SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION REVIEW OF CLIENT LEGAL PRIVILEGE AND FEDERAL INVESTIGATORY BODIES

1. Overview: Introducing the first two ALRC proposals to refuse them all

A privilege is a right to resist disclosing information that would otherwise be ordered to be disclosed. It commonly covers the confidential communications passing between a client and his lawyer in civil or criminal courts, but is applied far more widely throughout Australian society. This submission mainly discusses Proposal 5-1, which is the first proposal made in the discussion paper on Client Legal Privilege and Federal Investigatory Bodies, produced by the Australian Law Reform Commission (ALRC Sept. 2007). Proposal 5-1 calls upon the Australian Parliament ***'to enact legislation 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 proposals in this discussion paper'.*** The contents of this submission also broadly apply to all ALRC proposals which follow on from the above (5-1).

I present arguments to call for rejection of this new legislation proposal as foolish, unworkable, and costly, on many grounds. The most important ground is that many or all proposals in the ALRC discussion paper are wrong to the extent that they depend upon a prior ALRC assumption, which is probably false. This assumption, which the ALRC discusses primarily in chapter two of its paper, is that, ***' the protection of the confidentiality of communications between a lawyer and a client facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice'*** (p. 207).

However, the ALRC also makes clear that the above view, that secrecy facilitates legal compliance rather than legal non-compliance, is highly contested and neither side has much scientific evidence in support. I address the meanings of 'curial' and 'non-curial' more fully later. According to Google, the former means the arbitration arena, although the ALRC does not explain this. Neither does the ALRC discuss whether all federal investigatory bodies are ideally or actually curial in nature and, if so, why they were established as curial rather than non-curial, (as courts). The ALRC has written its paper as if it wished that the whole concept of arbitration would silently melt away, leaving the conceptual field entirely to lawyers and their courts. This shows a lack of the intellectual rigour one ideally requires of a law reform commission. I assume the ALRC is full of lawyers and also discuss major problems stemming from this later.

The ALRC's highly contested assumption, that client legal privilege facilitates legal compliance, also underlies its second proposal (5-2), which is that ***'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'.*** In other words, the ALRC wants new legislation to clearly expand client legal privilege requirements to the operations of all federal investigatory bodies, unless another course of action seems more appropriate in a particular legislative context. The ALRC recommends this in an environment where it

admits there is no consensus or scientific evidence regarding its basic assumption, which is that client legal privilege facilitates, rather than undermines, compliance with the law.

ALRC proposal 5-3 requires that government either **confirm, 'abrogate'** (repeal?) **or modify** current legislation to make its requirements clearer and more consistent in regard to newly legislated expectations about the general desirability of client legal privilege. (I am paraphrasing the proposal as I find its language almost impossible to understand.)

I disagree entirely with the overall ALRC position and provide detailed arguments later. As a result of this discussion I recommend that a more logical, workable and cost-effective course of action is the removal of the concept of client legal privilege entirely from all Australian law and related practice. This is recommended on the grounds that it appears to be the only logical way of providing more certainty and information for everybody faced with an otherwise opaque, fragmented, conflicted, increasingly complex and therefore increasingly ignorant, slow and costly legal environment. ALRC proposals, on the other hand, can only increase such problems. If government took the course of action which I later present as being logically necessary, all Australians would still have the substantial protections of Australian privacy laws in regard to their affairs. The ALRC does not address privacy legislation at all. This is despite the fact that it has just produced three large discussion volumes as a result of its current review of privacy laws.

I have argued in many previous submissions to the ALRC and many others that alternative dispute resolution processes, including arbitration, are ideally much better than legal ones because courts are relics of an English feudal past which operate on many pre-scientific, wrong assumptions. The latter still dominate us all in the modern era because of the ultimate Constitutional and related political power of the professional monopoly which wields them. A mockery is made of competition requirements in this monopoly context. For more information see my attached article entitled, 'A healthier approach to justice and environment development in Australian communities and beyond', published in 'Public Administration Today (Oct.-Dec. 2006), the journal of the Institute of Public Affairs in Australia (IPAA). I also attach a more recent article entitled 'From the Constitutional Past to the New Educational Ideal' which is forthcoming in the same journal.

