



---

# Supplementary Information

## Federal Court of Australia

### Amendment (Criminal Jurisdiction) Bill 2008

---

## **Senate Legal and Constitutional Affairs Committee**

9 February 2009

---

GPO Box 1989, Canberra  
ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788  
Facsimile +61 2 6248 0639

Law Council of Australia Limited  
ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

---

## Table of Contents

<b>Legal Professional Privilege .....</b>	<b>3</b>
Proposed provision.....	3
Explanatory Memorandum .....	3
The Need for the Provision .....	4
Previous Law Council Submissions on Abrogation of Legal Professional Privilege.....	5
Recommendation.....	5
<b>Attachment A: Profile of the Law Council of Australia.....</b>	<b>6</b>

---

## Legal Professional Privilege

The Law Council of Australia (the Law Council) is grateful for the invitation to respond to a question taken on notice at the Senate Legal and Constitutional Affairs Committee (the Committee) hearing into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (the Bill).

The question related to proposed section 23CL of the Bill relating to the partial abrogation of legal professional privilege in relation to pre-trial disclosure.

Dr David Neal SC for the Law Council indicated that the proposed section gave cause for concern and that the Law Council would provide further views to the Committee.

Mr Tim Game SC for the Law Council also indicated that there may be relevant case law in the context of legislation relating to the Australian Crime Commission.

### Proposed provision

Proposed sub-section 23CL(1) provides that a party is not excused from disclosing material under an order for pre-trial disclosure on the basis that to do so would involve disclosure of material that is protected by inter alia legal professional privilege.

The order for pre-trial disclosure may be an order for:

- The prosecution to give notice of its case to the accused
- The accused to give notice of its response to the prosecution
- The prosecution to give notice of its response to the accused's response
- The prosecution and the accused to make ongoing disclosures

Proposed sub-s 23CL (2) provides that the Subdivision does not otherwise abrogate or affect the law relating inter alia to legal professional privilege.

Proposed sub-s 23CL (5) provides that legal professional privilege includes privilege under the *Evidence Act 1995* or a similar law of a State or Territory.

### Explanatory Memorandum

The Explanatory Memorandum notes that under the pre-trial disclosure provisions the prosecution must provide material it intends to rely on as well as material which is potentially relevant to the case of the accused or that might adversely affect the reliability or credibility of a prosecution witness. The Explanatory Memorandum also suggests that the accused must provide a copy of any expert report the accused proposes to rely on at trial and that this is the only situation in which there is a requirement for the accused to provide copies of evidential material to the prosecution unless raising a defence of alibi or mental impairment.<sup>1</sup> However, this suggestion is not supported by the terms of proposed sections 23CF and 23CH or by other parts of the Explanatory Memorandum.

Proposed s 23CF lists a number of matters to be included in an accused's response where relevant such as expert reports and notices of alibi or mental impairment and concludes with the words 'and may include other matters'. Proposed s 23CH refers to the accused's obligation of continuing disclosure including the obligation to disclose something if the accused takes issue with something in the prosecution case on an alternative or additional basis. These provisions mean that the obligation to disclose evidential material may not be restricted to expert reports and material relating to alibis and

---

<sup>1</sup> *Explanatory Memorandum*, p13

---

mental impairment as suggested by the Explanatory Memorandum. The Explanatory Memorandum itself states that the list of matters in s 23CF is not exhaustive and that the continuing disclosure obligation in s 23CH also refers to additional material coming into the possession of a party after formal disclosure is complete.<sup>2</sup> In this context, proposed sub-section 23CL (1) becomes even more significant.

The Explanatory Memorandum in relation to proposed sub-section 23CL (1) states that for the purposes of pre-trial disclosure legal professional privilege is automatically abrogated. It asserts that criminal proceedings are routinely delayed by claims for legal professional privilege and that the provision balances the policy objectives of maximising disclosure of each party's case against the rationale for protecting privilege by abrogating privilege only for pre-trial disclosure. It also asserts that the disclosure will not amount to a waiver of privilege and that the party can still claim privilege at the trial.<sup>3</sup>

## The Need for the Provision

The Explanatory Memorandum does not refer to any empirical evidence in relation to the assertion that criminal proceedings are routinely delayed by claims of legal professional privilege.

