promoting the efficient operation of the adversarial system.[19] The ALRC also discussed the importance of safeguarding client legal privilege in order to protect access to justice, facilitating other rights or protections.[20]

13.11 Protecting the confidentiality of communications between lawyers and clients facilitates a relationship of trust and confidence.[21] A confidential relationship encourages clients to communicate in a frank and honest way with their legal representative. Without that confidence, a person may decide—often to their detriment—not to engage a lawyer. The privilege therefore 'assists and enhances the administration of justice'.[22]

13.12 In *Greenough v Gaskell*, Lord Brougham explained that the privilege was fashioned '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.[23]

13.13 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.[24]

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17 *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500.

18 For instance, in *R v Bell; Ex Parte Lees*, the High Court upheld the rejection of a claim for client legal privilege on the grounds that the claim would have defied a Family Court order: *R v Bell; Ex Parte Lees* (1980) 146 CLR 141.

19 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.9].

20 Ibid [2.43].

21 The Hon 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 rationales for client legal privilege, including instrumental rationales and rights-based rationales. See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.5]–[2.61].

22 *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.

23 *Greenough v Gaskell* (1833) ER 39 621.

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

> [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.[25]

13.14 In *Esso Australia Resources v Commissioner of Taxation*, 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'.[26]

History

13.15 Client legal privilege has a long history, having existed for over 400 years in English law.[27] Indeed American legal historian, Professor John Wigmore, described the privilege as 'the oldest of the privileges for confidential communications'.[28]

13.16 The privilege dates from Elizabethan times[29] 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'.[30] Dr Jonathan Auburn described the privilege as one of the 'many rules in the large mass of law relating to testimonial compulsion' that developed in the 16th century.[31]

13.17 Professor John Wigmore explained that the privilege, along with other similar protections in civil and criminal law, developed as a way to invest a sense of sportsmanship into the adversarial justice system:

> The right to use a rule of procedure or evidence as one plays a trump card, or draws to three aces, or holds back a good horse til the home stretch is a distinctive result of the common law moral attitude towards parties in litigation.[32]

13.18 The privilege developed significantly in the 18th and 19th centuries in the Chancery courts when it was considered to be only an evidentiary rule.[33] As common law procedures were reformed in the late 19th century, client legal privilege came to be

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

26 *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.

27 *Baker v Campbell* (1983) 153 CLR 52, 84 (Murphy J).

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

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

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

31 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 7.

32 Wigmore, above n 28, 374–75.

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

understood as a substantive right. 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.[34] Indeed the Administrative Review Council noted in 2008 that client legal privilege continues to be an 'evolving and often contentious area of the law'.[35]

A right?

13.19 The language of 'rights' has arisen during the course of the evolution of the privilege at common law.[36] For instance, in *Baker v Campbell*, Murphy and Deane JJ adopted the terminology of rights when discussing the privilege.[37] This view was endorsed by a majority of the High Court in *AFP v Propend Finance*.[38]

13.20 Client legal privilege has also been described as a human right, derived from the right to privacy[39] and the right to protection from the state.[40] In *Baker v Campbell*, 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'.[41]

13.21 Client legal privilege quite clearly interacts with other rights and privileges at common law, including the right to a fair trial[42] and the right to privacy. 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. [43]

13.22 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'.[44]

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34 Auburn, above n 31, 13.

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

36 There is a discussion of the 'rights' rationale for client legal privilege in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.52]–[2.61].

37 *Baker v Campbell* (1983) 153 CLR 52, 85, 116–117.

38 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 65 (McHugh, Gaudron, Gummow and Kirby JJ).

39 See also Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.36]–[2.39].

40 For an explanation on the rights-based rationales for client legal privilege, see, eg, Ibid [2.35]–[2.61].

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

42 The right to a fair trial is discussed in Ch 10.

43 *Baker v Campbell* (1983) 153 CLR 52, 89.

44 Ibid 95.

Protections from statutory encroachment

Australian Constitution

13.23 While the *Australian Constitution* contains no express provision in respect of client legal privilege, the High Court has yet to consider whether it is protected with respect to the exercise of judicial power by any implication arising from Ch III of the *Constitution.*

Principle of legality

13.24 The principle of legality provides some protection to client legal privilege.[45] When interpreting a statute, courts will presume that Parliament did not intend to interfere with client legal privilege, unless this intention was made unambiguously clear.[46] 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.[47]

International law

13.25 Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) protects the right to a fair and public trial but also a limited right to privacy in relation to proceedings.[48] This suggests communications between clients and lawyers should be treated as confidential.

