

Privileges and Immunities

LAW20009: Week 5

Swinburne Online

Alana Ray

Welcome

- Truth-seeking vs. protecting fundamental social values
- Every litigation matter involves privilege considerations
- Professional Responsibility: Getting privilege wrong = negligence claims + disciplinary action
- Policy Foundation: Sometimes "the truth costs too much" (R v Young)

Truth v Protection

- **Truth-Seeking Imperative:** Courts need complete information for accurate decisions
- **Competing Values:** Legal representation, human dignity, government function, dispute resolution
- **The Cost:** Wrong decisions when relevant evidence is excluded
- **Judicial Recognition:** Each privilege reflects different public policy (Spigelman CJ)
- **Critical Question:** Does the public policy outweigh truth-seeking interests?

Nature and Operation of Privilege

- **Legal Right to Object:** Not discretionary - if privilege applies, person has right to claim it
- **Must Be Claimed:** Privileges don't operate automatically - someone must object
- **Court Determines Validity:** Judge decides if privilege actually applies
- **Generally, Can Be Waived:** Most privileges belong to someone who can give up protection
- **Section 132:** Court's duty to inform witnesses of privilege rights
- **Section 134:** "Oops rule" - evidence inadmissible if given before proper objection

Client Legal Privilege - Two Categories (Sections 118 & 119)

UBIA

Section 118 - Legal Advice Privilege: Traditional form covering communications for legal advice

Section 119 - Litigation Privilege: Broader privilege for communications about proceedings

Different Elements: Each has distinct requirements and applications

"Real Prospect" Test: Proceedings must be actually contemplated (Mitsubishi Electric)

Section 120: Limited privilege for unrepresented litigants

Practical Distinction: Advice vs. litigation focus determines which section applies

The "Dominant Purpose" Test

- **High Court Definition:** "Ruling, prevailing, or most influential purpose" (Spotless Services)
- **Clear Paramountcy:** Must be "touchstone" (Dick Smith Electronics)
- **Not "Primary":** Dominant differs from primary or substantial
- **Objective Test:** Court examines all circumstances, not just subjective intention
- **Multiple Purposes:** Common in practice - requires careful analysis
- **Key Factors:** Status of recipient, circumstances, prior communications

Definition of "Client" (Section 117) - Expanded Scope

- **Dramatically Expanded:** Goes far beyond ordinary understanding of "client"
- **Employees and Agents:** Can communicate with client representatives
- **Government Clients:** Commonwealth, States, Territories, statutory bodies
- **Personal Representatives:** Executors, administrators after death
- **Successors:** Acquiring companies can claim privilege over acquired communications
- **In-House Distinction:** Must distinguish legal advice from administrative duties

Loss and Waiver - Overview and Principles

- **Fundamental Concept:** Client acts inconsistently with confidentiality (Mann v Carnell)
- **Inadvertent Disclosure:** Mere carelessness doesn't waive privilege (Sovereign Motor Inns)
- **Statutory Framework:** Sections 121-126 specify when prohibitions don't apply
- **Burden of Proof:** Party asserting non-application must prove on balance of probabilities
- **Strategic Matters:** Waiver decisions can determine case outcomes

Section 122 - Waiver in Detail

- **Two Main Methods:** Knowing/voluntary disclosure OR disclosure with consent
- **"Substance" Definition:** Essence or vital part of advice (Doran Constructions)
- **Protected Disclosures (s 122(5)):** Five categories that don't constitute waiver
- **Common Interest:** Sharing with parties having common interest (Southern Cross Airlines)
- **Partial Disclosure:** Can be tactical without waiving entire privilege (BATA v DoHA)

Section 125 - Misconduct Exception

- **Two Categories:** General misconduct (s 125(1)(a)) and deliberate abuse of power (s 125(1)(b))
- **Standard of Proof:** Reasonable grounds to find fraud/misconduct was committed (s 125(2))
- **"Furtherance" Requirement:** Communication must be made to further the misconduct
- **Prima Facie Standard:** Sufficient evidence "to give colour to the charge" (Kang v Kwan)
- **Dishonesty Element:** Fraud requires element of dishonesty (Idoport v NAB)

