



National Legal Aid Secretariat
GPO Box 9898
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813

f: 03 6236 3811

m: 0419 350 065

e: louise.smith@leqalaid.tas.gov.au

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
E-mail: privilege@alrc.gov.au

5th November 2007

Dear Sir,

**Re: Discussion Paper 73 - Client Legal Privilege and Federal Investigatory Bodies
National Legal Aid submission**

Thankyou for the opportunity to make this submission in relation to Discussion Paper (DP) 73, Client Legal Privilege and Federal Investigatory Bodies.

Introduction to NLA submission

This submission is made in the context of our earlier submission to the Issues Paper (IP) 33 Client Legal Privilege and Federal Investigatory Bodies. We remain concerned about any proposal which would encourage "reluctance of the client to engage in the full sharing of information characteristic of the lawyer-client relationship".¹

5. Client Legal Privilege in Federal Investigations

Proposal 5-1 The Australian Parliament should enact legislation of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations (hereafter referred to as federal client legal privilege legislation) in accordance with the proposals in this Discussion Paper.

Proposal 5-2 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies.

Proposal 5-3 Any legislative scheme which seeks to abrogate or modify client legal privilege must do so by express reference to the particular sections or

¹ NSW Bar Association, at p. 284 of the DP

divisions within that scheme that confer coercive information-gathering powers which abrogate or modify the privilege.

NLA supports the above proposals noting the statement in the DP at page 28 that "A key theme in submissions was that, to the extent that there was a problem in relation to client legal privilege in the context of federal investigatory bodies, it lay in the domain of practice and procedure. If there were greater transparency, clearer guidelines and procedures, many of the present problems could be solved - and a greater framework of co-operation and trust could be generated, while still respecting the fundamental principle of client legal privilege. Many argued that if you remedy the problems in relation to practice and procedure - on both sides, client (lawyer) and federal body - many of the other concerns would be addressed." This is our view. Consequently, we would expect that "legislative schemes seeking to abrogate or modify client legal privilege" would be rare. We note that "...the ALRC envisages that any abrogation of client legal privilege will occur only in a few exceptional circumstances- not as a matter of course".²

Proposal 5-4 To promote national harmonisation, the Attorney-General of Australia should lead a process through the Standing Committee of Attorneys-General to encourage the states and territories to adopt the Commonwealth model proposed in Proposals 5-1 to 5-3 above.

Harmonisation across States and Territories is a matter for respective Attorneys-General.

6. Modification or Abrogation of Privilege?

Proposal 6-1 Federal client legal privilege legislation should provide that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to a particular Royal Commission of inquiry or investigation undertaken by a federal investigative body.

The factors to be considered in determining whether such legislation should be enacted are:

- (a) the subject of the Royal Commission of inquiry or investigation, including whether the inquiry or investigation 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 likelihood and degree to which the privileged information will benefit the Royal Commission or investigation, particularly where the legal advice itself is central to the issues being considered by the Commission or federal body.**

² p. 293 DP

Our concern is that any legislative provision not encourage legislation for abrogation almost as a matter of course for every/any Royal Commission or federal inquiry at the point of establishment. We note the references to "special circumstances" and "major public importance." Many would argue that a Royal Commission is always going to be founded in circumstances that are said to be special and that there will always be a matter of major public importance.

Whilst client legal privilege is presently abrogated for Royal Commissions in NSW and Victoria and we note that the "ALRC has received no evidence suggesting that this abrogation of the privilege in those jurisdictions has lead to any problems" it would not be unreasonable to conclude that such abrogation has or will adversely affect full and frank disclosure and the provision of advice.

Proposal 6–2 The Australian Parliament should amend the *Inspector-General of Intelligence and Security Act 1986* (Cth) and the *Ombudsman Act 1976* (Cth) to state that where client legal privilege cannot be claimed over legal advice given to a Minister, an agency or an authority of the Commonwealth, this abrogation applies to litigation privilege as well as advice privilege.

Supported.

Proposal 6–3 Federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of a federal body is not required to disclose a document that is a tax advice document prepared for that person.

- A 'tax advice document' should be defined as a confidential document created by an independent professional accounting adviser for the dominant purpose of providing that person with advice about the operation and effect of tax laws. It does not include 'source documents', such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers).
- An independent professional accounting adviser must be a registered 'tax agent' for the purpose of s 251L(1)(b) of the *Income Tax Assessment Act 1936* (Cth).
- No privilege should apply where a tax advice document is created in relation to the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.
- Claims that a document is a tax advice document may be required to be certified by a lawyer in accordance with the procedures set out in Proposal 8–3.

