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National Legal Aid

The Executive Director
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13th June 2007

Dear Sir,

Re: Issues Paper 33 - Client Legal Privilege and Federal Investigatory Bodies
National Legal Aid submission

Thankyou for the opportunity to make this submission in relation to Issues Paper (IP) 33, Client Legal Privilege and Federal Investigatory Bodies.

About National Legal Aid (NLA)
National Legal Aid (NLA) represents the Directors of the Legal Aid Commissions of all Australian states and territories. Legal Aid Commissions provide legal services to socially and economically disadvantaged people. The legal services Commissions deliver include representing clients who are eligible for legal assistance in federal, and state and territory courts and tribunals, the provision of dispute resolution services as appropriate, and the provision of information, advice, assistance and education to members of the public.

NLA aims to ensure the protection or assertion of the legal rights of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice
- afford the financial cost of appropriate legal representation
- obtain access to the federal and state and territory legal systems
- obtain adequate information about the law and the legal systems.

Introduction to NLA submission
NLA makes this submission on the basis of the Commissions' experience in assisting people who are amongst the most disadvantaged and vulnerable in our community. We have taken account of the information provided in the IP and addressed those questions in the IP most related to our business.

1. Introduction to the Inquiry

1–1 What are the best contemporary rationales for the doctrine of client legal privilege?

Referring to the range of rationales as described in the IP, NLA's view is that the best contemporary rationales for the doctrine of client legal privilege are "encouraging full and frank disclosure", "promoting the administration of justice" which is facilitated by full and frank disclosure by the client to his/her lawyer, "encouraging compliance" which is also facilitated by full and frank disclosure, and "protecting privacy".

In our experience the explanation of the privilege to the client encourages honesty and better disclosure. A full understanding of the facts, surrounding perceptions and background to a matter, enables the lawyer involved in a case to give appropriate advice, including in relation to compliance with the law and procedures where compliance is an issue. Appropriate advice and compliance in turn promote the administration of justice, enabling matters to be dealt with more expeditiously. The protection of personal matters by the privilege, and the client's trust in the lawyer (contributed to by the privilege) encourage disclosure of matters which, with instructions, should properly be put before the Court to achieve justice. In our view a further rationale for the doctrine of client legal privilege is promoting access to justice.

The stated rationale "Part of the policy against self-incrimination", would be difficult to include in any examination of the development of the privilege. It is important to the extent that the privilege against self-incrimination could be avoided in some cases if self-incriminating communications had been made to the lawyer and these could be produced in evidence. However, in the absence of a general evidential rule about giving evidence about admisssions it is difficult to see how client legal privilege is part of the policy against self-incrimination.

1–2 Does client legal privilege serve broad 'public interests'? What is it/are they? Does client legal privilege essentially amount to a private right?

Yes, client legal privilege serves broad public interests. These public interests are the promotion of access to justice and the efficient and effective administration of justice, and compliance with the law.

NLA's view is that client legal privilege is also a private right consistently with the high importance Australians place on privacy. We also note that this is a new development.

1–3 Do the underlying rationales accord with actual current practice?

In our experience, yes.

More than other legal practitioners, Legal Aid Commissions have to collect information from clients to form an opinion as to their means and the merits of their cases for the purpose of determining whether a grant of legal assistance should be made. Attempts to obtain access to this information by subpoena, warrant or other

means are objected to by Commissions. Any change to current protections would undermine our ability to assure clients that their information will be protected.

1–4 Is there a different rationale for particular contexts such as the context of Commonwealth investigatory bodies, including Royal Commissions?

Generally, NLA is not able to identify any different rationale for particular contexts, although there may be specific instances where a different rationale exists. For example, in a Royal Commission, the subject matter may be such that consideration should be given as to whether the public interest in discovering the truth should prevail over the interest in maintaining client legal privilege.

NLA's view is that matters should be dealt with on a case by case basis and that appropriate safeguards should apply accordingly.

2. Overview of Client Legal Privilege

2–1 A communication made in furtherance of the commission of a fraud or an offence is not protected by client legal privilege. As a practical matter, what are the difficulties for Commonwealth investigatory bodies in proving that a communication is not privileged on the basis of this exception?

