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Submission by the Commonwealth Ombudsman
ALRC Inquiry into Client Legal Privilege and Federal
Investigatory Bodies

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Relevant legislative provisions

Under the *Ombudsman Act 1976* (the Act), the Ombudsman has the capacity to obtain information that is or may be subject to a claim for legal professional privilege.

For example, s8 of the Act provides that when investigating (following a complaint or on the Ombudsman's own motion), the Ombudsman may investigate as he or she thinks fit and may make inquiries of any person. Section 8(2B) offers protection to officers disclosing information to the Ombudsman including legal advice or a communication that would be protected by legal professional privilege by providing that the information is not admissible in evidence against the person. Section 8(2E) removes the risk of privilege being waived by virtue of the information having been disclosed to the Ombudsman in this context.

Prior to the enactment of these provisions in late 2005, it was not unknown (although not especially common) for an agency to decline to cooperate with the Ombudsman because of the possibility that this may be seen as a waiver. An example of the argument appears in the ACT Administrative Appeals Tribunal decision in *Fry v University of Canberra* [2005] ACTAAT 23 where President Peedom considered that privilege, in relation to documents provided to the Ombudsman in an investigation related to a dispute, had been waived.

Section 9 of the Act gives the Ombudsman coercive powers. The Ombudsman may issue a notice requiring any person to provide information or documents relevant to an investigation and may require a person to attend and answer questions.

If the Ombudsman uses his or her powers under s 9 to compel the production of information, or the attendance of a person to answer questions, s 9 (4)(ab) provides that a person is not excused from complying on the basis that compliance would disclose legal advice given to a Minister or Department or agency. Section 9(5A) removes the risk of privilege being waived by virtue of a person complying with the Ombudsman's requirements in this context.

Limitations

The Ombudsman's capacity to obtain information that may be subject to a claim for legal professional privilege is not unlimited.

For example, the Issues Paper discusses the *Inspector-General of Security and Intelligence Act 1986* and suggests that a claim for client legal privilege would excuse a person from giving information or producing a document if the document fell within the litigation limb of the privilege. The same issue may arise in an Ombudsman Act context. This limitation does have the capacity to constrain an Ombudsman investigation as it may excuse an agency from explaining to the Ombudsman how it planned and conducted litigation, even if the litigation is or would have been connected to a matter subject to investigation.

Another limitation is that although the Ombudsman can compel the production of legal advice provided to a Minister or Department or agency, it may not be possible to compel the production of legal advice provided to other persons because the excuse for not complying with a notice is not removed. The protections available to an agency may not apply should another person release privileged information.

There is also a possible unresolved issue concerning waiver of privilege. A Commonwealth agency can be considered not to have waived privilege by providing information to the Ombudsman, or another agency with similar powers. However, it is less certain that any subsequent disclosure or reference to the information by the investigative agency, if also an emanation of the Commonwealth, could not be argued to be a waiver of the Commonwealth's privilege. It would be worthwhile for the law in this area to be clarified, as the issue obviously affects other agencies.

The practical importance of being able to obtain an agency's legal advice

The ability to access an agency's legal advice, as part of an investigation into an agency's actions, is of significant practical importance to the Ombudsman. Although legal issues do not necessarily arise in every investigation, they arise sufficiently often for the provisions described above to be necessary in order for the Ombudsman's statutory role to be satisfactorily fulfilled. Sighting the agency's legal advice can help the Ombudsman to assess the lawfulness and reasonableness of an agency's actions.

For example, Ombudsman investigations often involve issues about how an agency has applied legislation. The legal advice given to an agency about the interpretation of its legislation may form part of the ordinary documentary background that is necessary to fully understand the issues in a case. Without access to that legal advice the investigating officer could find it very difficult to understand why an agency has taken the action it has taken. It would then be more difficult for the investigating officer to assess whether an agency's actions were 'apparently contrary to law' or otherwise wrong. Lack of access to an agency's legal advice would therefore mean that an investigation would take longer, consume more resources, or not reach a satisfactory conclusion if there was not a shared view of the agency's understanding of its legal position. The Ombudsman's office is not a court that can provide legal certainty; nor is it a body that should routinely obtain external and independent advice that may or may not contradict an agency's position.