2. The ALRC reveals no consensus of opinion or scientific evidence regarding the general benefits or otherwise of client legal privilege

In Chapter 2 the ALRC first discusses and supports the underlying rationale for client legal privilege, which is *'that the protection of the confidentiality of communications between a lawyer and a client facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice'*. However, discussion throughout the paper also makes clear that a great many more scholars than I do not support this basic assumption. Any study of the whole ALRC discussion paper must conclude that there is no consensus or scientific evidence that the opening ALRC assumption about the benefits of client legal privilege is true. This also puts into question the idea that any ALRC proposals related to the first assumption, including legislation, will be desirable or effective.

In scientific terms, the array of views on the desirability or otherwise of client legal privilege which are displayed in the ALRC paper seems like eminent mathematicians being unable to agree over whether 1+1 = 2. In the light of such highly varying opinion among legal and other scholars, which is also reflected in growing inconsistencies in legislation, it is difficult to see how any clarifying legislative approach could be devised other than one which does away with the concept of client legal privilege entirely. More evidence is provided later for my claim, based almost entirely on the ALRC paper.

The ALRC states that while there is 'no clear evidence of chronic abuse of claims of client legal privilege, there is evident distrust on the part of federal investigatory bodies that claims are not being made legitimately in some cases'. It further states that 'as it is in the very nature of client legal privilege that communications are kept confidential – and never made known to anyone other than the lawyer and client involved – it is difficult to gauge the extent of any actual abuse' (p.401). Therefore, nobody knows whether the assumption on which legislation and all other ALRC proposals rest, is true or false.

For argument's sake, I assume the reverse of the ALRC position, and believe that '*the protection of the confidentiality of communications between a lawyer and a client mainly facilitates non-compliance with law, thereby undermining the public interest in effective administration to obtain the goals of society and individuals, while instead increasing complex inconsistency, opacity, tardiness, opportunity for wrongdoing, and all related costs'*. I take my position primarily on the grounds that although the lawyer holds duties to the client and the court, the interests of the client will normally win out in any competition, because serving the client's interests immediately generates the lawyer's fee. (Like the economist, I assume that individuals are normally driven to maximise their pecuniary interest and that secrecy will assist them do so. Like the economist, I also believe that perfect information is necessary for perfect competition, and that the legislated secrecy inherent in the concept of client legal privilege for individuals hinders this.)

My theoretical position is perhaps a little like that of the Australian National Audit Office (ANAO), among others, when it states that legal professional privilege is used 'as a tactical tool to impede and frustrate both the progress and ultimate outcome of taxation audits in terms of restricting the auditor's ability to access factual information about transactions and arrangements' (p. 216). Nobody can show evidence which suggests that such views, which oppose those of the ALRC, are wrong. Some say client legal privilege is good and some say it is bad but neither group have scientific evidence. What clarifying legislation is possible in such an embattled and ignorant environment?

From my perspective, the point of setting up bodies with coercive information-gathering powers is so they can look at information where there is a reason for concern that somebody may be breaking the law. This power also logically protects the person upon whom suspicion falls, as long as they are innocent of lawbreaking. Were I accused of tax avoidance, for example, I would welcome the chance to show my innocence by showing investigators anything they wanted to see, under the protection of privacy principles, where necessary. For government to set up bodies with information gathering powers,

whilst centrally undermining those information gathering capacities through passing legislation based on a counter-intuitive, highly contested assumption such as the rightness of client legal privilege, seems like diving into further confusing and costly legal madness. As shown below, only lawyers are likely to benefit from this.

3. The ALRC can provide no good reasons for the new legislation it proposes which dooms it to being unworkable and increasingly costly

In relation to Proposal 5-1, the ALRC suggests, in Proposal 5-3 that government should confirm, 'abrogate' or modify current legislation to make its requirements clearer and more consistent. Should one trust that lawyers, such as those writing this ALRC report, are capable of making recommendations in the public interest, rather than their own? To me it seems madness to do so. Who is capable of doing the Herculean groundwork advising on legislation, which is necessary to assist the parliament - more lawyers? The alternative and more proper course of action, I argue later, is removal of the concept of client legal privilege and its benefits from all legislation. Alternative research or outcome evaluation of non-curial and curial (court and arbitration) practice is also discussed later.