In the time available to answer the question on notice, the Law Council has been unable to consult widely on this issue. Dr David Neal SC, and Mr Phillip Priest QC, members of the Law Council's Criminal Law Committee advise that they are not personally aware of such delays in pre-trial disclosure and the issue has not been raised in two revisions of Victorian pre-trial procedures of which they are aware.

Dr Neal SC and Mr Priest QC suggest that expert reports are routinely supplied by the defence without any objection based on legal professional privilege. A recent Victorian decision about a failure to disclose an expert report prior to trial did not relate to any claim of legal professional privilege.<sup>4</sup>

Apart from the threshold issue of whether the provision is required at all, another issue arises as to the way the provision is drafted, which also brings into question the need for the provision.

As noted, the proposed sub-s 23CL(1) provides that a party cannot rely on legal professional privilege to avoid pre-trial disclosure and sub-s 23CL (3) provides that the law relating to legal professional privilege is not otherwise abrogated or affected. The Explanatory Memorandum states that a party can still claim legal professional privilege at trial in relation to a document which has been disclosed.<sup>5</sup> It is difficult to see what would be gained by making the claim at trial when the other party is already aware of the contents of the document. The two sub-sections may not operate effectively together. This point has also been made in the submission of the NSW Attorney-General.<sup>6</sup>

In contrast, two sub-sections in the *Australian Crime Commission Act 2002 (Cth)* relating to legal professional privilege appear to operate more effectively together.

Sub-s 30 (3) provides that a legal practitioner who is required to answer a question or produce a document to an Australian Crime Commission Examiner (the Examiner) is entitled to refuse to do so if the answer or document contains a privileged communication unless the client agrees to waive the privilege. If the legal practitioner refuses to answer the question or produce the document, the Examiner can require the practitioner to provide the name and address of the client.

Sub-s 30(9) provides that sub-s 30(3) does not *affect the law relating to legal professional privilege* (emphasis added). This sub-section is similarly worded to the proposed sub-section in the Bill.

---

<sup>2</sup> *Explanatory Memorandum* at pp 11-12

<sup>3</sup> *Explanatory Memorandum*, p 14

<sup>4</sup> *DPP v Farquharson (Ruling No 4)* [2007] VSC 458

<sup>5</sup> *Explanatory Memorandum*, p 14

<sup>6</sup> See submission of the NSW Attorney-General

---

It has been held that sub-s 30 (3) does not set out the only circumstances in which legal professional privilege may be claimed.<sup>7</sup> Sub-s 30 (9) has been held to operate effectively with sub-s 30(3). It has also been held that Parliament had no intention to abrogate the common law rule of legal professional privilege through the operation of these sub-sections.<sup>8</sup>

While the context of the decisions relating to the Australian Crime Commission is different, these decisions indicate that there is potential confusion over the meaning of such provisions which seek to restrict the common law right of legal professional privilege. Such potential confusion could be avoided by removing the provision as no need for it has otherwise been demonstrated.

The Law Council notes that no other Australian jurisdiction appears to have such a provision in the context of pre-trial disclosure.

## **Previous Law Council Submissions on Abrogation of Legal Professional Privilege**

In 2007, the Law Council made submissions to the Australian Law Reform Commission in relation to its inquiry into Client Legal Privilege and Federal Investigatory Bodies.

The Law Council's submissions referred to the position that client legal privilege, which is also referred to as legal professional privilege, is a fundamental protection and pillar of the Australian legal system and should not be abrogated by legislation. Client legal privilege ensures full and frank discussions between lawyers and clients and promotes the administration of justice and compliance with the law. Incursions against privilege have a deleterious impact on the lawyer-client relationship and the administration of justice. There is a consistent thread of common law authority describing client legal privilege as a fundamental right.<sup>9</sup>

## **Recommendation**

The Law Council recommends that the provision in its current form be removed from the Bill.

---

<sup>7</sup> *MM v Australian Crime Commission* [2007] FCA 2026

<sup>8</sup> *Mansfield v Australian Crime Commission* [2003] FCA 1059

<sup>9</sup> See Law Council submissions, *Response to the Australian Law Reform Commission Report No. 107 – Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies*, 28 March 2008; *Client Legal Privilege and Federal Investigatory Bodies*, 1 November 2007; *Client Legal Privilege and Federal Investigatory Bodies*, 4 June 2007 at <http://www.lawcouncil.asn.au/library/submissions.cfm>

---

## **Attachment A: Profile of the Law Council of Australia**

---

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.