Federation of Community Legal Centres (Vic) Inc

Alan Kirkland
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

4th June 2007

Dear Mr Kirkland,

Review of Client Legal Privilege and Federal Investigatory Bodies

We appreciate the opportunity provided by the Australian Law Reform Commission to comment on Issues Paper 33 *Client Legal Privilege and Federal Investigatory Bodies*.

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance, representation and community legal education to more than 100,000 Victorians each year. We also work on strategic research, casework, policy development and social and law reform activities. The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

Our submission

The Federation believes that the client-legal privilege is absolutely essential to clients obtaining and receiving accurate legal advice. Client legal privilege should not be modified or abrogated except in exceptional circumstances where there is a compelling justification and a clear public interest outweighing the public interest in favour of privilege. The Federation believes that the rationales of encouraging full and frank disclosure, protecting client privacy, protection against self-incrimination and encouraging accurate and efficient legal advice are imperative in determining the scope of privilege.

Client legal privilege is particularly important given the client base of Federation members. Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

In this framework, it is essential that our clients are prepared to seek advice from a lawyer and to speak openly and honestly to their lawyer. If clients feel that what is discussed may not remain confidential (unless of course disclosure is authorised by the client) this may reduce a client's willingness to speak openly. In turn, this will affect the quality and accuracy of legal advice that lawyers can provide.

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ASIO and the AFP – Anti-Terrorism Laws and Privilege

The Federation thanks the ALRC for meeting with members of the Federation's Anti-Terrorism Laws Working Group on 25 May 2007. The protection granted to lawyer-client communications by client legal privilege is extremely important in the context of the investigation of terrorism offences and related national security matters. The application of privilege to lawyers practising in anti-terror law, and to their clients, is unclear and at times, problematic. A summary of our concerns and experiences, as outlined at our May meeting, is provided below.

About the Anti-Terrorism Laws Working Group

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLCs to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals. The Working Group has worked closely with a number of communities that have been affected by recent changes to Australia's anti-terrorism laws, in particular Muslim, Kurdish, Tamil and Somali community groups.

Capacity of individuals to receive legal advice

Given the breadth and complexity of Australia's anti-terrorism laws, it is difficult for those who may be affected by them to bring their behaviour into compliance without legal advice. This is particularly so because the laws (given their extra-territorial reach) have the greatest impact on Australian communities with strong connections to overseas situations of entrenched conflict and, in many cases, these communities have a significant proportion of members who do not read English or do not have a high degree of familiarity with the operation of the Australian legal system.

Lawyers, when giving legal advice, are of course bound by an obligation of confidentiality. In the context of anti-terrorism advice, however, there can be no practical guarantee of confidentiality. Both federal police and security agencies who investigate such matters rely heavily on covert surveillance and intelligence gathering. It is therefore crucial, if clients are to be able to frankly explain their circumstances and receive advice, that any disclosures that they make to their lawyer be protected by law. Indeed, in the absence of the protection that client legal privilege provides and given the uncertainty about the possibility of covert surveillance, a lawyer would be irresponsible to allow a client to speak and potentially confess to the commission of what are extremely serious offences.

Of course, clients are frequently aware of the possibility that either they, or their lawyer, may be subject to covert surveillance. In our experience, understandably this makes clients reluctant to speak frankly about their situation, which in turn makes it difficult or impossible to give advice. It is primarily the reassurance that can be provided by explaining the law of privilege to clients that gives them the confidence to actually explain their circumstances in detail and thereby to receive the advice they need to bring their behaviour into compliance with the law.

This issue takes on added significance because of the nature of Australia's anti-terrorism

legislation. The legislation has been drafted in extremely broad terms. Without being able to obtain specific information from clients regarding their circumstances, it is impossible to advise them as to whether they are falling foul of the laws. Furthermore, Australia's terrorism offences all carry extremely severe penalties. It is therefore imperative that individuals be able to obtain detailed and accurate legal advice because the consequences of non-compliance may be extremely dire for the individual.

We stress that these arguments are not put forward in the abstract. They arise out of the experience of community lawyers working in the area of anti-terrorism law. When advising clients, explaining privilege and ensuring that it is not inadvertently waived by clients, is a central and in some cases pre-eminent concern. In circumstances in which privilege does not apply, such as community forums, we have found it impossible to give effective advice to individuals as to their rights and liabilities. In the absence of the protection of privilege people simply cannot explain their detailed circumstances because of the fear that they may be admitting to the commission of extremely serious offences whilst under surveillance of some sort. Based on our experiences advising in this area, we are of the view that we would not be able to provide adequate legal advice to clients in the absence of the protection of client legal privilege.