7. Safeguards

Proposal 7–1 Federal client legal privilege legislation should provide that, if another federal statute expressly abrogates or modifies client legal privilege, such abrogation or modification does not extend to legal advice that relates to the investigation itself, or to the representation of the client in the investigation, provided that, or to the extent that, the investigation concerns offences alleged to have been committed prior to the commencement of the investigation.

NLA suggests that the words "provided that" and everything following should be deleted. Privilege should remain available even where it is alleged that the conduct continued after an investigation into it has commenced. This is essential because otherwise people may be dissuaded from seeking advice or providing full and frank disclosure in relation to ongoing conduct.

Proposal 7–2 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power:

- (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; and**
- (b) the court will have a general discretion to allow use of the information as evidence, balancing the public interest in allowing the information to be used against a consideration of whether the use of that information would be unfairly prejudicial to a party; and**
- (c) a federal body is precluded from using otherwise privileged information against the holder of client legal privilege in any administrative penalty proceedings.**

NLA agrees with the idea of safeguards and agrees with the DP that both use and derivative use immunities have their problems. We note the ALRC's recognition of problems with use immunity is a basis of the proposal for allowing a judicial discretion to limit the use as evidence in criminal or civil proceedings of otherwise privileged information, obtained pursuant to the exercise of the federal coercive information gathering power that abrogates privilege.

Generally, as the DP notes, this approach is flexible, but has the disadvantage of being uncertain in outcome. Certainly, this will be an issue in criminal proceedings - the likely success or failure of a consequent prosecution will often come down to the threshold issue of whether or not the relevant evidence will be ruled as admissible. And that will be the advice given to clients, which will result in proceedings continuing to a stage where the point is tested, and possibly challenged further on appeal. This will do little to promote the early disposition of criminal matters and will add to the length and complexity of criminal proceedings arising from these investigations.

Additionally, one must also here bear in mind the fundamental nature of Royal Commissions and similar inquiries. They are designed as a means to investigate and expose systematic problems of fundamental public importance³. They are an extremely expensive and cumbersome way of addressing suspected criminal behaviour by individuals, when compared to traditional investigative techniques. The focus is ordinarily upon the procedural and systemic issues, and reform, rather than pursuit and punishment of the individual. Fixing the systemic problem and preventing its future recurrence should take precedence over criminal prosecution of the individual. The broader aims of the inquiry process (and its ability to collect relevant information) will be enhanced by limiting the discretion safeguard to civil proceedings (where the liberty of a person is not in issue) and adopting an immunity upon use of the information in consequent criminal proceedings. This will assist to facilitate the inquiry/information gathering process, as potential wrong-doers will be more inclined to co-operate if an immunity exists, rather than their evidence potentially being admissible upon their trial, if the public interest outweighs individual prejudice.

Proposal 7–3 Federal client legal privilege legislation should provide that where client legal privilege has been abrogated in respect of any federal coercive information-gathering power, federal bodies should be required to notify persons the subject of such powers, as well as those who produce information on a voluntary basis, about whether any safeguards apply to the use of otherwise privileged information in subsequent proceedings.

Supported.

Proposal 7–4 Where client legal privilege is abrogated or modified in a federal investigation that takes place in a public setting—such as a Royal Commission—evidence that may disclose communications subject to client legal privilege should be presented in-camera, or may be subject to a non-publication order.

Supported.

Proposal 7–5 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, where other federal legislation abrogates or modifies client legal privilege in federal investigations that abrogation or modification does not affect the holder of the privilege from maintaining privilege against a third party.

Supported.

Proposal 7–6 The Commonwealth Director of Public Prosecutions (CDPP) should amend its *Statement on Prosecution Disclosure* to make it clear that the exception to disclosing unused privileged information to the defence applies

³ p. 167 DP

irrespective of whether the privilege holder is the federal investigatory body that refers the matter to the CDPP, or a party that produced information to that federal investigatory body in the course of its investigation.

Supported.

Proposal 7–7 If client legal privilege is abrogated or modified in respect of any federal body with coercive information-gathering powers, that federal body should be required to:

(a) implement appropriate document management systems to ensure that documents the subject of a client legal privilege claim are:

(i) clearly identified or recorded as such;

(ii) stored and managed appropriately; and

(iii) returned, as soon as practicable, to the person who produced them; and

(b) publish its policies and procedures in this regard.

Supported.