13.26 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[49] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[50]

Bills of rights

13.27 In some jurisdictions, 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'[51] and the right to a fair

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45 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

46 *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 of New South Wales v Yuill* (1991) 172 CLR 319.

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

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

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

50 *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.

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

hearing and to communicate with his or her lawyer in criminal proceedings.[52] The ACT's *Human Rights Act* provides protection for a fair hearing.[53]

Laws that abrogate client legal privilege

13.28 There are some provisions in Commonwealth laws that abrogate client legal privilege.

13.29 Few stakeholders to this Inquiry identified Commonwealth laws that abrogate client legal privilege.[54] For the most part, stakeholders identified two areas of law that affect client legal privilege: mandatory data retention laws; and statutory access to communications between lawyers and individuals suspected of terrorism-related offences. As explained later in this chapter, these laws do not indicate an express and unambiguous legislative intention to abrogate the privilege, as required by the principle of legality.

13.30 Most of the laws identified in this chapter include statutory protections for witnesses: use or derivative use immunities render evidence or testimony that was the subject of a claim for client legal privilege inadmissible in some future proceedings.

13.31 A use immunity usually limits the use of information that would ordinarily be subject to a claim of client legal privilege in any subsequent criminal or civil penalty proceedings against the person who provided the information, except in proceedings in relation to the falsity of the evidence itself.[55]

13.32 A derivative use immunity is wider than a use immunity, in that it also renders inadmissible in subsequent proceedings any evidence obtained as a result of the person having disclosed or provided a privileged communication. Therefore, any documents obtained or witnesses identified as a result of the information having been provided are not admissible against the person compelled to answer.[56]

13.33 Commonwealth laws that abrogate client legal privilege generally arise in the following contexts:

- ad hoc legal investigations;
- laws aimed at open government and transparency; and
- the coercive information-gathering powers of federal investigatory bodies.

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

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

54 Law Council of Australia, *Submission 75*; Australian Securities and Investments Commission, *Submission 74*; National Association of Community Legal Centres, *Submission 66*; Australian Council of Trade Unions, *Submission 44*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; D Black, *Submission 6*; J Gans, *Submission 2*.

55 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [7.34]–[7.35].

56 Ibid.

Ad hoc investigations

13.34 Some Commonwealth laws abrogate client legal privilege in the context of ad hoc bodies or investigations.

13.35 For instance, in the *Royal Commissions Act 1902* (Cth), ss 6AA(1) and 6AB(5) provide that it is not a reasonable excuse for a person to refuse or fail to provide a document, evidence or information to the Commission in relation to ss 3(2B) and (5), subject to exemptions.

13.36 Section 4 of the *James Hardie (Investigations and Procedures) Act 2004* (Cth) provides that legal professional privilege may be abrogated in relation to a James Hardie investigation or proceeding, or James Hardie 'material', as defined in that Act. Section 6 provides that this does not create a general abrogation of legal professional privilege.

13.37 It may be appropriate for client legal privilege to be abrogated in the context of specific investigations,[57] given they are designed to investigate specific matters that are in the public interest and are conducted for a fixed or limited period of time. 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.[58] The Explanatory Memorandum of the James Hardie (Investigations and Procedures) Bill 2004 outlined the policy justification for the abrogation of client legal privilege in that bill:

> 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.[59]

13.38 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'.[60]

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57 Ibid Rec 6–1.
58 Ibid Rec 6–2.
59 Explanatory Memorandum, James Hardie (Investigations and Procedures) Bill 2004 (Cth).
60 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

13.39 The Law Council of Australia raised concerns about the process by which client legal privilege may be abrogated by the *Royal Commissions Act 1902* (Cth) and the process for appeal. The Law Council argued that

> While parties retain the right to appeal to the Federal Court against a finding by a Royal Commissioner that a document is not privileged, there remains a concern that the proceedings may be tainted by the knowledge of privileged—and potentially prejudicial matters—notwithstanding the provision that the Commissioner is to disregard matters subject to privilege. Further, while there is an argument that Royal Commissions deal with matters of significant public interest, over-riding the private interest in protection of privilege, the reasonableness of such a claim in respect of *all* Royal Commissions is belied by the fact that the question of amending the *Royal Commissions Act* in this way had not previously been raised—presumably because it was not considered necessary. Accordingly, a more targeted approach may have been appropriate in the circumstances.[61]