2–2 The Australian Taxation Office has issued an administrative guideline which allows certain types of advice prepared for the purpose of advising a client on taxation matters to be kept within the confidence of taxpayers and their professional accounting advisers. Are there circumstances in relation to other Commonwealth investigatory agencies where a similar concession should be extended to accountants or other professionals who provide what amounts to legal advice? By what means would such a concession or privilege best be realised—for example, by legislation, regulation or administrative instrument?

The wider the privilege is cast, and the more people and circumstances to which it applies, the greater is the liability for abuse and the whole content of the privilege thus falling into disrepute.

2–3 Should client legal privilege apply only to natural persons and not to corporations?

There is no conceptual reason in the rationales for distinction.

4. Client Legal Privilege in Commonwealth Investigations

4–1 Is there a need to clarify the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies (including Royal Commissions)? If so, how would this best be achieved?

Privilege applies unless it is expressly or necessarily abrogated by statute. Our experience is that within some Commonwealth bodies explanation of the laws relating to the operations of that body, would assist. NLA suggests that education and training within bodies would best address this issue.

To the extent that there is really a lack of clarity about the application of the privilege in relation the operations of particular Commonwealth bodies, then it should be dealt with as it arises, ie on a case by case basis.

Where the parties cannot resolve an argument between them about whether or not client legal privilege is preserved, then appropriate efficient and effective processes should be available to ensure resolution.

4–2 Is it desirable to harmonise provisions relating to the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies? If so, what approach should be taken? Should there be a uniform set of provisions or should distinctions be drawn depending on the functions performed by Commonwealth bodies or the subject matter with which they deal? In particular, should distinctions be drawn:

(a) between Commonwealth investigatory bodies and Royal Commissions; and

(b) based on whether or not the core function or focus of the Commonwealth body is investigation or enforcement?

NLA's view is that the purpose and functions of the various Commonwealth bodies are so diverse that it would be best to proceed on an individual basis. It appears to us that uniformity of provisions is undesirable unless such provisions were limited to stating that the privilege is not abrogated except by express statement.

4–3 Would harmonisation best be achieved by: creating a specific new Commonwealth statute; amending the scattered statutory provisions conferring coercive powers on Commonwealth bodies; or by some other method?

Please refer to 4. 2 above.

5. Practice and Procedure

5–1 What problems arise concerning:

(a) the making and resolution of a claim for client legal privilege in response to the exercise by a Commonwealth body of a coercive information-gathering power; and

(b) in particular, where information the subject of a potential claim for privilege is held in electronic form or is sought to be seized during the execution of a search?

5–2 What issues arise in relation to the making of a claim for client legal privilege where a person the subject of a coercive information-gathering power holds documents belonging to another that record potentially privileged communications?

5–3 What issues arise in relation to the making of a claim for client legal privilege where the person who is the subject of a Commonwealth coercive information-gathering power is not legally represented or has not received legal advice in relation to his or her rights in an investigation?

5–4 Are the 'General Guidelines between the Australian Federal Police and the Law Council Of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made' working in a satisfactory manner? Are the procedures followed in respect of the execution of warrants at other premises satisfactory?

5–5 Do policies and procedures governing the execution of Commonwealth search warrants need to be amended specifically to address claims made for privilege in respect of documents stored electronically?

5–6 The Australian Taxation Office has developed and published guidelines about dealing with claims for client legal privilege made during the exercise of coercive information-gathering powers. What procedures would be effective in resolving claims for client legal privilege raised in response to the exercise by a Commonwealth body of a coercive information-gathering power?

5–7 Should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position concerning client legal privilege;

(b) the procedures to be adopted in making and resolving claims for privilege; and

(c) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

The nature of Commission business is such that arguments relating to client legal privilege which have not been readily capable of resolution have only arisen occasionally. In this regard it is noted that Commissions have respective enabling legislation which protects the relationship between applicant/client and legal practitioner, including by the preservation of privileges, and addresses the function of providing grants of legal assistance.