Privilege Against Self-Incrimination - Foundation

- **Historical Foundation:** Protects human dignity (EPA v Caltex)
- **Core Principle:** State must prove crimes themselves, not force self-condemnation
- **Key Limitations:** NOT available to defendants on charged offence (s 128(10))
- **Corporations Excluded:** Only natural persons can claim (s 187)
- **Trial Only:** Section 131A doesn't extend this privilege pre-trial

Section 128 - Five Step Process

- **Step 1:** Witness objects - evidence "may tend to prove" offence/penalty
- **Step 2:** Court assesses "reasonable grounds for objection"
- **Step 3:** Court informs witness of options (voluntary evidence + certificate OR refuse)
- **Step 4:** Court decides if "interests of justice" require evidence
- **Step 5:** Use-immunity certificate protects evidence and consequences

"Interests of Justice" Factors

- **No Legislative Guidance:** Courts must develop own framework
- **Evidence Factors:** Importance, reliability, availability of alternatives
- **Proceeding Factors:** Defendant vs prosecutor seeking evidence, nature of matter
- **Witness Factors:** Likelihood of prosecution, pending charges, publication limits
- **Public Interest:** Already published, jury interpretation of refusal

Public Interest Immunity - Foundation and Operation

- **Fundamental Difference:** Protects public interests, not personal privileges
- **Cannot Be Waived:** No individual can waive (Attorney-General v Lipton)
- **Court's Own Motion:** Section 130(2) allows court to consider without party claims
- **Two-Stage Balancing:** Public interest in disclosure vs. public interest in confidentiality
- **Government Focus:** Primarily protects governmental and state functions

"Matters of State"

Categories (Section 130(4))

- **Non-Exhaustive Categories:** Guidelines, not automatic immunity
- **National Security/Defence:** Particularly important during wartime (Duncan v Cammell Laird)
- **Offence Prevention:** Police methods, informant identities, intelligence techniques
- **Confidential Sources:** Crucial for law enforcement effectiveness
- **Government Function:** Cabinet minutes, ministerial correspondence, high-level policy
- **Individual Balancing:** Each case requires specific assessment

Chapman v Luminis - Case Study

- **Background:** Hindmarsh Island bridge controversy, Indigenous "secret women's business"
- **Legal Issue:** Should anthropologist produce document and answer questions about restricted knowledge?
- **Competing Interests:** Justice administration vs. Indigenous cultural heritage protection
- **Section 130(5) Analysis:** Systematic application of balancing factors
- **Decision:** Balance favoured disclosure with protective measures

Settlement Privilege - Foundation and Policy

- **Statistical Reality:** Vast majority of civil proceedings settle (Gans & Palmer)
- **Policy Foundation:** System depends on settlement - privilege encourages negotiation
- **Mechanics:** Covers communications and documents in settlement attempts (s 131)
- **Civil Only:** Doesn't apply to criminal proceedings
- **Joint Privilege:** Belongs to all parties in dispute
- **"Without Prejudice" Not Determinative:** Courts look to substance over form

Settlement Privilege Exceptions (Section 131(2))

- **Exception (c):** Express or implied consent of all parties
- **Exception (d):** Communication explicitly stated as not confidential
- **Exception (f):** Agreement to settle is in issue - existence/terms disputed
- **Exception (g):** Court would be misled by excluding communications
- **Exception (h):** Liability for costs - reasonableness of settlement offers
- **Exceptions (j)&(k):** Fraud or deliberate abuse of power