13.40 In its *Royal Commissions and Official Inquiries* report, the ALRC made specific recommendations about the operation of client legal privilege in specific, ad hoc inquiries, including royal commissions.[62]

Open government and accountability in decision-making

13.41 There are some Commonwealth laws that abrogate client legal 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 promote transparency in government decision-making. Unless otherwise stated, the following provisions confer immunities. The laws include the following provisions:

- *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii), which provides that client legal privilege is not an excuse for not disclosing information to the Commonwealth Ombudsman regarding the inspection of a prescribed Commonwealth agency's records, although any evidence protected by legal professional privilege cannot later be used to prosecute the individual for specific offences in pt 7 of the *Criminal Code* (Cth).
- *Crimes Act* s 15HV, which provides that the Commonwealth Ombudsman should be given access to documents and information relating to controlled operations, despite any claims for client legal privilege.
- *Judiciary Act 1903* (Cth) s 55ZH, which 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 client legal privilege. While there is no immunity attached to this provision, privilege will not be waived in respect of the entire communication.

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61 Law Council of Australia, *Submission 75*.

62 See, for example, Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Final Report No 111 (2009) Ch 17; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

- *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii) which provides that where the Ombudsman has reason to believe that a person is capable of furnishing information or producing documents or other records relevant to an investigation, client legal privilege cannot be used as an excuse to avoid producing those documents. There are similar provisions in ss 7A(1B) and 8(2B). Any evidence disclosed is inadmissible in later criminal proceedings.

Coercive information-gathering powers of regulatory agencies

13.42 Many Commonwealth agencies have statutory coercive information-gathering powers, enabling them to investigate complaints and initiate inquiries into illegal activities such as corruption. The coercive powers of these agencies vary significantly depending on their functions across a broad area of laws including, for example, criminal law, migration law and corporate regulation. As part of those powers, statutory officers are often empowered to compel witnesses to provide documents, information or evidence. Unless otherwise stated, these provisions include use or derivative use immunities. Examples of such provisions include the following:

- *Fair Work (Building Industry) Act 2012* (Cth) s 53, which provides that a person is not excused from providing evidence or information under an examination notice to a special, independent assessor appointed under the Act to enforce the Building Code.
- *Inspector-General of Taxation Act 2003* (Cth) s 16, which abrogates client legal privilege where the Inspector General requires the production of information or documents from tax officials at the Australian Taxation Office under s 15.
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5), which provides that 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 protected by client legal privilege.
- *Seafarers Rehabilitation and Compensation Act 1992* (Cth) ss 70 and 85, which provide that client legal privilege does not apply to medical reports supplied in relation to an injury that is the subject of a compensation claim. There are no immunities available in these provisions.

13.43 There appear to be few Commonwealth corporate and commercial laws that abrogate client legal privilege. For instance, the Australian Securities and Investments Commission (ASIC) stated that there are 'no current Commonwealth laws that abrogate client legal privilege specifically for ASIC's activities'.[63]

13.44 The access and information-gathering powers of the Australian Taxation Office (ATO) are subject to client legal privilege, so that privileged documents or

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

communications need not be disclosed or produced to the ATO, whether in response to those powers or to an informal request.[64]

National security legislation

13.45 There may be an argument that laws that allow or require telecommunications companies or Commonwealth agencies, like the Australian Federal Police (AFP) or the Australian Security and Intelligence Organisation (ASIO), to access or retain data that may reveal an individual's communications with their lawyer, results in an abrogation of client legal privilege.

13.46 While client legal privilege is understood as a 'right to resist disclosing information that would otherwise be required to be disclosed',[65] access and surveillance laws may create a chilling effect[66] on the communications between a lawyer and their client.[67] These provisions include the following:

- *Australian Security and Intelligence Organisation Act 1979* (Cth) (the *ASIO Act*) s 34ZQ(2), which is part of the special powers regime that empowers ASIO to issue questioning and detention warrants in relation to persons suspected of terrorism offences. This provision requires that all contact between a person subject to one of these warrants and their lawyer is able to be monitored by an ASIO official.
- *Criminal Code* s 105.38(1), which requires any contact between a lawyer and a person being detained under a preventative detention order be capable of being 'effectively monitored by a police officer'.[68]
- The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) requires service providers such as telecommunications companies to retain customer's metadata for two years. This data may be accessed by prescribed Commonwealth agencies.

