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Dr. James Popple
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Law Council of Australia
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By email: janina.richert@lawcouncil.au

Dear Dr Popple,

UPDATED GUIDANCE NOTE ON CLIENT LEGAL PRIVILEGE AND FEDERAL REGULATORS

Thank you for the opportunity to provide further feedback to the Law Council in relation to the development of its forthcoming publication, *Client legal privilege and federal regulators (Guidance Note)*. The Law Society's Public Law and Ethics Committees contributed to this submission.

We consider that the Guidance Note will be a useful resource to assist legal practitioners in applying the principles of client legal privilege (**CLP**) when dealing with federal regulators on behalf of their clients. We offer the following suggestions for the Law Council's consideration.

Outlining the case for a proportionate approach to privilege review and substantiation

We suggest that it will be important to state at the outset of the Guidance Document that a commonsense, proportionate approach should be taken to privilege review and substantiation, depending on the size and complexity of the request, and the resources available. This acknowledges that many practitioners face resource constraints and do not have access to advanced document management or privilege review tools.

We suggest that these considerations are also highlighted in any conversations that the Law Council conducts with federal regulators in the context of launching the Guidance Note, given smaller firms sometimes struggle to meet the tight deadlines imposed by regulators.

Practical solutions to address the operational burden of document review for large-scale requests

The guidance places significant emphasis on the need for detailed substantiation of privilege claims (e.g., document particularisation and the use of a 'dominant purpose' analysis). While it is important to set out these requirements and their legal basis, they may be difficult for practitioners to meet in the context of large-scale regulatory requests involving thousands of documents.

It would therefore be useful to include practical solutions to assist practitioners to address this burden, including more detailed recommendations on privilege review workflows and the use of AI or technology-assisted review. It would also be useful to assist lawyers on how to negotiate requests with the relevant regulator, for example the use of staged production, sampling or safe harbors for bulk or high-volume reviews.

Additionally, we suggest inclusion of a section on how a firm should respond where there is inadvertent disclosure of documents at scale.

Supporting in-house lawyers in applying CLP principles

The Guidance Note highlights challenges that may arise in demonstrating that CLP attaches to an in-house counsel's advice, including as regards the capacity in which an in-house counsel developed and provided advice as well as independence and confidentiality.

Given these challenges, it would be useful to offer practical advice tailored to in-house lawyers, for example on how to structure communications, maintain separate files, or document the legal purpose of an advice, noting that marking a document as 'privileged' will not be a sufficient basis to claim privilege over it. Any case studies illustrative of these issues may also be helpful.

Meeting the requirements in regulator protocols

The Guidance Note reminds practitioners that regulator protocols (e.g., Australian Taxation Office Legal Professional Privilege Protocol) are voluntary. In the experience of our members, however, there is significant pressure to comply, and non-compliance could lead to increased scrutiny or an adverse inference being drawn against the client.

In these cases, it would be useful to provide more specific examples of how to document reasons for not adhering to a voluntary protocol. This issue may arise in the case where subject lines and client names may themselves be privileged or confidential, but regulator protocols may request this information to be provided. We encourage the use of case studies to assist practitioners in making a decision as to whether to generalise or withhold such information when responding to a protocol. The Guidance Note could also provide sample notations or suggested wording for declining to provide identifying details that would risk the waiver of privilege.

Interaction between anti-money laundering and counterterrorism (AML/CTF) legislation and CLP

We note the Guidance Note does not intend to cover issues of CLP that may arise for practitioners in the context of their AML/CTF obligations, for example the offence of 'tipping off'. However, given these issues will be front of mind for many practitioners when the changes for AML/CTF Tranche 2 entities take effect on 1 July 2026, it may be useful to provide a link in the Guidance Document to AUSTRAC's webpage regarding CLP, including the anticipated guidelines to be issued by the Minister for Home Affairs, which will set out the processes for handling of CLP claims.¹

¹ Australian Government, AUSTRAC, AML/CTF Reform- Legal professional privilege (Webpage): <https://www.austrac.gov.au/about-us/amlctf-reform/reforms-guidance/amlctf-program-reform/reporting-austrac-reform/legal-professional-privilege-reform>.



THE LAW SOCIETY
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Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball
President