The ALRC discussion of its proposed 'client legal privilege legislation', which will 'abrogate' (repeal?), 'amend', or 'confirm' the requirements of client legal privilege wherever this is considered necessary in the public interest, does not give one cause for confidence that this attempt will do anything other than prolong legal debate and all related cost. For example, the factors which the ALRC thinks are ideally considered in determining whether abrogation can ever be justified are numerous and complex (See pp243-244). How such issues ought to be decided ideally depends, I presume, on the particular case and its environment, not on prescriptive and therefore feudal legislation. (See the attached discussions on problems with the prescriptive, pre-scientific approach.)

The ALRC states that it is 'of the preliminary view that abrogation only should be legislated in circumstances where there is a higher competing public interest in the availability of otherwise privileged information. This must be something considerably greater than the ordinary investigatory interests of a federal agency' (p. 239). If I were more inclined to agree with the ALRC's original premise, which I am not, I would ask exactly how such a higher competing public interest could possibly be judged. I guess the answer would be, 'According to the rules that we establish'. The search for truth is too important to reduce to the status of a legal game, let alone one which dominates all.

There are many other contention issues discussed in the ALRC paper, including:

- Whether client legal privilege should relate to the lawyer, his client or to both
- Whether client legal privilege is a common law right and, if so, whether its legal treatment is ideally consistent with later, international, rights based legislation
- Whether it is reasonable to assume that client legal privilege has 'two limbs' – an investigation limb and a prosecution limb – or is ideally a unitary concept
- Whether client legal privilege should only apply to individuals or also to corporations

- Whether legally privileged relationships ideally should also apply to others besides lawyers, such as accountants or other professional advisers
- Whether it is ever possible to distinguish between the information which ought ideally to be the subject of client legal privilege and that which ought not to be (since lawyers have often crawled over everything in any business)
- What should be the appropriate relationship between Royal Commissions, courts, federal investigatory bodies and parliaments in regard to client legal privilege?
- Differing interpretations of requirements for client legal privilege in general and in specific instances also pose continuing problems. For example s.155(1) of the Trade Practices Act appears likely to continue to generate dispute for a long time to come and I cannot even understand what McHugh J said about the matter (p.182) partly because of his double negatives, which lawyers generally seem to love.

It is also of continuing concern that the ALRC does not address the appropriate relationship of all current state legislation to all relevant federal legislation, including privacy law, since there is a substantial range of state investigatory bodies. It will be legal heaven if the ALRC proposals are supported, which is red tape hell for everybody else.

The ALRC concludes that 'it is not readily apparent whether particular federal bodies take the view that their powers abrogate client legal privilege by necessary implication, especially where such powers have never been used. In some instances, federal bodies have never considered whether their powers abrogate privilege. Clarifying the law will not only address present uncertainties but will have the advantage of addressing potential uncertainties that may arise in the future when there is a cause to consider the application of privilege to a particular power' (p. 192). (Surely they must be kidding?) What person could feel capable of making a decision about new legislation to clarify the requirements of client legal privilege in the public interest in such a fragmented, embattled, confusing legal context (unless, of course, they were a lawyer, for whom all dispute makes money).

From my perspective, embarking upon any further discussion of client legal privilege with a view to producing generally clarifying legislation, as recommended by the ALRC in Proposal 5-1 and supported in all later proposals, can only generate greater legal disagreement and a related cost explosion. Under the circumstances, the only sensible course of action, from my perspective, is to abolish the concept of client legal privilege and rely on the protections of Australian privacy law. See below for further information.

4. Logically, the ALRC must scientifically test its primary assumption or dismiss it

There is no good evidence from the ALRC that client legal privilege leads to greater legal compliance, just as there is no good evidence that client legal privilege leads to legal non-compliance, which is the opposing position that I and many others have taken. The ALRC paper merely offers the reader many conflicting opinions for consideration. This process could go on ad-nauseam. Logically, if the ALRC and all opposing others are considered equally ignorant in regard to the truth or otherwise of the basic assumption that *'the protection of the confidentiality of communications between a lawyer and a client facilitates compliance with the law'*, one must proceed in one of two ways.