Monitoring contact under preventative detention orders

13.47 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 be capable of being 'effectively monitored by a police officer'.

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

65 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.1]. There is common law authority for the proposition that client legal privilege does not extend to the disclosure of a client's identity, see, *Bursill v Tanner* (1885) 16 QBD 1; McNicol, above n 6, 98.

66 Auburn, above n 31, 66.

67 Generally speaking, the fact that an individual engaged the services of a lawyer, is not protected by client legal privilege: *Minter v Priest* [1930] AC 558.

68 This provision relates to contact with a lawyer under ss 105.35 and 105.37. These provisions were raised by the Law Council of Australia, *Submission 75*.

13.48 The Gilbert and Tobin Centre for Public Law argued that this provision

> infringes client legal privilege as any communication between the person and a lawyer must be monitored. The infringement of these rights is unjustified on both principled and practical grounds. The [Independent National Security Legislation Monitor] INSLM described the powers as being 'at odds with our normal approach to even the most reprehensible crimes'. The COAG Review remarked that such powers 'might be thought to be unacceptable in a liberal democracy'. Both recommended that the power be repealed.[69]

13.49 Similarly, the Law Council of Australia wrote 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'.[70]

Telecommunications data retention

13.50 The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) amended the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) to introduce a mandatory data retention scheme. The scheme requires service providers to retain types of telephone and web data under the TIA Act for two years.

13.51 The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) expressed some concern about the implications of this regime as potentially abrogating client legal privilege:

> There are also currently no exceptions for the retention and accessing of data on persons whose communications are subject to obligations of professional secrecy, such as lawyers. Under the proposed scheme, it would be possible for the data from a legal practitioner to be accessed, which raises questions as to whether this could impact on legal professional privilege. If it were to impact on legal professional privilege this would raise concerns as to whether this is proportionate with the right to privacy. The committee is concerned that the communications data of persons subject to an obligation of professional secrecy may be accessed and that accessing this data could impact on legal professional privilege.[71]

13.52 The Human Rights Committee requested the advice of the Attorney-General as to whether such data could, in any circumstances, impact on legal professional privilege, and if so, how this is proportionate with the right to privacy. No response is, however, evident in the Committee's report.[72]

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69 Gilbert and Tobin Centre of Public Law, *Submission 22*.

70 Law Council of Australia, *Submission 75*.

71 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifteenth Report of the 44th Parliament* (November 2014) [1.52]–[1.54].

72 Ibid.

13.53 There are a number of safeguard measures built into the Act, including the following:

- that mandatory data retention only applies to telecommunications meta data (not content)—the type of information that is to be retained is outlined in sch 1 of the amending Act;[73]
- mandatory data retention is to be reviewed by the Parliamentary Joint Committee on Intelligence and Security three years after the commencement of the Act; and
- the Commonwealth Ombudsman has oversight of the mandatory data retention scheme and, more broadly, the exercise by law enforcement agencies of powers under chs 3 and 4 of the TIA Act.

13.54 The statement of compatibility with human rights that accompanied the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 acknowledged that the bill engages and limits the right to privacy but not the right to client legal privilege. The statement identifies the object of the legislation as being 'the protection of national security, public safety, addressing crime, and protecting the rights and freedoms'.[74]

13.55 Several stakeholders raised concerns about whether the abrogation of client privilege could be implied into the legislation.[75] The National Association of Community Legal Centres, 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 client legal privilege.[76] Australian Lawyers for Human Rights proposed that the bill include exemptions for lawyer/client communications.[77]

13.56 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 client legal 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

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73 This schedule commences on 13 October 2015.

74 Explanatory Memorandum, Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014 (Cth).

75 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 client legal privilege where the legislative intention is clear.

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

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

> disclose a defence case. A litigation strategy or case theory could be identified based on witnesses or experts contacted by the lawyer.[78]

13.57 Similarly, the Law Council of Australia 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;
>
> the number of communications and type of communications between a lawyer and a client, witnesses and the duration of these communications.[79]

13.58 In response to such concerns, the Attorney-General's Department noted that, at common law, legal professional privilege attaches to the 'content of privileged communications, not to the fact of the existence of a communication between a client and their lawyer'.[80] The Parliamentary Joint Committee on Intelligence and Security relied on this Departmental response when concluding that there is no need for 'additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer'.[81]

13.59 The Government supported all of the Committee's recommendations, however none of those recommendations addressed concerns relating to the confidentiality of lawyer/client communications.[82]

13.60 The ALRC observes that without a clear and unambiguous legislative intention to abrogate client legal privilege, it is not clear that the telecommunications data retention law is capable of doing so.

