

LEGAL PROFESSIONAL PRIVILEGE: WHAT IS IT AND HOW TO KEEP IT

WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

Legal professional privilege (“LPP”) protects the confidentiality of certain “communications”. If a communication is “privileged” we may be able to resist its disclosure in:

- litigation;
- freedom of information applications; and
- in some cases, when compulsory disclosure to regulators (such as the ACCC) would otherwise be required.

The rationale behind LPP is to encourage open communications between a client (the University) and its legal adviser (Legal Services or external lawyers) so that legal issues can be openly discussed and understood.

WHAT “COMMUNICATIONS” ARE PROTECTED?

“Communications” covers all types of communications, whether they occur orally, in writing, electronically or otherwise. It includes written documents, emails, reports, photographs, taped telephone conversations, voicemails, interview records and data contained on discs.

LPP does not protect communications which were created to facilitate the commission of a crime or a fraud.

HOW DO YOU KNOW WHETHER A DOCUMENT IS SUBJECT TO LPP?

Courts have devised a series of tests to determine whether or not a particular correspondence should be protected by LPP. Essentially, LPP will only apply to confidential communications between the University’s lawyers (or external lawyers) and University staff if the communications are created for the dominant purpose of either (i) obtaining or providing legal advice, or (ii) use in actual or anticipated legal proceedings (generally speaking, court proceedings only). LPP might also protect communications between the University or the

University’s lawyers and third parties, such as University contractors or consultants.

Despite the existence of these seemingly simple formulas, the question whether or not a document is protected by LPP can be very complex. It is also very easy to surrender or “waive” LPP in a communication – whether or not you intended to do so. It is therefore important that you seek legal advice before creating any communications on a potentially sensitive or contentious issue.

CONFIDENTIALITY

Confidentiality is an essential requirement for LPP. When communications are circulated widely throughout the University or when they are sent to people outside the University they can lose their confidential nature. You should seek advice from Legal Services before releasing confidential communications widely or to people outside the University.

LPP CHECKLIST

1. Contact Legal Services on 9479 2495 for legal advice before a document on a sensitive or contentious issue is created. Note that you must seek approval from Legal Services before being given access to Legal Services’ files.
2. Don’t assume that all communications with lawyers will be privileged – it depends on the purpose of creating the communications and a range of other considerations.
3. All documents which are created for the dominant purpose of obtaining legal advice or for use in legal proceedings should be marked prominently with “*Confidential & Subject to Legal Professional Privilege*”. But remember that just marking a document “privileged” will not make it privileged.
4. Control access and maintain confidentiality of privileged documents.
5. When preparing documents, be careful about what you record. Note that the liberal use of email can often result in sensitive information being disclosed to recipients for whom it was not intended.
6. Do not include privileged communications in minutes or agenda papers for University Boards or Committees. If you need to refer to privileged communications in minutes or agenda papers make sure the reference is set out under a clearly marked sub-heading.
7. Do not summarise legal advice – the summary may not attract the privilege which accrues to the original advice.

This article is intended as a general guide. Please contact Legal Services on 9479 2495 if you would like any further information regarding this guide or if you require particular advice.