Firstly, one might proceed logically by trying to establish the scientific conditions for testing the ALRC's first premise about the positive social effects of client legal privilege. One assumes such investigation must also be done on a legal case by case basis, which is also consistent with the legally required processes. Alternatively, one might logically proceed by ceasing completely to recognise the words 'client legal privilege', so that it never came up anywhere ever again. This could be done by passing an overriding piece of legislation containing only a few words, such as, 'Client legal privilege is dead forever'.

In summary, from any perspective other than the lawyers', it would now seem only reasonable either to be entirely silent about the concept of client legal privilege, which also means removing it from legislation totally, or else to devise appropriate inquiry into the ancient feudal premise of client legal privilege and the arena surrounding it, which still follows pre-scientific rules. Lacking all confidence in research driven by the normal legal mind, because of its feudal training, and knowing we are secure in the protections of Australian privacy law, I favour the other, repealing course of action, supported by broad education and related service outcome evaluation, as described in the attached articles.

5. ALRC proposals ignore the relationship of curial and non-curial contexts

The term 'curial' was not included in the pocket dictionary I first consulted. However, in an on-line article published in Mealy's International Arbitration Report (May 2005; 39-43), entitled 'An Arbitrator's Powers and Duties Under Art. 114 of Chinese Contract Law in Awarding Damages in China in Respect of a Dispute Under a Contract Governed by CISG', Professor Marcus S Jacobs, QC, a Sydney barrister, and Yanming Huang, an arbitrator in the China International Economic and Trade Arbitration Commission state the curial law is 'the lex arbitri, or the law of the situs or the site of the arbitration'.

Curiously, from any normal Australian academic or bureaucratic perspective, the authors never give the CISC its full name. My further trip through Google indicated that, according to Bruno Zeller, a law lecturer in the Victorian University of Technology in Melbourne, the CISG is the United Nations Convention on Contracts for the International Sale of Goods (1980), which has been accepted by most of Australia's major trading partners with the notable exception of the United Kingdom and Japan. Zeller claims the CISG has become the de-facto sales law of the European Community (EC), overtaking some well established civil laws in countries such as Italy, Germany and Switzerland. As China is now Australia's largest trading partner it seems extremely remiss of the ALRC to ignore key national and global distinctions between curial and non-curial contexts in its current discussions. This adds to the problems and costs outlined in this submission. (By the way, how much do you think the shared concept of client legal privilege assists the Italian governments' continuing struggle with the Italian mafia? A lot?)

The argument that I present follows the practice of the ALRC in largely ignoring the key definitions and legal distinctions between Australian curial and non-curial contexts and their related requirements, even though these questions form part of the background to the current ALRC inquiry and hence the reasons for its terms of reference. I do not deal with

such distinctions out of personal ignorance. But what is the ALRC's excuse for their more vital abrogation of the duty to discuss the ideal requirements of arbitration as distinct from judgments in the court? To assist all such deliberation, I offer background information on the ideal steps of mediation, conciliation and arbitration, as discussed in my recent article entitled, 'A healthier approach to justice and environment development in Australian communities and beyond', published in 'Public Administration Today (Oct.-Dec. 2006), the journal of the Institute of Public Affairs in Australia (IPAA).

After consultation, the National Alternative Dispute Resolution Advisory Council (NADRAC 2004) advised the Commonwealth Attorney General to review potential models for a national mediator accreditation system. It had earlier defined ADR as 'a process, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in dispute to resolve the issues between them'. It called ADR processes facilitative, advisory, and determinative or, in some cases, a combination of all three. Mediation was defined as facilitative, because the practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Conciliation was called an advisory process in which the conciliator is a neutral third party who considers and appraises the dispute. Expert assistance may be sought in regard to apparent facts of the dispute, the law, possible or desirable outcomes and how these may be achieved. Arbitration, expert determination and private judging are provided as examples of determinative ADR processes in this document (NADRAC 2001). Next to nothing is said about arbitration.