8. Practice and Procedure

Proposal 8–1 Federal client legal privilege legislation should require federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of the privilege—to notify persons the subject of those powers, as well as those who provide information on a voluntary basis, whether or not client legal privilege applies to:

(a) the exercise of a particular power; and

(b) the voluntary production of information.

Supported. The notification should be brought to the direct attention of persons and explain as far as possible in plain English its meaning and effect. The notification should refer to the right to obtain legal advice.

Proposal 8–2 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to the manner of notifying persons whether the privilege applies to the exercise of their information-gathering powers and to the voluntary production of information.

Supported.

Proposal 8–3 Federal client legal privilege legislation should provide a mechanism for the making of privilege claims in federal investigations. Those provisions should include a requirement that persons be given a reasonable opportunity to claim privilege, and where a federal body requests particulars that:

- (a) the person specify the grounds on which client legal privilege is claimed; and
(b) where claims are made in respect of communications contained in documents:
- (1) the person making the claim describes the documents or in the case of a bundle of documents of the same or similar nature, describe each bundle, sufficiently to enable the document or bundle to be identified;
 - (2) communications prepared by or involving an in-house counsel should be indicated;
 - (3) in respect of the in-house counsel referred to in the list, the claimant is to provide sufficient details about that person's independence;
 - (4) 'tax advice documents' (defined in Proposal 6-3) prepared by a professional accounting adviser should be indicated; and
 - (5) where a federal body so requests:
 - (i) the particulars of the privileged documents and the basis for the claims are to be verified on oath or affirmation by the person making the claim; and
 - (ii) where the person is represented in the federal investigation or has otherwise received legal advice in relation to the preparation of the particulars of documents subject to a claim for privilege, the person's lawyer is to certify that having reviewed the documents the subject of a privilege claim, that in his or her opinion there are reasonable grounds for the making of the claim.

Generally supported, but noting that the "sufficient details requirement in relation to "in-house counsel" may need some further consideration. At present the proposal appears to envisage that "sufficiency" be decided by the federal body.

Proposal 8-4 Federal client legal privilege legislation should specify that providing a description of the documents or bundle of documents in accordance with legislative requirements of itself will not amount to waiver of the privilege.

Supported.

Proposal 8-5 Federal client legal privilege legislation should specify that the particulars of documents subject to a claim for privilege are to be provided to the federal body within the time frame defined by that body, which must be reasonable having regard to the circumstances of each particular request for information. The types of factors that may be relevant include:

- (a) the number of documents that a claimant is required to review;
- (b) the need to access and identify electronically-stored documents;
- (c) whether the information is required pursuant to the exercise of a search warrant (or a search without warrant);
- (d) the urgency and seriousness of the investigation being conducted by the federal body; and
- (e) the time frame for production of documents pursuant to the coercive power.

Supported noting that there may be other relevant factors.

Proposal 8–6 Federal client legal privilege legislation should provide that where a person fails to comply with a federal body’s request to provide particulars of communications in respect of which privilege is claimed the federal body may apply for a declaration that privilege is not maintainable unless particulars are provided to the court forthwith or within a designated time determined at the discretion of the court.

Supported.

Proposal 8–7 Federal client legal privilege legislation should provide that where a person is represented in the federal investigation—or has otherwise received legal advice in connection with the production of information pursuant to a coercive power—and the federal body requests that any claims for client legal privilege made by the person be certified by his or her lawyer, and the lawyer fails to certify any or all of the privilege claims made by that person:

- (a) the federal body should inform the person that the lawyer has not certified some or all of the claims (if it appears that the person may not be aware of this fact) and of the consequences of failure to certify (as set out below);**
- (b) the federal body may apply to the court for a declaration that, unless the court otherwise orders, if certification is not made within the time provided by the court, the claim for privilege is not maintainable; and**
- (c) the person may apply to the court for a declaration that privilege applies despite the lack of certification.**

Supported if failure to certify is first to be brought to the attention of the lawyer who should have reasonable opportunity to respond, and that any communications to the person by the federal body are also copied to the lawyer holding that person's instructions.

Proposal 8–8 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures for addressing apparent unintentional disclosures by unrepresented persons of material likely to be subject to a claim of client legal privilege; particularly the circumstances in which they recognise such persons should be given an opportunity to seek legal advice about whether to claim or waive the privilege.

Supported on the basis that unintentional disclosure does not result in a waiver of privilege.