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78 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].

79 Law Council of Australia, Submission No 126 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

80 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).

81 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.

82 Attorney-General and Minister for Communications, 'Government Response to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security into the Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014' (Joint Media Release, 3 March 2015).

ASIO's questioning and detention warrant regime

13.61 ASIO may issue a questioning or a detention warrant under pt III div 3 of the *ASIO Act*. This is referred to as the special powers regime of the *ASIO Act*. A questioning warrant compels the subject to appear for questioning by ASIO at a prescribed time.[83] A detention warrant empowers a police officer to take the subject into custody if there are

> reasonable grounds for believing that if a person is not immediately taken into custody, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before a law enforcement or security authority, or may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[84]

13.62 Under s 34ZQ(2) of the *ASIO Act*, contact between the subject of a questioning or detention warrant and their lawyer 'must be made in a way that can be monitored'.

13.63 The Gilbert and Tobin Centre for Public Law argued that the requirement that all conversations between lawyers and their clients be monitored under ASIO's special powers regime risks abrogating client legal privilege.[85]

13.64 The Explanatory Memorandum to the ASIO Legislation Amendment (Terrorism) Bill 2002 that introduced s 34ZQ(2) did not provide specific justifications for the abrogation of client legal privilege, other than a general statement that the bill will 'assist in the investigation of terrorism offences'.[86]

13.65 The Explanatory Memorandum stated that the effect of the proposed section is to require that

> contact between the detained person and the legal adviser be made in a way that can be monitored by a person exercising authority under the warrant (an ASIO officer or other appropriate officer) (proposed subsection 34U(2)).[87]

13.66 The policy justification for the introduction of the special powers regime, including the requirement in s 34ZQ(2) that all communication between the subject of a warrant and their lawyer be monitored, was informed by debates about approaches to counter-terrorism in the post 9/11 period. The central issue in this ongoing debate is the balance between national security and individual rights.

13.67 The Law Council of Australia's submission to the INSLM'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

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83 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(2).
84 Ibid s 34F(4)(d)(i)–(iii). This provision was also discussed in Ch 6 on Freedom of Movement.
85 Gilbert and Tobin Centre of Public Law, *Submission 22*.
86 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.
87 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

their lawyer, there are no practical means to challenge any ill-treatment'.[88] The Law Council highlighted related legal rights that may be affected if client legal privilege is abrogated, such as a suspect's ability or willingness to report allegations of misconduct or mistreatment while in custody.

13.68 Ultimately, the ALRC considers that without a clear and unambiguous intention to abrogate client legal privilege, this law arguably does not abrogate legal privilege. The law does not require disclosure of information despite a claim for privilege. Rather, it allows law enforcement to access and monitor communications between a lawyer and their client, with the knowledge of the client and their lawyer.

Other laws

13.69 There are other laws that may be seen to abrogate client legal privilege in criminal proceedings:

- *Crimes Act 1914* (Cth) s 3ZQR, which provides that a person cannot rely on client legal privilege to avoid adducing a document, information or other evidence related to a serious terrorism offence. This evidence is inadmissible in future criminal proceedings against the person.
- *Criminal Code* s 390.3(6)(d), which 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 of Australia argued that this burden may result in the need to disclose information that may otherwise be subject to client legal privilege.[89] It is not clear whether this provision abrogates client legal privilege.
- *Evidence Act 1995* (Cth) s 123, which allows a defendant to adduce evidence of privileged proceedings unless the defendant is an associated defendant.

Justifications for abrogating client legal privilege

13.70 The common law recognises a need to confine or place limits on client legal privilege.[90] The High Court has stated that the privilege should be 'confined within strict limits'.[91] The High Court has enunciated various balancing tests to weigh competing interests in claims for client legal privilege.

13.71 In *Waterford v Commonwealth*, the High Court explained that:

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception, the public interest in the 'perfect administration of justice' is accorded

88 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].

89 Law Council of Australia, *Submission 75*.

90 See, for example, the discussion in Auburn, above n 31, 99.

91 *Grant v Downs* (1976) 135 CLR 674, 685.