Our main concern relating to the making and resolution of a claim about client legal privilege would be the potential cost involved where agreement cannot be reached between the parties and resort must be had to Court to resolve the claim.

NLA's view is that it would be appropriate for Commonwealth bodies exercising coercive information gathering powers to develop and publish practices and policies

in relation to the matters listed at 5-7 (a), (b) and (c) above, to the extent that each body has not already done so. Information about the right to legal advice and legal aid are relevant in this regard. There should be specific policies and procedures in relation to electronic documents.

6. Modification or Abrogation of Privilege?

6–1 In Daniels, the High Court described client legal privilege as a 'fundamental common law right', rather than a mere procedural safeguard. However, investigatory bodies need to be able to have access to the relevant information required to perform their functions. Would modification or abrogation of the client legal privilege rules achieve greater efficiency or effectiveness in the work of Commonwealth investigatory agencies, including Royal Commissions?

NLA suggests that any concerns that client legal privilege is diminishing the efficiency or effectiveness of the work of Commonwealth investigatory agencies would be best addressed by ensuring there is capacity for the speedy and inexpensive resolution of any claim for the privilege. Speedy resolution would be likely to be assisted by the provision of information and guidelines in connection with the processes to be used.

6–2 What consequences might flow from the modification or abrogation of the privilege?

Modification or abrogation of the privilege may result in people being reluctant to seek legal advice or to provide full and frank disclosure to their lawyer. NLA refers to the answer at paragraph 1-1 above. Legal advice and/ representation on the basis of full and frank disclosure assists access to justice, the effective and efficient administration of justice, and compliance with the law.

Litigation involving people who are not represented can lead to the administration of justice being impeded because the processing of matters takes longer (because a party may not understand what is in issue, wants their "day in court", doesn't understand the purpose of, and rules about, various pre-hearing procedures, etc). A lack of representation can also mean that matters which ought to be raised in the interests of justice are not because the litigant does not see the relevance of them.

6–3 Is it desirable to modify or abrogate the application of client legal privilege uniformly to all the coercive information-gathering powers of Commonwealth bodies or should distinctions be drawn depending upon the functions performed by Commonwealth bodies and Royal Commissions or the subject matter with which they deal?

NLA does not support uniform modification or abrogation of client legal privilege to all coercive information gathering powers of Commonwealth bodies. NLA's view is that modification/abrogation should only be considered on a case by case basis taking

into account both the functions which it is the agencies clear responsibility to perform and the subject matter with which it is being required to deal.

6–4 Client legal privilege has been abrogated under certain Commonwealth legislation such as the James Hardie (Investigations and Procedures) Act 2004 (Cth). ASIC also takes the position that client legal privilege is abrogated under the *Australian Securities and Investments Commission Act 2001* (Cth). Similarly, client legal privilege is abrogated under the *Royal Commissions Act 1923* (NSW). What has been the practical effect, if any, of this abrogation on lawyer-client relations? Has the availability of otherwise privileged material facilitated better fact finding and enforcement by investigatory bodies?

6–5 In some areas, the privilege against self-incrimination applies only to interviews and information given in the course of an investigation, not to pre-existing documents. Should client legal privilege be available only for those documents or communications that relate to the representation of a client once the investigation process commences, and not pre-existing documents? Are there other classes of confidential communications to which the privilege should not apply or should be modified?

Client legal privilege is not the same as the privilege against self-incrimination. Client legal privilege should not be available only for those documents or communications that relate to the representation of a client once the investigation process commences, and not to pre-existing documents. To preclude the privilege to situations that relate to representation once the investigation process has commenced could dissuade people from seeking early legal advice. As referred to above legal advice contributes to compliance with the law, access to justice, and the effective and efficient administration of justice.

6–6 Once a matter has proceeded beyond the investigation phase, should the absolute protection available under the current client legal privilege rules be replaced with a 'qualified' privilege along the lines of Division 1A of the *Evidence Act 1995* (NSW)? (In which case, a court would have discretion to admit the material if the probative value of the evidence, having regard to the nature of the offence, outweighs the harm to the person who made the confidential communication.)

