MEMORANDUM

TO: LEGAL ETHICS STUDENTS
FROM: LOUIS PIEROTTI
DATE: 23 February 2004
RE: Legal Ethics Course – Additional and replacement material

As I mentioned during lectures some of the material in the Coursebook required updating.

As promised, I provide the following:

**Topic 6 - Duty to report offences/bankruptcy** [pages 74 - 6] — attached is a copy of Clauses 133 and 134.

**Topic 8** - generally — attached is a diagram setting out the interaction of the various provisions in the Legal Profession Act and Administrative Decisions Tribunal Act which were discussed.

- **Legal Services Commissioner** [pages 96 – 7] — attached is a copy of Section 59D [Functions of the Commissioner] and Section 160 [re a Commissioner’s decision on review] of the Legal Profession Act. These Sections replace Sections 131(1) and 160, respectively, as set out at pages 96 and 97.

**Topic 9 – Confidentiality and privilege** — attached is a short summary [by no means exhaustive] of the relevant cases.

- please note that in some of the case extracts in the Coursebook “S” [e.g. S 263] has been printed as “5”.

- again, I draw student’s attention to a very good summary of the decision in **Daniels v ACCC** [High Court 7 November 2002] in an article by Fiona Crosbie and Bashi Kumar — “Client’s privilege is protected “ appearing at page 59 of the February 2003 Law Society Journal.

Any student needing to contact me can do so on (02) 9926 0314 (W); 0413 440 694 (WMob) or at lwp@lawsocnsw.asn.au.
133 Duty to report offences

(1) If a barrister or solicitor is found guilty of an offence (other than an excluded offence), the barrister or solicitor must:

(a) notify the appropriate Council in writing of the finding and the nature of the offence, and

(b) furnish to the appropriate Council, within the time specified by the appropriate Council, such further information as it requires relating to the finding or the commission of the offence.

(2) Subclause (1):

(a) applies to an offence whether or not committed in the course of practice as a legal practitioner, and

(b) applies to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence, and

(c) applies to an offence committed in New South Wales or to an offence committed outside New South Wales (so long as it would have been an offence, other than an excluded offence, if committed in New South Wales), and

(d) applies to a finding of guilt even if other persons are prohibited from disclosing the identity of the offender, and

(e) extends to an indictable offence committed before the commencement of this Regulation (and so extends whether the finding of guilt was made before or after that commencement), and

(f) extends to an offence (other than an indictable offence) committed after 8 March 1991.

(3) A notification under subclause (1) must be made within 7 days after the finding was made.

(4) Subclause (1) does not require the disclosure of any information previously disclosed in an application for a practising certificate or under this clause.

(5) In this clause, offence includes a tax offence.
134 Duty to report bankruptcy

(1) A barrister or solicitor who commits an act of bankruptcy (within the meaning of section 3 (3) of the Act) must notify the appropriate Council in writing of the details of the act of bankruptcy.

(2) A notification under subclause (1) must be made within 7 days after the act of bankruptcy was committed.

(3) Subclause (1) does not require the disclosure of any information previously disclosed in an application for a practising certificate or under this clause.

[STUDENTS PLEASE NOTE: an act of bankruptcy is defined in Section 3(3) of the Legal Profession Act:

“(3) For the purposes of this Act, a person is taken to have committed an "act of bankruptcy" if the person:

(a) is bankrupt or the subject of a creditor’s petition presented to the Court under section 43 of the Bankruptcy Act 1966 of the Commonwealth, or

(b) has presented (as a debtor) a declaration to the Official Receiver under section 54A of the Bankruptcy Act 1966 of the Commonwealth of his or her intention to present a debtor’s petition or presented (as a debtor) such a petition under section 55 of that Act, or

(c) has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit.”]
59D Functions of Commissioner

(1) The Commissioner has, in accordance with this Act, the following functions:

(a) to receive complaints about professional misconduct or unsatisfactory professional conduct of legal practitioners and interstate legal practitioners,

(b) to assist and advise complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing),

(c) to initiate a complaint against a legal practitioner or an interstate legal practitioner,

(d) to investigate, or take over the investigation of, a complaint if the Commissioner considers it appropriate,

(e) to refer complaints to the appropriate Council for investigation or mediation in appropriate cases,

(f) to monitor investigations and give directions and assistance to Councils in connection with the investigation of complaints,

(g) to review the decisions of Councils to dismiss complaints or to reprimand legal practitioners or interstate legal practitioners in connection with complaints,