> paramountcy over the public interest that requires, in the interests of a fair trial, the admission, in evidence of all relevant documentary evidence.[92]

13.72 In *Esso Australia Resources v Commissioner of Taxation,* the High Court noted 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 the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.[93]

13.73 In *Carter v Northmore Hale Davy & Leake,* Deane J explained that once client legal privilege attaches, there is 'no question of balancing … The question itself represents the outcome of such a balancing process'.[94]

13.74 There is limited guidance in parliamentary committee reports on appropriate justifications for abrogating client legal privilege. In the context of right of entry provisions in workplace laws, the Scrutiny of Bills Committee recommended to legislatures that

> Legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege.[95]

13.75 The conferral of statutory immunities and the use of information and evidence to assist federal investigations are two justifications for the abrogation of client legal privilege.

Statutory protections

13.76 As noted earlier in this chapter, most provisions which abrogate client legal privilege contain use or derivative use immunities to protect witnesses from future criminal proceedings.[96] The protection afforded by the conferral of such immunities may counterbalance the abrogation of client legal privilege.

13.77 The Law Council suggested that where client legal 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'.[97]

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92 *Waterford v Commonwealth* (1987) 163 CLR 54, [8] (Mason and Wilson JJ).

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

94 *Carter v The Managing Partner, Nothmore Hale Davy and Leake* (1995) 183 CLR 121, 133.

95 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002) [1.30].

96 There is a lengthy discussion of the use of these statutory protections in Ch 12 on the privilege against self-incrimination.

97 Law Council of Australia, *Submission 75*.

13.78 In its 2008 *Privileges in Perspective* report, the ALRC made a recommendation concerning safeguards for individuals who are required to disclose information or evidence that may be subject to client legal privilege in the course of federal investigations.[98] Recommendation 7–2 stated that:

> Federal client legal privilege legislation should provide that, in the absence of any express statutory statement concerning the use to which otherwise privileged information can be put (for example, provisions conferring use immunity or derivative use immunity or authorising unrestricted use of otherwise privileged information), where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power the following default provision should apply:
>
> (a) a federal body that seeks to rely on otherwise privileged information as evidence in any court proceedings must apply to the court for permission to do so;
>
> (b) there should be a presumption against use of the evidence which is able to be displaced in the court's discretion, having regard to the following factors:
>
> (i) the public interest in limiting the effects of the abrogation of an important common law right;
>
> (ii) whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and
>
> (iii) the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a serious adverse impact on the community in general or on a section of the community; and
>
> (c) a federal body is precluded from using otherwise privileged information against the holder of client legal privilege in any administrative penalty proceedings.

Assisting investigations

13.79 Abrogation of client legal privilege may sometimes be justified where the law is aimed at assisting regulatory or criminal investigative processes. ASIC wrote that 'such public interests include that all relevant information should be available to a court and to government agencies conducting investigations'.[99]

13.80 As outlined earlier in this chapter, there are some Commonwealth agencies that possess coercive information-gathering powers to investigate complaints or instigate inquiries. These agencies are, on occasion, able to compel witnesses to provide evidence, information or documents, and often expressly abrogate client legal privilege. The privilege may be abrogated in circumstances where reliance on the privilege may interfere with the administration of justice caused by delays in investigations or proceedings.[100]

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98 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 322.

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

100 Ibid.

13.81 The cost of litigating claims of client legal privilege may also frustrate proceedings and the resources of federal agencies.[101]

13.82 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 client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.[102]

13.83 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.[103]

13.84 The recommendations in that report serve as a useful guide for legislatures when abrogating client legal privilege. 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.[104]

13.85 In the Council's view, coercive information-gathering agencies should keep written records of the situations where the privilege applies and, in particular, where the privilege is waived. This requirement should be part of agency guidelines on coercive information-gathering powers.[105]

13.86 There may also be specific types of information that may, justifiably, need to be disclosed in the public or national interest. 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. Abrogating client legal privilege for

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101 Ibid. This issue was canvassed in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [8.244].

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

103 Ibid.

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

105 Ibid.

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 client legal privilege for state governments.[106]

13.87 ASIC also pointed to the fact that litigating client legal privilege claims can be a costly and time-intensive task for regulatory agencies.[107]

Legitimate objectives

13.88 As outlined throughout this chapter, both the common law and international human rights law recognise that client legal privilege can be restricted in order to pursue legitimate objectives—such as national security and public safety. Client legal privilege may be seen as a corollary of other important rights such as the right to privacy and the right to a fair trial.