Please refer to our answer above.

7. Safeguards

7–1 If client legal privilege were to be abrogated or modified, should there be a distinction drawn between privileged communications relating to the representation of a client in the investigation process, and privileged communications that relate to the subject matter of an investigation?

Please refer to our answers above.

7–2 If client legal privilege were to be abrogated or modified, what safeguards, if any, should be put in place relating to the use of privileged information obtained through the use of coercive powers? In particular, should use immunity or derivative use immunity apply and, if so, to which type of proceedings should such immunities apply?

NLA would support the introduction of appropriate safeguards in the event that client legal privilege was to be abrogated or modified.

7–3 If use immunity or derivative use immunity were to be introduced as a safeguard, should a distinction be drawn between the application of the immunities to:

(a) corporations and individuals;

(b) the production of documents and the making of oral statements giving information;

(c) Commonwealth bodies, depending upon the functions which they perform;

(d) Commonwealth agencies exercising coercive powers and Royal Commissions; and

(e) Commonwealth investigations conducted in public and those conducted in private?

NLA refers to its answers to the questions posed in the IP above. Any modification/abrogation of privilege should be on a case by case basis taking into account the functions of the agency and subject matter. The question of safeguards should be dealt with accordingly.

7–4 If client legal privilege were to be abrogated or modified should it remain available against third parties—for example, in response to a subpoena issued to the Commonwealth body or pursuant to a statutory request for release of that information?

Please refer above.

7–5 If client legal privilege were to be abrogated or modified, should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position; and

(b) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

(a) Yes, including information about the right to seek legal advice and legal aid.

(b) Yes.

7–6 Where a lawyer arguably has maintained a claim for client legal privilege improperly, as a tactic for delay or obstruction, should professional disciplinary action follow?

Professional disciplinary action should follow where a lawyer has maintained a claim for client legal privilege improperly.

7–7 Should a person who, in bad faith, asserts or maintains a claim for client legal privilege either personally or on another's behalf, be made liable to penalties, whether criminal, civil or administrative?

Existing sanctions are presently sufficient. NLA is concerned that penalties such as those envisaged by the IP could be discouraging of some arguable claims. The prospect of such penalties are likely to be more discouraging for those with the least to lose.

7–8 What is the best way of ensuring that lawyers are properly informed about their professional ethics and responsibilities in relation to:

(a) making and maintaining claims of client legal privilege; and

(b) identifying privileged communications at the time of creation?

NLA suggests that appropriate professional induction courses by employers would assist to reinforce and contextualise the professional ethics studies undertaken at university. Continuing professional development programs should also address issues relating to professional ethics and responsibilities.

Conclusion

It appears to NLA from the IP that the real issues raised are in connection with inappropriate making of claims for privilege, and the time and cost sometimes involved in processing claims for privilege, rather than the privilege per se.

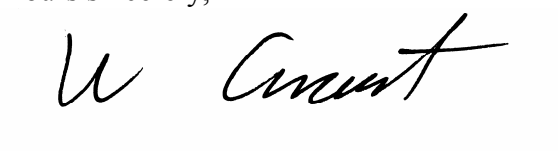
To the extent that claims for legal professional privilege are made in bad faith, they are an abuse of process and demonstrate a lack of understanding of the lawyer's duty to the Court. Such unprofessional conduct should be addressed, but NLA suggests that this is best done not by modifying or abrogating the privilege but by discouraging the conduct through identification and sanction.

Delay and cost are issues which we suggest should be capable of being addressed by a means less dramatic and, we would respectfully suggest, potentially counter-productive, than abrogation or modification of client legal privilege.

The legal profession is a "helping profession" and it is in the public interest that the profession's capacity to provide assistance and support to people who are often in very difficult and distressing circumstances be fostered. NLA's view is that the privilege is important because it supports full and frank disclosure leading to appropriate legal advice and representation which in turn assists access to justice, the proper administration of justice, and compliance with the law. There should be clear and compelling reasons for any abrogation/modification of the privilege.

Thankyou for the opportunity to make this submission.

Yours sincerely,



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