

IGIS SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO LEGAL PROFESSIONAL PRIVILEGE

Thank you for your letter of 24 April 2007 concerning the current inquiry by the Australian Law Reform Commission (ALRC) into the application of legal professional privilege (or client legal privilege) to the coercive information gathering powers of Commonwealth bodies.

You asked for information on how this office approaches the key issues and I am happy to provide a response. By way of context I should note at the outset that:

- a) The role of this office (which commenced on 1 February 1987) is to review the activities of the six Australian government agencies which are collectively called the Australian Intelligence Community. Importantly, the focus is very much on the activities of the agencies and their staff.
- b) One element of this review is the conduct of formal inquiries, and certain coercive powers (together with a use immunity) are available in the course of such inquiries.
- c) The Inspector-General has considerable flexibility about how each formal inquiry is conducted, although they must be conducted in private.
- d) The purpose of these formal inquiries is to ascertain the truth and make recommendations.
- e) The Inspector-General does not have any capacity to give directions or make determinations at the conclusion of an inquiry.

Frequency of coercive powers use

Since I was first appointed as Inspector-General on 23 March 2004, I have used the coercive powers in section 18 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) in the course of three inquiries.

Section 18 powers have not been used in all inquiries because, in my view, it has not been necessary or appropriate to use them. In most instances inquiries have proceeded by way of examination of records (access to which has been freely provided by the relevant agencies), interviews with relevant staff which have not involved compulsion and the administration of an oath or affirmation, and obtaining statutory declarations from staff addressing questions pertinent to the inquiry.

I understand that the practice of my predecessors was essentially similar.

In the three inquiries where I have issued notices under section 18, this was done either because I formed a belief based on reasonable grounds that certain persons may not have been forthcoming or truthful, or because I took the view that as it was a matter of significant public interest, key witnesses should give their evidence on oath or affirmation.

Some 20 notes under section 18 were involved in these three inquiries. Nineteen of those were notices to appear before me and to answer questions relevant to the matter under inquiry. In one instance the notice required the person to provide me certain information in writing. All of these requests were complied with by the recipients.

It should be noted that in all instances the recipients of the notice was a current or former staff member of one of the six agencies within my jurisdiction.

Client professional privilege

As noted by the ALRC in Issues Paper 33 of April 2007, section 18(6) of the IGIS Act provides that it is not a reasonable excuse for not providing information or documents or answers if it would disclose legal advice given to a minister or an agency or authority of the Commonwealth.

The issues Paper suggests that this abrogates privilege for those bodies in relation to advice but not in respect of existing or anticipated legal proceedings i.e. the "litigation limb". And clearly the privilege is not abrogated for people or bodies other than those specified in section 18.

The office records and recollections of long serving staff do not reveal any instances of an agency, authority or person attempting to rely on client legal privilege as a reason for not responding to a section 18 notice.

Practice and procedures

I am only aware of one instance where privilege in the context of the section 18 powers in the IGIS Act has potentially been an issue. This related to the notice mentioned above where a person was required to provide information in writing.

Prior to issuing the notice I discussed the matter with the individual concerned. He indicated that the easiest way for him to respond would be to provide me with a copy of a statement he had provided to the legal area of an organisation which was not a Commonwealth organisation.

I advised him that the particular document appeared to attract client legal privilege and I would be happy for him to provide the information in another way. Alternatively he should speak with the relevant legal area as to how he might proceed. In the event the document was subsequently provided to me.

As client legal privilege issues arise only very rarely in relation to section 18 of the IGIS Act, this office has not set down any policies or procedures in a manual or otherwise.

For completeness I should also comment that if necessary, the privilege could be maintained against third parties because the Inspector-General and the staff of the office cannot be compelled to disclose information (see in particular section 34 of the IGIS Act). This has not arisen as a practical issue in the experience of this office.

Use and derivative use immunity

Section 18(6) of the IGIS Act provides for use immunity and I can say confidently that this has not been an inhibition to effective investigation in my experience.

Arguably, use immunity provides additional incentive for a person to cooperate insofar as they do not have to engage in an exercise of weighing the potential penalty for non-compliance with the potential penalties that might attach to prosecution of them for conduct which is under consideration.