The effective operation of an adversarial criminal justice system

As the High Court acknowledged in the well-known decision of *Dietrich v. The Queen* (1992) 177 CLR 292, an adversarial system of criminal justice can only operate fairly and effectively if accused persons have legal representation. This is particularly so when the trial concerns a serious criminal offence, such as those established by Part 5.3 of the *Criminal Code* related to anti-terrorism offences.

The capacity of individuals to receive legal advice is therefore crucial to the operation of our system of criminal justice. And, as explained above, this in turn depends upon the protection that is granted by client legal privilege. Without that protection, suspects and accused person cannot have the confidence to communicate frankly with their lawyers.

The role of Commonwealth agencies

The two agencies who have the principal investigatory roles in relation to anti-terrorism matters are the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO). Traditionally, the AFP has acted as a police force, investigating offences and gathering evidence for prosecution, and in the course of so doing has respected client legal privilege and lawyers' duty of confidence to their clients.

ASIO, on the other hand, has acted as a spy agency, gathering intelligence with little concern for the niceties of privilege but not exercising any policing function.

There is reason to believe, however, that these agency roles are becoming increasingly blurred. For example, in its recent inquiry into the operation of ASIO questioning and detention warrants, the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) found that these warrants were being used to question suspects in order to bring charges (paragraphs 1.45–1.46, 1.73-1.75). The Committee rightly expressed concern that a special intelligence-gathering regime might become a de facto method of police investigation, without the traditional protections that apply to such investigations.

Given the apparent expansion of ASIO's role, we are particularly concerned about the lack of clarity around how ASIO approach the issue of client legal privilege. As they operate covertly, it is unknown how they respond to situations where they come across privileged material in the course of their surveillance or interceptions. For example, where a telephone interception leads to the monitoring of a phone call to a lawyer or where seizure of a computer leads to the discovery of communications between a lawyer and client on the hard drive.

As a result, the confusion over and intermingling of agency roles already has the potential to undermine the fair and effective operation of the criminal justice system. It is crucial that this potential not be exacerbated by undermining the protection that continues to be provided by client legal privilege.

Operation of particular investigatory regimes

The need for lawyer-client communications to enjoy the protection of privilege is made all the greater by the existence of mechanisms for compulsory third-party questioning in the context of anti-terrorism investigations, such as requests for information or documents under Subdivision B of Division 4B of Part IAA of the *Crimes Act (Cth) 1914*, warrants issued under Division 3 of Part III of the ASIO Act 1979, and notices to produce documents issued under Subdivision C of Division 4B of Part IAA of the *Crimes Act (Cth) 1914*. It is crucial, if a client is to have confidence in communicating with his or her lawyer, that the protection of privilege apply to information and documents that are communicated pursuant to these various mechanisms.

The first and second of these regimes are not said to override legal professional privilege, and therefore presumably are subject to it (this inference is supported by the contrast, in Division 4B of the *Crimes Act (Cth) 1914*, between Subdivision B and Subdivision C, and by section 34ZV of the *ASIO Act (Cth) 1979*, which expressly preserves privilege). This is particularly important in relation to ASIO warrants, which operate in a covert fashion (pursuant to section 34ZS *Crimes Act (Cth) 1914*), thus precluding a lawyer from even informing her client that information or documents have been sought and divulged.

The notice to produce regime is more problematic as the extent of protection it provides to privilege is limited: a claim of privilege in relation to a produced document can still be upheld (section 3ZQR(4) *Crimes Act (Cth) 1914*) but the regime contemplates the use of privileged documents for investigatory purposes. This regime clearly acts as a disincentive for clients to seek advice, and to disclose all their circumstances in so doing. This is exacerbated by the fact that it has the potential to operate covertly (pursuant to section 3ZQT *Crimes Act (Cth) 1914*), thus undermining the clients capacity to rely upon the word of their lawyer (although it is possible that a lawyer's disclosure to their client that they have been called upon to produce a document might itself be protected by privilege – the regime is not clear in relation to this matter).

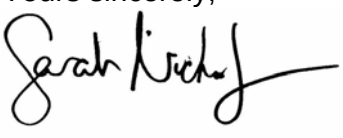
Summary of key concerns

The Federation strongly supports retention of the existing protection provided by legal profession privilege in the context of anti-terrorism investigations. In relation to the notice to produce regime, we support repeal of the abrogation of privilege. The Federation further supports clarification of ASIO's policy on privilege and that this policy be made public and if necessary amended to ensure that client legal privilege is protected in the course of ASIO's operations.

We would welcome any opportunity to further elaborate on our submission. In particular, we are happy to refer the ALRC to specialist centres or Working Groups within the Federation who have particular exposure to federal investigatory bodies.

If you have any questions regarding our submission, please contact Prue Elletson, or myself on (03) 9652 1506 or via Sarah_Nicholson@clc.net.au.

Yours sincerely,



Sarah Nicholson
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