Other Privileges - Specialized Protection

- **Professional Confidential Relationships (ss 126B-126E):** NSW, ACT, Tasmania only - judicial balancing required
- **Covered Relationships:** Medical, social work, journalism, accounting, other professional confidential relationships
- **Balancing Test:** Harm to confider vs. desirability of evidence
- **Journalists' Privilege (s 126K):** ACT, NSW, Victoria, Commonwealth - stronger protection
- **Sexual Assault Counselling:** Varies by jurisdiction - protects victim-counsellor communications

Exam Strategy - Systematic Privilege Analysis

Step 1: Identify privilege type - different privileges have different elements

Step 2: Check all required elements systematically - missing one defeats claim

Step 3: Consider waiver and exceptions - even valid privilege can be lost

Step 4: Apply relevant test - dominant purpose, balancing, procedural requirements

Step 5: Address procedural issues - objections, court duties, certificates

Practice Problem - Cannabis Cultivation Case

John and Beth are charged jointly with cultivating cannabis on their rural property, which they own in joint names. The charge arises from the discovery by police, following 'information received', of a large greenhouse to the rear of the property. Over 50 cannabis plants thrived with additional electric heating and a sophisticated sprinkler system. When police raided the property, they discovered only the couple's son Simon, aged ten, who cheerfully invited them into the greenhouse to admire 'Dad's fairy plants, that'll be sent to Hogwarts when they're fully grown'. When questioned further, Simon willingly advised them, without seeming hesitation, that 'Dad planted them a couple of months ago, and he said that they'll be worth a fortune when they're ready.'

Which of the parties bears what burdens of proof?

1) John denies his guilt, while Beth advises her counsel that she only went along with it because John threatened her with severe violence if she mentioned the cannabis crop to anyone and took no part in the cultivation process.

Which of the parties bears what burdens of proof?

Can John's counsel object to this evidence be led?

2) It emerges during the preparation for trial by John's new solicitor, Mark, that the so-called 'tip-off' came from John's former solicitor, Edmund, who advised police, without any prompting from them, that when he enquired regarding the outstanding payment of his fees in respect of previous legal services, John informed him 'in confidence' that he anticipated being able to pay him when he sold a substantial cannabis crop that he'd been cultivating.

Can John's counsel object to this evidence be led?

What process must be followed to assess Simon's fitness to testify, and if he appears reluctant, can he be compelled?

3) There is some doubt regarding Simon's fitness to be called as a witness. An educational psychologist has assessed him as 'borderline intellectually disabled, but with no obvious cognitive impairment'.

What process must be followed to assess Simon's fitness to testify, and if he appears reluctant, can he be compelled?

Was she correct in adopting this position?

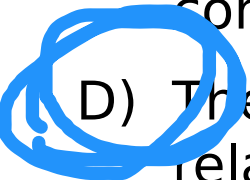
4) When Beth declines to give evidence, and none of the witnesses is cross-examined by her counsel beyond a vague suggestion that she knew nothing of what was growing in the greenhouse, the trial judge advises her counsel that the jury will not be allowed to consider even the possibility that she was acting under duress from John.

Was she correct in adopting this position?

Mini-Quiz

I'll ask you some questions – pop your answer in the chat.

Which of the following statements about client legal privilege is CORRECT?

- A) The privilege belongs to the lawyer and can be waived by the lawyer in the client's best interests
- B) The privilege only applies during court proceedings, not in pre-trial discovery
- C) The privilege requires that legal advice be the sole purpose of the communication
-  D) The privilege belongs to the client and continues even after the lawyer-client relationship ends

Under the "dominant purpose" test for client legal privilege, "dominant" means:

- A) The most important purpose among several equal purposes
- B) Any purpose that is primary or substantial
- ☒ C) The ruling, prevailing, or most influential purpose showing clear paramountcy
- D) The purpose that takes up the most time in the communication

Dicksmith

Public interest immunity differs from other privileges because:

- A) It can be waived by government ministers
- B) It only applies to criminal proceedings
- C) Courts can consider it even if no party claims it
- D) It provides absolute protection once established