(h) to take over investigations or to institute proceedings in the Tribunal against legal practitioners or interstate legal practitioners following a review by the Commissioner,

(i) to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent legal practitioners and interstate legal practitioners with the complaints handling and disciplinary system,

(j) to monitor the refusal to issue, cancellation and suspension of practising certificates under Part 3 on grounds relating to fitness to practise (for example, in connection with acts of bankruptcy, the commission of indictable offences or tax offences or failures to give required notifications),

(k) functions conferred on the Commissioner under Division 1AA of Part 3,
(l) to monitor generally the exercise of regulatory functions by the Councils (other than the imposition of conditions on practising certificates),

(m) to review barristers rules, solicitors rules and joint rules,

(n) to assist the Councils to promote community education about the regulation and discipline of the legal profession,

(o) to assist the Councils in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars,

(p) to report on the Commissioner’s activities under this Act.

(2) The Commissioner may appear by barrister or solicitor before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court under this Act or otherwise in relation to barristers or solicitors.

(3) The Commissioner has such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.

Note: The Conveyancers Licensing Act 1995 confers on the Commissioner the function of dealing with complaints against licensed conveyancers.
Decision of Commissioner on review

(1) When the Commissioner has completed the review of a Council’s decision, the Commissioner may:

(a) confirm that the complaint is dismissed or that the legal practitioner is reprimanded, or

(b) refer the matter to mediation, or

(c) re-investigate the complaint or direct the appropriate Council to do so, or

(c1) investigate any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or

(c2) direct the appropriate Council to investigate, or re-investigate, any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or

(c3) reprimand the legal practitioner if the practitioner consents to the reprimand, or

(d) institute proceedings in the Tribunal against the legal practitioner or direct the appropriate Council to do so.

(2) If the Commissioner decides to re-investigate a complaint, or to investigate part of a complaint, the provisions of this Part apply as if the Commissioner had taken over the investigation of the complaint.

(3) Before instituting proceedings in the Tribunal, the Commissioner must notify the relevant Council of the Commissioner’s intention to do so and of the reasons for the decision.

(4) A Council is required to comply with a direction of the Commissioner under this section. The Commissioner may take further action under this section if the Council fails to comply with the direction.
PRIVILEGE AND CONFIDENTIALITY

Legal Professional Privilege ("Privilege") is the 'client's' privilege.

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available." - Grant v Downs.

Grant v Downs (1976) - High Court

Privilege is confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings.

A Court can examine a document to determine whether the claim is made out.

See per Barwick CJ (minority) – test is ‘dominant purpose’.

Baker v Campbell (1983) – High Court

Held by majority that doctrine of Privilege is not confined to judicial or quasi judicial proceedings.

Evidence Act (1995) – Cth., NSW and ACT

Only applies in respect of proceedings.

Applies the ‘dominant purpose’ test.

Read the various Sections extracted in the Course Book.

Waterford (1987)

Burden of proof, to prove existence of Privilege, rests on the party claiming it.
Propend (1997) – High Court

1. Whether Privilege may extend to copy documents in circumstances where the original may not be privileged.

See McHugh J for example – Privilege turns on purpose “and no argument is needed to show that the purpose of a client or lawyer in making a copy document may be very different from the purpose of the person who created the original” The actual form of the communication or recording was irrelevant.

2. Communication made for an illegal or improper purpose.

What test to apply in determining whether illegal or improper purpose.

Gaudron J (similarly McHugh and Gummow JJ) – will vary from cases to case. What will shift the onus on the person claiming privilege is evidence which, “if accepted, which “raises a prima facie case of illegality…”

Kirby J – test is lower – what would be required is material that would “…lead a reasonable person to see a strong probability that there was a disqualifying crime or fraud...(falling) short of the requirement to make out with strong evidence a prima facie case of crime or fraud “.

Displacing privilege.

Brennan CJ and Gaudron J – evidence to displace privilege because of alleged illegal or improper purpose must be in admissible form.

Kirby J – hearsay evidence could be relied upon but a mere assertion is not enough.

Esso (1999) – High Court

Court overturns Grant v Downs after going through the historical reasoning of the earlier judgement.

Dominant purpose test should be preferred to the sole purpose test – Per Gleeson CJ, Gaudron and Gummow JJ – dominant purpose test “strikes a just balance, and suffices to rule out claims of the kind considered in Grant v Downs …and it brings the common law of Australia into conformity with other common law jurisdictions.”