Proposal 8–9 Federal client legal privilege legislation should provide that, other than in covert investigations, where a federal body receives apparently privileged information from a person other than the privilege holder (the notice recipient)—pursuant to the exercise of a coercive power that does not abrogate client legal privilege—the federal body should take reasonable steps to give the

privilege holder an opportunity to establish that privilege had not been waived by the privilege holder's provision of the information to the notice recipient.

Supported.

Proposal 8–10 The Federal Court and the Supreme Court of each state and territory should have appropriate arrangements in place to cater for hearing applications on short notice concerning disputes about client legal privilege claims in federal investigations.

Supported.

Proposal 8–11 Federal client legal privilege legislation should provide that, where a federal body (other than a Royal Commission), disputes a privilege claim (after having received particulars of the documents in respect of which a claim of privilege is made in answer to the exercise of a coercive power):

- **A claimant should be given the opportunity within a defined time to agree to an independent review mechanism to resolve the claim.**
- **Where a claimant does not agree to have the claim assessed by an independent reviewer or reviewers, the claimant must commence proceedings in a superior court within 14 days seeking a declaration that the disputed material is subject to client legal privilege.**
- **The federal body may also commence proceedings within 14 days but the onus of establishing client legal privilege is on the claimant.**
- **Where the claimant fails to commence proceedings, the federal body will be entitled to regard the claim as having been waived, in the absence of special circumstances that negate this inference.**

Supported.

Proposal 8–12 Federal bodies (other than Royal Commissions) with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish procedures in relation to the resolution of disputed privilege claims. Such procedures should, as far as practicable, be uniform. (See Proposals 8–13 and 8–14).

Supported.

Proposal 8–13 The Attorney-General's Department in consultation with federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal

privilege—should establish a model procedure for resolving disputed privilege claims in federal investigations.

Supported.

Proposal 8–14 Where a federal body disputes a privilege claim, the model procedure for resolving the claim (referred to in Proposal 8–13) should include the following features:

- (a) Where possible, the federal body should adopt a flexible approach to the mechanism used to resolve the claim.
- (b) The federal body should notify the claimant of the availability of an independent review process to resolve the dispute, in accordance with these procedures, and give the claimant a reasonable time limit in the circumstances within which to indicate whether or not he or she agrees to submit to that review process.
- (c) The claimant may agree to the engagement of a mutually acceptable independent reviewer or reviewers (with appropriate legal qualifications) to make a non-binding assessment of the claim, although the claimant and federal body may agree to accept the assessment as binding.
- (d) Upon signing a confidentiality undertaking, those conducting the independent review should be given access to the documents containing the communications in dispute and should make an assessment of each in the following categories:
 - (i) privileged;
 - (ii) not privileged;
 - (iii) partly privileged; or
 - (iv) unable to make an assessment.
- (e) Upon receiving the assessment of the independent review, either party may within seven days (or another period agreed to by the parties) commence proceedings seeking declarations from a superior court in relation to whether the documents are privileged.
- (f) If the independent review’s assessment is that a document is privileged, the claimant is entitled to retain possession of the document unless the federal body obtains a declaration that the document is not privileged.
- (g) If the independent review’s assessment is that a document is partly privileged, the claimant should mask those parts that are assessed to be privileged, and produce the remainder of the document to the federal body, unless the claimant seeks declaratory relief within the required time frame.
- (h) If the independent review’s assessment is that a document is not privileged, the claimant should produce the document to the federal body, unless the claimant seeks declaratory relief within the required time frame.
- (i) If an independent review process takes place, the parties may agree on who is to pay the costs of the reviewers but the ordinary presumption is that the costs will be shared equally. A federal body may, in its discretion, agree to meet the entire costs.
- (j) Liability for costs for any court proceedings are to be determined by courts in accordance with their rules.

Supported. Information about the procedure should be provided to the person by the federal body at the time of notification of the dispute.

Proposal 8–15 Federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a privilege claim, if granting the extension is in the interests of justice.

Supported.

Proposal 8–16 Federal client legal privilege legislation should provide that where information which may be subject to a claim for client legal privilege is stored on the same electronic medium as non-privileged information that falls within the scope of a Commonwealth search warrant:

- (a) the executing officer is not precluded from copying or imaging that medium and causing it to be removed from the premises for further inspection; and
- (b) such copying or imaging does not amount to a waiver of privilege.

NLA is supportive of the proposal that copying not amount to waiver but is concerned that the documents which may be subject to a claim for client legal privilege be independently held until the privilege can be ascertained.