Another scenario may be that an agency whose actions appear unreasonable may seek to deflect potential criticism by claiming that its actions are based on legal advice. Without access to that advice this claim could not be tested during an Ombudsman investigation. An agency that is acting unreasonably would be able to hide behind legal advice, which, upon examination, might not justify or necessitate the particular course of action taken. This could happen, for example, where the legal advice relied upon was given in a materially different context.

Issues raised by the ALRC in its correspondence to us

In its letter to the Ombudsman of 24 April 2007, the ALRC drew attention to some particular issues of interest. These are addressed below.

Frequency of exercising coercive powers

As discussed above, the role of Ombudsman is backed up by strong coercive powers in legislation. However, the vast majority of investigations are undertaken with reliance on voluntary cooperation by agencies and without the need to exercise coercive powers. The use of, for example, an s 9 notice to compel production of documents requires decision making under a legislative power that is not delegated to most investigation officers. It is no longer the case that answering a notice provides the only protection from facing the consequences of disclosure, but some individuals may consider themselves more protected if they are compelled. Use of this power also requires that the Minister must have been informed of the investigation. Accordingly, use of such a power is not a routine step, but is used sparingly. In 2005–2006, although 6,176 complaint issues were investigated and finalised by the office very few of these involved the issue of s 9 notices.

The office places emphasis on managing its relationships with agencies and encouraging voluntary cooperation. However, it is important to note that the voluntary cooperation of agencies occurs in substantial part because of the knowledge of the existence of coercive powers available to be used by the Ombudsman if voluntary cooperation does not occur. For reasons of efficiency, agencies would not wish their Ministers to be notified routinely of every investigation that may be commenced, even if confident that their position is correct. Although coercive powers may be used sparingly, their existence is crucial in securing agency cooperation in providing information or documents. The coercive powers are also crucial when the investigation is less cooperative, or when the agency wishes to be protected by a clear distinction between their actions and our decisions.

Policies and manuals setting out our practice in relation to legal professional privilege

The office maintains a Work Practices Manual setting out investigation practices and procedures developed within the office. The use of coercive powers is discussed in detail.

It is not unusual for agency employees to be reluctant to provide documents in response to a request for voluntary cooperation with an investigation. In particular, the need to protect legal advice, and the ability to claim legal professional privilege, may be of concern to agencies. As discussed above, certain provisions of the Act encourage voluntary cooperation in this situation by protecting the officer, and also by providing that an agency's ability to claim legal professional privilege has not been waived by disclosure to the Ombudsman under certain circumstances. These provisions were inserted into the Act in 2005 in order to allay agency concerns about voluntary cooperation. The Work Practices Manual discusses these provisions.

In practice, an investigating officer who is having difficulty obtaining voluntary cooperation because of an agency's concerns about disclosing legal advice, will usually seek internal legal advice before proposing the issue of a notice.

Issues raised by the ALRC in the Issues Paper

The ALRC Issues Paper raises the issue of whether there is a need for a uniform approach. This office would be reluctant to be subject to a uniform approach of a lower stringency than our current legislative provisions, because of the practical problems that this would cause for us in attempting to fulfil our statutory role.

In the main, our jurisdiction covers public sector agencies. Those agencies have a need for legal advice in much the same fashion as do private sector entities, but as an additional issue, many agencies are created under complex legislation or exercise functions that are governed by complex legislation. This gives rise to the creation of legal advice that affects an agency's decisions in performing the administrative functions that are subject to Ombudsman jurisdiction. It is important that an investigating officer be able to obtain an agency's legal advice in much the same fashion as other documents or information that is relevant to an investigation.

It might be helpful if any reforms adopted could address the question of preserving the privilege from any implied waiver by the Ombudsman or similar investigative agency. When the relevant information is provided to an investigative body and then expressly relied on, referred to or alluded to, this should not be considered to be a waiver of privilege.