Compulsion of Law

Privilege is not waived if a disclosure of a communication was made under a "compulsion of law".

See also Section 122(2)(c) of the Evidence Act.

**Communications for illegal or improper purposes.**

Communications which might otherwise attract Privilege, will not be privileged if they were brought into existence for an illegal or improper purpose.

See Propend above.

*A G (NT) v Kearney* (1985) - High Court

*Prima facie* case that the communications came into being as part of a scheme to defeat land claims.

"exception is not confined to cases of crime and fraud, even in the wide sense "fraud" has been used...unless the meaning of that word is extended to include anything that might be described as a fraud on justice".

**O'Donovan v Vereker, O'Donovan v Forsyth** (1987)

Privilege cannot be claimed for advice that goes to the promotion of an illegal act.

Note the comments by the Court on determining “the liability of a barrister when giving advice in his professional capacity as a barrister.”

**Other qualifications**

**Citibank v FCT** (1985)

"must be accepted...since the judgement of the Full High Court in Baker...that S 263 does not override legal professional privilege. Baker...is an authoritative statement that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings and that, in the absence of some legislative provision restricting its application, the doctrine applies to all forms of compulsory disclosure of evidence. Section 263 is a section which requires the compulsory disclosure of evidence and I see no basis for negating the application of legal professional privilege to the section."

Time and opportunity should have been given to argue the question of Privilege.
CAC v Yuill (1991)

High Court held that Privilege did not apply to excuse the production of documents required pursuant to an order for production served pursuant to Section 295(1) of the Companies (NSW) Code. As for reasoning see also Pyneboard below.

Pyneboard Pty Ltd v TPC (1983) - High Court

General principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication.

"[I]n deciding whether a statute impliedly excludes (Privilege) much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings."

The Daniels Corporation International Pty Limited v ACCC [2002] HCA 49 (7 November 2002).

Notices under the Trade Practices Act.

The ACCC issued section 155 notices on the Daniels Corporation in order to obtain, among other things, privileged material. The Daniels Corporation complied with the section 155 notices, except for the requirement to produce privileged material.

The ACCC commenced proceedings, seeking a declaration that the Daniels Corporation could not claim privilege in answer to a section 155 notice and orders compelling the production of the privileged material.

The Full Federal Court unanimously held that the ACCC had the power, under section 155, to obtain privileged communications. The matter proceeded to the High Court.

All seven members of the High Court held that the ACCC could not use its powers under section 155 to obtain privileged material.
Gleeson CJ, Gaudron, Gummow and Hayne JJ described client legal privilege as a “common law right” or a “common law immunity.”

McHugh J said that it was an important immunity.

Callinan J characterised it as an important common law right.

Kirby J said that privilege was a fundamental human right, although he acknowledged the difficulty with this description when referring to a corporation.

The High Court again pointed to the well-settled rule that statutory provisions should not be construed as overriding common law rights, privileges or immunities without the legislation providing so by express words or as a necessary implication.

If investigations by authorities were to be hampered by the Court’s ruling then, the Court suggested, that would be short-lived since Parliament would intervene to amend the legislation.

Kirby J and Callinan J noted that the task of finding the right balance between the competing public interests of preserving privilege and allowing investigations by regulatory bodies is best left to Parliament.

See Yuill above - a majority of the High Court said that Yuill might be decided differently today.

**Government and Corporate Lawyers.**

See Kearney *supra*.

**Farrow Mortgage Services.**

Question of joint privilege as, for example, in the case of joint directors.

Where two or more persons communicate with their legal advisor and certain communications attract Privilege, that Privilege ‘belongs to all the persons who joined in seeking the advice. The privilege is a joint privilege.’

All to whom the Privilege ‘belongs’ must concur in its waiver.

Privilege attached to legal advice obtained by a company is not lost when the advice is disclosed to its directors - not because of their common interest but because the company can only ‘function’ by the “actions and declarations of human beings”.

“Common interest is not in this context a rigidly defined concept. A mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on it.”
Confidentiality

See PCPR Rules 2 and 3.

Mallesons..v KPMG (1990)

The Court “would restrain a solicitor from acting where there is a real and sensible possibility of confidential information being disclosed or used to the detriment of a former client”.

Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSC 287 (17 August 2001)

Victorian judgement on application to have Solicitors cease acting.

“Inevitably in (sic) these type of applications are a matter of impression.” - Warren J.