13.89 In analysing legislation, the Human Rights Committee asks whether a limitation on a privilege—like client legal privilege—is aimed at achieving a 'legitimate objective of promoting or protecting the rights of others'[108]—a quite open category of limitation. The Centre for Comparative Constitutional Studies agreed that the 'concept of a legitimate end should encompass a wide range of laws and that only exceptionally would a law be considered not to pursue a legitimate end'.[109]

13.90 When considering whether Commonwealth laws that abrogate client legal privilege are appropriately justified, it is useful to consider the limitations and derogations outlined in the ICCPR. Article 14(1) of the ICCPR protects the right to a fair trial and a limited right to privacy in relation to proceedings.[110] This may suggest some protection for confidential communications between a lawyer and their client.

13.91 The United Nations Human Rights Committee warned against 'severe restrictions or denial'[111] 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.[112]

13.92 The Administrative Review Council's 2008 report into the *Coercive Information-Gathering Powers of Government Agencies* included suggestions about

106 Liam Brown, 'The Justification of Legal Professional Privilege When the Client Is the State' (2010) 84 *Alternative Law Journal* 624, 638.
107 Australian Securities and Investments Commission, *Submission 74*.
108 See eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].
109 Centre for Comparative Constitutional Studies, *Submission 58*.
110 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.
111 United Nations Human Rights Committee, General Comment No 32 on Article 14 (Administration of Justice) of the ICCPR (CCPR/C/GC/32) [23]32.
112 Ibid [34].

the circumstances or justifications for when client legal privilege and the privilege against self-incrimination could be abrogated. The Council considered that

> there is a link between any abrogation of client legal privilege and the threshold specified for the exercise of a particular coercive information-gathering power and suggests that consideration will need to be given to the threshold if privilege is to be abrogated.[113]

13.93 There was some discussion of client legal privilege in the Productivity Commission's 2014 Access to Justice Report. The Commission noted that legal complaint bodies—such as law societies or practitioners' boards—whose role is to investigate improper practise by lawyers, may need to override the privilege in the public interest.[114] The Commission made a recommendation that state and territory legal complaint bodies should be empowered to compel lawyers to produce information or documents, despite a claim for client legal privilege. However, the Commission noted that any information subject to the privilege should only be used for the purposes of investigating a lawyer's conduct and pursuing disciplinary action.[115]

Proportionality and client legal privilege

13.94 Unlike other rights, freedoms and privileges discussed in this Inquiry, stakeholders and commentators have not advanced the use of a proportionality test to assess the justification of Commonwealth laws that abrogate client legal privilege.

Conclusions

13.95 There are some provisions in Commonwealth laws that abrogate client legal privilege.

13.96 The ALRC's 2008 *Privilege in Perspective* report identified provisions in the empowering statutes of some Commonwealth coercive information-gathering bodies that abrogate client legal privilege. That report made recommendations—many of which have not yet been adopted—concerning the circumstances in which client legal privilege may be abrogated. Some of the laws identified in that report and in this chapter may warrant further review by an appropriate body, to ensure they do not unjustifiably abrogate client legal privilege. These provisions arise in many different areas of law.

13.97 There is some guidance—from departmental and other material such as the Guide to Framing Commonwealth Offences—on the circumstances when client legal privilege may be abrogated. The Administrative Review Council offers one such guide. In its 2008 report into the *Coercive Information-Gathering Powers of Government Agencies*, the Council stated:

> Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be

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

114 'Access to Justice Arrangements' (Inquiry Report 72, Productivity Commission, 2014) 225.

115 Ibid rec 6.7.

> upheld through legislation … Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.[116]

13.98 Many of the provisions identified in this chapter include statutory protections by way of use and derivative use immunities to protect witnesses and individuals who are compelled to disclose information that may be subject to claims of client legal privilege. As discussed, the conferral of statutory protections may—in some circumstances—justify the abrogation of client legal privilege.

13.99 Stakeholders to this Inquiry raised surveillance and access provisions in telecommunications data retention laws and in some criminal laws, arguing that such laws may be characterised as abrogating client legal privilege. However, in the absence of a clear and unambiguous legislative intention to abrogate client legal privilege, these laws arguably do not abrogate the privilege.

116 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) Principle 17.