In any case, in my view it is intuitively fair that use immunity be available if the normal right concerning self-incrimination is not available.

General comments

There are cogent reasons for generally maintaining client legal privilege. While some of the rationales for privilege given in the first chapter of Issues Paper 33 are debatable, it is difficult to put aside the rationales of full and frank disclosure, encouraging compliance and protecting the fairness of the adversarial system.

Nonetheless, I would suggest some important exceptions or qualifications need to be made.

One concerns the Royal Commissions of the inquisitorial/investigatory type. Such Royal Commissions will have been established because there is a matter of substantial public interest/concern. A great deal of public monies is usually expended. Ascertaining the truth is the fundamental purpose of having the Royal Commission. Such Royal Commissions are relatively unusual and abrogation of privilege would not impact to any significant degree on the instrumental rationales for client legal privilege – it would be most surprising if the possibility of a Royal Commission was on people’s “mental horizon” when conducting their affairs and obtaining legal advice. In any case, the public interest in Royal Commissions ascertaining the truth should be paramount.

I should mention that on occasion there have been policy advisory Royal Commissions (as compared to inquisitorial/investigatory Royal Commissions). This distinction is drawn in Scott Prasser’s *Royal Commissions and public inquiries in Australia* (LexisNexis, Chatswood NSW 2006). It must be acknowledged that policy advisory Royal Commissions should not, in practice, need to access material of the sort which might raise issues of client legal privilege.

A second area where the appropriateness of client legal privilege needs to be considered is where review of the activities of government bodies is being carried out.

Adequate accountability of government entities is vital for several reasons. These are neatly encapsulated in a quotation from the publication *Accountability in the Commonwealth Public Sector* by the Management Advisory Board and its Management Improvement Advisory Committee, No 11, June 1993:

“Accountability is fundamental to good governance in modern open societies. Australian rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration. Indeed, public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.”

Given the importance of ensuring the proper accountability of public bodies, a strong argument can be made out to limit or remove the possibility of entities claiming client legal privilege when being lawfully reviewed by other parts of the executive arm of government.

Even if this general argument is thought to go too far, I would argue that there is an additional consideration in respect of the intelligence and security agencies. Such agencies operate largely in secrecy. Other processes which might restrain the conduct of public entities, such as the capacity of citizens to be fully aware of what is being done in respect of them, or for representatives of the entity to be questioned about operational details in public sessions of parliamentary committees, are not applicable to the intelligence and security agencies.

In these circumstances the special review mechanism of the Inspector-General of Intelligence and Security has been developed. Consistent with the need for the Inspector-General to be something of a substitute for other accountability mechanisms and hence very incisive, there should be no restrictions on what the Inspector-General can view with the agencies.

Moreover, formal inquiries under the IGIS Act are, in significant respects, similar to a Royal Commission. Coercive powers (with a use immunity) are available, the objective is to ascertain the truth, and the IGIS does not have any determinative or decision making powers at the conclusion of an inquiry.

For these reasons I believe the abrogation of legal professional privilege in the IGIS Act in respect of the intelligence and security agencies is entirely appropriate.

However, given that the IGIS is an ongoing body and its focus is very much intended to be upon those six agencies, the abrogation rightly does not go beyond the agencies and relevant ministers.

At the same time I must say that limiting the abrogation in respect of the agencies to legal advice is, in my view, a potential deficiency. Privilege in respect of the litigation arm should also be clearly abrogated.

There could well be occasions when the Inspector-General should, to properly achieve the stated objectives of the IGIS Act, examine the compliance of agencies with the *Legal Services Directions* issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903*. There has been significant growth in the number of litigation actions to which ASIO is a party or otherwise involved (see page four of the unclassified [ASIO report to Parliament 2005-2006](#)).

Of course, abrogation in respect of litigation should not extend to any situation where both an agency and the inspector-General are parties to a particular action (not that this seems remotely likely).

I hope this information and comment is useful. Please don't hesitate to contact me if further information or clarification would be helpful.

Yours sincerely

Ian Carnell

Inspector-General of
Intelligence and Security
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