Issues Paper 33 - Legal Professional Privilege and Commonwealth Investigatory Bodies

Submission to the Australian Law Reform Commission

June 2007
Office of the Privacy Commissioner

The Office of the Privacy Commissioner (the Office) is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office, established under the Privacy Act 1988 (Cth) (the Privacy Act), has responsibilities for the protection of individuals’ personal information that is handled by Australian and ACT government agencies, and personal information held by all large private sector organisations, health service providers and some small businesses. The Office also has responsibilities under the Privacy Act in relation to credit worthiness information held by credit reporting agencies and credit providers, and personal tax file numbers used by individuals and organisations.

Background

The Privacy Commissioner’s investigative powers are set out in Part V of the Act. In addition the Privacy Commissioner deals with complaints under Part VIIIC of the Crimes Act 1914 relating to spent convictions.

Coercive powers of the OPC

The Privacy Act confers a number of coercive information gathering powers on the Privacy Commissioner. Those powers are subject to certain limitations.

Section 44 of the Act gives the Commissioner power to obtain information and documents where the Commissioner has reason to believe that a person has information or a document relevant to an investigation. The Commissioner may require information to be produced in writing. The Commissioner may also require a person to attend before the Commissioner to answer questions relevant to an investigation.

Section 45 gives the Commissioner the power to administer an oath or affirmation to a person required to attend before the Commissioner. Section 46 gives the Commissioner the power to call a compulsory conference and to require the production of documents at the conference. Section 68 gives a person authorized by the Commissioner the power to enter premises and to obtain a warrant.

Limitations on the coercive powers of the OPC

The coercive powers of the OPC are subject to certain limitations. A person who fails to attend a compulsory conference is guilty of an offence, subject to the defence of reasonable excuse (section 46). Similarly sections 65 and 66 provide that it is an offence to refuse or fail to; attend before the Commissioner, be sworn or make an affirmation, give information, answer a question or to produce a document or record when required under the Act, subject to the defence of “reasonable excuse.”

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Section 69 provides that information, documents and prescribed information shall not be furnished in such a way as to identify an individual unless the individual is the complainant or consents. Section 70 provides that the Commissioner cannot require a person to give any information, document or record where the Attorney General certifies that the giving to the Commissioner of the information, document or record would be contrary to the public interest.

**Answers to specific questions asked by ALRC on Coercive powers of the OPC and legal professional privilege**

The frequency with which OPC exercises its coercive powers, and if there are any powers which have never been used

While the OPC does not routinely exercise its coercive powers, such powers are exercised from time to time in appropriate circumstances. For example, circumstances where the section 44 powers might be used include where protected personal information is required from third parties, or in cases involving fraud where a number of sources need to be contacted in order to determine the veracity of a complainant’s identity.

The OPC has exercised its section 44 powers where a respondent has failed to respond, or to respond in a timely manner, to the OPC’s routine requests to provide information. To date the Commissioner has not obtained a warrant to enter premises.

Whether OPC takes the view that any of its coercive information gathering powers abrogate legal professional privilege by necessary implication

OPC's coercive information gathering powers under the Act do not abrogate legal professional privilege either expressly or by necessary implication. Further, in practice, the OPC does not seek or compel the production of legal advice obtained by a party to a complaint as the OPC is concerned to form its own view of the legality of an alleged interference with privacy.

In any event, the OPC takes the view that, even if it were to be suggested that certain provisions of the Act may impact on legal professional privilege, the “reasonable excuse” exception in s66(1B) includes a claim for legal professional privilege.¹

Therefore, in relation to questions 4-1 and 4-2 of IP33, the OPC does not consider that there is a need to clarify the application of legal professional privilege to the coercive information gathering powers under the Privacy Act.

¹See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, [19]-[20], [53], [113].
OPC has not encountered difficulties in relation to the application of legal professional privilege and considers that the existing regime is sufficient. In relation to questions 6-1 to 6-6 and 7-1 to 7-8, to date the Office has not been hindered by claims for privilege in investigating complaints. In those circumstances we do not consider that there are grounds for the privilege to be modified or abrogated. The prospect of criminal penalties where a person is found not to have a reasonable excuse appears to take account of the situation where a person asserts the privilege in bad faith.

The doctrine of legal professional privilege serves a broad public interest in protecting the privacy of the client against intrusion and should only be modified or abrogated in exceptional circumstances. In the context of largely individual complaints made under the Privacy Act, there does not appear to be justification for abrogating or modifying the privilege. This is particularly so as my Office has not encountered difficulties with information being withheld under a claim of privilege.

Chapter two of IP 33 asks whether there are circumstances where a concession of confidence should be extended to accountants or other professionals who provide what amounts to legal advice. My Office does not have evidence which would support a modification or abrogation of the privilege, nor do we have any evidence which would suggest the privilege should be extended to other professional relationships. The concept of a concession of confidence being available to other professionals is one which should be the subject of careful consideration, such that it is not used as a mechanism to prevent legitimate enquiry into matters.

Whether OPC makes the recipients of notices concerning the exercise of a compulsory power aware of their rights in relation to legal professional privilege

When exercising coercive powers the OPC notifies recipients of the relevant provisions of the Act. The OPC does not notify recipients of their rights in relation to legal professional privilege. OPC does not compel the production of legal advice and considers that notifying a recipient of their rights relating to legal professional privilege could constitute the provision of legal advice. As an impartial regulator, the OPC does not provide advice to the parties to complaints.

OPC’s practices and procedures in relation to managing any claims for privilege made in response to the exercise of a coercive information gathering power

OPC’s Compliance Manual does not set out its practice in relation to legal professional privilege in detail. Any claim of privilege made in response to the exercise of a coercive information gathering power would be assessed by the Commissioner or delegate. The issue may arise in the context of a party claiming that they have a “reasonable excuse” for failing to comply with a notice compelling the production of information. In those circumstances, the
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onus is on the party claiming the privilege to satisfy the Commissioner that grounds for a “reasonable excuse” exist.

Information about any instances in which OPC has challenged a claim for privilege asserted in respect of the exercise of a compulsory power

OPC has not challenged a claim for privilege asserted in respect of the exercise of a compulsory power.