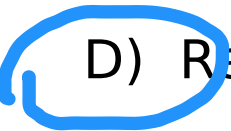
Settlement privilege under section 131 is lost when:

- A) Any party unilaterally decides to waive it
- B) Communications are marked "without prejudice"
- ☒ C) The existence or terms of a settlement agreement are in issue
- D) One party makes an unreasonable settlement offer

Distinguish between sections 118 and 119 client legal privilege in terms of:

- The types of communications covered
- The purpose requirements
- When each section applies
- Practical examples of each

The privilege against self-incrimination under section 128:

- A) Is available to corporations as well as natural persons
- B) Can be claimed by defendants about the offence they are charged with
- C) Applies in both pre-trial and trial contexts under section 131A
-  D) Requires the court to follow a specific five-step process

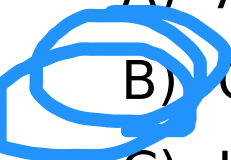
Short Answer

A client tells their lawyer: "I need advice about the tax implications of this business transaction, and also help with the contract drafting, plus I want to know what happens if the other party sues us."

Analyse whether this communication would be protected by client legal privilege, addressing:

- Which section (118 or 119) might apply
- The dominant purpose test
- Any potential issues with multiple purposes

Which of the following would constitute waiver of client legal privilege under section 122?

- A) Accidentally including privileged document in discovery bundle
-  B) Client tells opposing party "my lawyer says we have a strong case"
- C) Lawyer discusses case with expert instructed by client
- D) Document marked "privileged and confidential" disclosed under court order

Problem Question

Corporate lawyer Sarah receives email from CEO: "Sarah, the environmental regulator is investigating our waste disposal practices. I need legal advice about our potential liability, but I also want you to help us prepare a media strategy and coordinate with our engineering team to fix the problems before the regulator finds out."

Analyse:

- Whether this communication is protected by client legal privilege
- What issues arise from the multiple purposes
- How the "dominant purpose" test should be applied
- Any risks to privilege

The misconduct exception to client legal privilege (section 125):

- A) Applies to any illegal conduct discussed between lawyer and client
- B) Requires that the communication was made in furtherance of the misconduct
- C) Only applies to criminal conduct, not civil wrongdoing
- D) Can be claimed by prosecutors without proving misconduct occurred

Short Answer

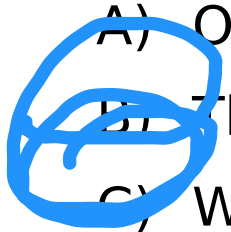
During settlement negotiations, Defendant's lawyer writes: "Without prejudice - our client offers \$50,000 to settle this matter. We admit our driver was probably speeding, but we deny this caused the accident. This offer is made to avoid the costs and uncertainty of trial."

Later, Plaintiff wants to tender this letter as evidence of Defendant's admission about speeding.

Analyse:

- Whether the letter is protected by settlement privilege
- Whether any exceptions to settlement privilege apply
- The significance of the "without prejudice" marking
- The likely outcome

Under section 128 (privilege against self-incrimination), "interests of justice" factors include:

- A) Only the importance of the evidence to the current proceeding
-  B) The likelihood of prosecution and the availability of other evidence
- C) Whether the witness has already been convicted of the relevant offence
- D) The political sensitivity of the potential charges

Problem Question

Medical malpractice case: Dr. Williams is sued by patient who suffered complications during surgery. Dr. Williams' lawyer requests advice from medical expert Dr. Dre, sending her the patient's complete medical file and asking: "Please review this file and tell me (1) whether our client met the appropriate standard of care, (2) what we should say to the medical board if they investigate, and (3) how much this case is likely worth in damages if we lose."

Meanwhile, the patient's lawyers seek to compel Dr. Dre to produce all documents and give evidence about her analysis.

Analysis required covering:

- Client legal privilege issues
- Which section (118/119) applies and why
- Dominant purpose analysis with multiple requests
- Any waiver or exception issues
- Recommendations

Have a
great week!