Proposal 8–17 The Law Council of Australia, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, and relevant accounting professional bodies in consultation with (a) federal bodies that possess search and seizure powers and (b) computer forensic experts, should devise a set of guidelines to cover the resolution of client legal privilege claims in respect of electronically-stored information (The ESI Guidelines). The ESI Guidelines should be adaptable for use at searches of premises of lawyers and accountants, other premises and searches of the person, and should be provided to persons at the time a Commonwealth search warrant is executed. The ESI Guidelines should, as far as possible, be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Supported.

Proposal 8–18 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to managing and resolving claims for privilege in respect of electronically-stored information. The policies and procedures should, as far as possible, be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Supported.

Proposal 8–19 The Australian Federal Police and the Law Council of Australia should revise the *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on a Lawyers’ Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made* to:

- (a) refer to the proposed method of making a claim, as set out in the proposed federal client legal privilege legislation;
- (b) allow the claimant an opportunity to agree to an independent review process to resolve the claim. The process to be adopted should meet the minimum requirements set out in Proposal 8–14;
- (c) state that the Guidelines apply to any part of non-legal premises that contain the work space of in-house counsel; and
- (d) refer to the procedures for making and resolving claims in respect of electronically-stored information. (See Proposal 8–17).

Supported.

Proposal 8–20 The Commonwealth Director of Public Prosecutions, in consultation with relevant federal bodies that possess search warrant powers, should amend the following documents which are attached to Commonwealth search warrants: *Claims for Legal Professional Privilege: Premises other than those of Lawyer, Law Society or Like Institution* (Non-Legal Premises Notice) and *Claims for Legal Professional Privilege: Searches of the Person*, to include the matters referred to in Proposal 8–19 (a), (b) and (d) above.

Supported.

Proposal 8–21 The Australian Federal Police, the Australian Taxation Office and legal and accounting professional bodies should negotiate guidelines concerning the execution of search warrants on the premises of professional accounting advisers in circumstances where a claim of client legal privilege is made. The guidelines should include the matters referred to in Proposal 8–19 (a), (b), and (d) above.

Proposal 8–22 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures in relation to:

- (a) notifying persons that they may wish to seek independent legal advice concerning their response to a coercive power or, if applicable, seek legal representation; and
- (b) making claims for privilege—which should be consistent with the proposed legislative procedures.

Supported. See above.

There are some potential resourcing implications for Legal Aid Commissions. The recommended notification requirements for agencies, as set in Chapter 8, will lead to increased recourse to legal advice. In some cases this will be through a Legal Aid Commission, a Community Legal Centre or an Aboriginal and Torres Strait Islander Legal Service. There is potential for further legal assistance being warranted for some people, going beyond mere advice.

The current Commonwealth legal aid funding agreement framework does not really address this pre-charge investigative stage, in terms of Commissions providing legal assistance beyond the advice stage. Provision of relevant aided assistance at an early stage to eligible persons would support them exercising their relevant rights, and may also expedite matters through promoting early identification of issues and their resolution.

9. Ensuring Professional Integrity—Education and Accountability
Proposal 9–1 State and territory legal professional associations should clarify their professional conduct rules to provide specific guidance about a lawyer’s ethical duties with respect to making and maintaining a claim of client legal privilege.

Proposal 9–2 State and territory legal professional associations should clarify their professional conduct rules to provide that a certification of documents as privileged—in line with Proposal 8–3—without reasonable grounds, is an example of conduct that contravenes the relevant professional conduct rules.

Proposal 9–3 University and other legal education programs on legal ethics and professional responsibility that are accepted for admission purposes should include specific consideration of the ethical responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Supported. The earlier in their law courses students are introduced to the ethical responsibilities of lawyering the more likely an ethical approach will be inculcated in them. Students need to understand the ethical context in which laws operate at the time that they study those laws.

Proposal 9–4 The study of legal ethics requirement found in state and territory rules and Uniform Admission Rules governing admission to practice as a lawyer should include the responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Supported.

Proposal 9–5 Continuing legal education programs (including those required for the maintenance of a current practising certificate) should include a regular

review of the law and responsibilities in relation to the making and maintaining of a claim of client legal privilege.

Supported noting that a regular review only is proposed, rather than an imposition of particular programs.

Proposal 9–6 Professional associations should issue to their members ‘best practice’ notes from time to time, about the law and responsibilities in relation to making and maintaining a claim of client legal privilege.

Supported to the extent appropriate in each jurisdiction.

Conclusion

Thankyou for the opportunity to make this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "H. Gilmore". The signature is written in a cursive, flowing style with a prominent initial "H" and a long, sweeping underline.

H. Gilmore
Chairperson
National Legal Aid