

## Briefing Note

Date: 11 July 2014

### Client legal privilege

#### Purpose

The Japan Federation of Bar Associations has requested information in response to three questions, the answers to which are provided below.

#### **Question 1: Does attorney-client privilege impede legitimate fact finding by government authorities?**

The Australian Law Reform Commission (ALRC) report [Client Legal Privilege and Federal Investigatory Bodies](#) (2008) recognised that client legal privilege (CLP) can impede investigations, as occurred in the Australian Wheat Board Royal Commission, but that CLP is of fundamental importance in the justice system, and should only be abrogated or modified by national legislation of general application in exceptional circumstances. The ALRC found that the importance of the privilege in encouraging compliance with the law outweighed the regulatory benefits that may flow from its abrogation. Chapter 6 of the report outlines the arguments for and against limiting the privilege.

The ALRC recommended that the factors that should be considered when considering limitation of the privilege in exceptional circumstances, such as major investigations and Royal Commissions, include:

- the impact that lack of access to the privileged information would have on an investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation. The ALRC did not support a broad abrogation of the privilege in relation to federal investigations, but recommended that it could be modified where the national Parliamentary legislates to give higher priority to issues being investigated. This occurred in relation to asbestos-related issues in the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) and the *Royal Commissions Act 1923* (NSW);

- if the investigation or inquiry (open or covert) concerns matters of major public importance with significant social impact; and
- whether the information sought can be obtained in a timely and complete way by using means other than those involving abrogation of client legal privilege.

**Question 2: What measures exist to incentivise voluntary cooperation with investigations by attorneys and how can abuse of assertions of privilege be avoided?**

The ALRC recommended that as a default position, any investigating bodies seeking to rely on otherwise privileged information as evidence in court proceedings, should have to apply to the court for permission to do so in accordance with a statutory process. The ALRC recommended that there be a presumption against use of the evidence of such material, but that the courts should have discretion to override that presumption in circumstances such as:

- (a) when the public interest outweighs the importance of the common law privilege;
- (b) having considered how the otherwise privileged information was obtained, such as whether covert investigatory powers were used; and
- (c) the probative value of the otherwise privileged evidence, including whether it reveals matters indicating serious misconduct or conduct with a serious adverse social impact.

**Question 3: Would the publication of information which would be privileged in Australia to a competent authority in Japan affect the preservation of privilege in Australia.**

How CLP can be lost or waived is a complex issue area at both the common law and under statute. Loss of CLP depends on the circumstances. Issues such as whether publication was made knowingly and with consent; whether the publication disclosed an intention to commit a fraud or abuse of power; whether the communicating party has died; whether the publication arose in a multi-party advice situation etc, may be relevant. For examples of national statutory provisions dealing with the loss of CLP please consider the *Evidence Act 1995* (Cth) ss 121–126F.

Should you require further information, please contact Hanna Jaireth, Section Administrator, Federal Litigation and Dispute Resolution  
Section [fedls@lawcouncil.asn.au](mailto:fedls@lawcouncil.asn.au) who will liaise with the Chair of the Client Legal Privilege Committee, Mr Harry Dixon SC.