I also attach relevant historical evidence in a more recent article entitled 'From the Constitutional Past to the New Educational Ideal', (forthcoming in the same IPAA journal) which shows that due to the driving requirements of the Constitution and High Court all Australian curial contexts appear almost inevitably to become more like non-curial ones over time. That is, Australian historical inquiry suggests that arbitration systems tend to be increasingly driven to become like courts, whatever reasons elected governments originally had for trying to set them up differently. The current ALRC proposals may be considered as a further demonstration of this fact, unless government thinks they are too incredibly silly to enact, as is my naturally optimistic hope and recommendation.

The ALRC appears not even to understand the modern meaning or public management rationale for the word, 'stakeholder', although its terms of reference indicate that it 'will identify and consult with relevant stakeholders' (p. 24). Logically, one would have thought that the key stakeholders (those who pay for and receive an administrative or legal service or benefit) should be particularly consulted, rather than all the legal service providers. However, the list of consultations in Appendix 3 suggests the ALRC only really cares about lawyers' views. Perhaps the ALRC thinks it has a higher duty to the law, as distinct from its own terms of reference, in this consultation matter, because it also points out that under the provisions of the Australian Law Reform Commission Act 1996 (Cth), the ALRC 'may inform itself in any way it thinks fit', for the purposes of reviewing or considering anything that is the subject of an inquiry' (p.24). Under the circumstances one wonders whether the ALRC is ignorant of stakeholder theory, or is consciously

returning to its feudal roots by downgrading the key stakeholders, who in this case are the broad masses of the Australian people, represented primarily by their elected politicians.

6. Client legal privilege can ideally be defended only from within an oppressive state

On the comparative historical and geographic evidence, as well as on the personal experience now available to me, I believe Australia is a democratic state of comparatively high quality. Further democratic and related educational development in Australia and globally now depend primarily upon openness and clear education, which lawyers are incapable of delivering, in my opinion. (See attached articles for related policy discussion.)

From my perspective, the most reasonable arguments in favour of client legal privilege occur when governments appear to be oppressive towards a silenced or ignorant majority, minority or particular individuals, who therefore often need to hide to be protected. Jews, gypsies and others clearly faced this situation until recently in many parts of Europe and the historical implications of this are discussed in the second of the articles I attach, which deals with the establishment of the United Nations, the Declaration of Human Rights and the Australian law which followed. Contemporary indigenous Australians and others will decide for themselves whether they think hiding from government or being open is in their best interests. Speaking as a feminist, I believe the latter is the sensible course of action. The protections of anti-discrimination and privacy legislation are available in this context.

In general, and apparently unlike the ALRC, I believe the approach of the ideal reasonable person, as distinct from that of lawyers who have historically made their living out of the increasing delays and complexities created by the doctrine of client legal privilege, is that if people have nothing bad to hide, in a well functioning democracy they should have little need of secrecy beyond the protections already offered by anti-discrimination and privacy legislation. Conversely, if people are experiencing something bad which they have been hiding, they are usually better off facing it openly and trying to deal with it, so that their future family members and related generations do not face similar problems. Arbitration now requires consideration primarily in specific community contexts, not in legal ones.

7. Conclusion

Due to the ALRC's scientifically untested assumption about the desirability of client legal privilege, and also due to many other feudal, pre-scientific assumptions which drive court processes, implementing ALRC proposals would be very costly, and generally unhelpful to the public interest. No-one can confidently advise politicians on new 'federal client legal privilege legislation' which would effectively 'abrogate or modify' current legislation to make its requirements clearer, more consistent and therefore more logical and cost-effective. The many contrasting opinions described in the ALRC paper, which also draw on little or no scientific evidence, mean that the proposed legislation would merely give new opportunity for further legal contests. This is also likely to lead to further legal amendment, more lack of clarity and more legal inconsistency, which in turn seems inevitably to lead to more dispute and further legislative amendment. Changing the current law in the way the ALRC proposes will thus lead merely to continuing, more

complex and costly dispute, unless the required legal change produces certainty by eliminating client legal privilege entirely. I have argued this latter course of action is logically, morally and economically desirable and attach information about a way forward.

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