La Trobe Law School

AUGUST
2026

Legal privilege and integrated legal assistance services

Submission to the Victorian Law Reform Commission

ENQUIRIES
Professor Chris Maylea
La Trobe University
Victoria 3086

T 9479 1284
E c.maylea@latrobe.edu.au
latrobe.edu.au

Table of contents

About this submission

La Trobe Law School welcomes the opportunity to make this submission.

This submission draws on research into integrated legal and non-legal service delivery conducted by academics at La Trobe Law School and, before that, at RMIT University, and through the Law School's own clinical practice. Our earliest work in the field was a study of three integrated practices in Melbourne, based on interviews with the lawyers and social workers in them.[1] We have since evaluated two non-legal advocacy services located within Victoria Legal Aid, being the Independent Mental Health Advocacy service[2] and the Independent Family Advocacy and Support (IFAS) pilot in child protection,[3] and we have evaluated Eastern Community Legal Centre's Engaging and Living Safely and Autonomously (ELSA) and Rights of Seniors in the East (ROSE) elder abuse response programs, which deliver legal advice and casework, advocacy and financial counselling together in the closely integrated model this reference concerns.[4] We have also modelled opt-out advocacy and legal representation services implementing recommendations 56(2) and 56(3) of the Royal Commission into Victoria's Mental Health System,[5] prepared a trauma-informed organisational toolkit for the legal assistance sector,[6] and are conducting an Australian Research Council Linkage project on trauma-informed practice in publicly funded legal services with National Legal Aid and three legal aid commissions.[7] The Law School's clinical program began in 1978 at the West Heidelberg Community Legal Service, a legal service operating from a community centre alongside health and welfare services.[8] The 2010 study the Commission cites at the opening of its consultation paper was conducted in the Law School's Rights and Justice Program.[9]

The Law School now teaches clinical legal practice through the La Trobe Law Clinic, which it runs with Whittlesea Community Connections in Melbourne's north on a health justice partnership model. The clinic sits within a wrap-around service and operates from community settings rather than from the University, and its clinics have covered family violence, elder abuse, legal support for older people, wills, divorce, and fines and civil matters, with the mix varying between semesters. Law students are placed alongside social work, criminology and information technology students, supervised by a practising lawyer and, in some settings, by a social worker. Clinic clients raise legal and social circumstances in the same conversation, and the clinic is designed to respond to both. The Law School therefore writes as a researcher of integrated practice and as a provider of it.

The submission was prepared by Professor Chris Maylea, Associate Dean (Partnerships), La Trobe Law School, and Deputy Director of the Mental Health and Disability Law Research Centre, on behalf of La Trobe Law School and the Mental Health and Disability Law Research Centre. Professor Maylea is qualified in social work and in law. He worked in mental health services as a social worker and as a manager before entering legal practice, and he has appeared as a legal representative before the Mental Health Tribunal. He has led each of the evaluations described above.

Summary of position

[1] Chris Maylea et al, 'Socialising the Law: Multidisciplinary Practice with Lawyers and Social Workers' in Simon Rice, Andrew Day and Linda Briskman (eds), *Social Work in the Shadow of the Law* (Federation Press, 5th ed, 2018) 25.
[2] Chris Maylea et al, *Evaluation of the Independent Mental Health Advocacy Service (IMHA)* (Final Report, Social and Global Studies Centre, RMIT University, March 2019); Chris Maylea et al, *Evaluation of the Independent Mental Health Advocacy Service Expansion* (Interim Report, La Trobe University, July 2026).
[3] Chris Maylea et al, *Final Evaluation of Independent Family Advocacy and Support (IFAS) Pilot* (Final Report, Social and Global Studies Centre, RMIT University, 2021).
[4] Chris Maylea et al, *Final Evaluation of ECLC's ROSE and ELSA Service Trials* (Final Report, La Trobe University, February 2023).
[5] Chris Maylea et al, *Opt-Out Non-Legal Advocacy and Legal Representation Service Models* (Report, La Trobe University, July 2022).
[6] Chris Maylea et al, *With You Toolkit: Empowering Trauma-Informed Rights-Based Organisations* (La Trobe University, 2023), prepared for the With You project led by Legal Aid NSW on behalf of a consortium of legal aid commissions and funded by the Commonwealth Attorney-General's Department.
[7] 'Supporting Trauma-Informed Legal Services (STILS): A Stepped-Wedge Multi-Site Study' (Australian Research Council Linkage Project LP230200751, La Trobe University and RMIT University with National Legal Aid, Legal Aid NSW, Victoria Legal Aid and Legal Aid NT).
[8] Judith Dickson, '25 Years of Clinical Legal Education at La Trobe University' (2004) 29(1) *Alternative Law Journal* 41.
[9] Mary Anne Noone and Kate Digney, *'It's Hard to Open up to Strangers': Improving Access to Justice: The Key Features of an Integrated Legal Services Delivery Model* (Research Report, Rights and Justice Program, School of Law, La Trobe University, September 2010).

1. Closely integrated services produce better outcomes than loosely integrated services.

2. Under the present law, the presence of a non-legal supporter can defeat privilege. A client who needs that support in order to take part in a legal process, commonly a client with cognitive disability, psychosocial disability, communication support needs or a trauma history, therefore receives less protection than a client who does not. This compounds the disadvantage of clients who are already marginalised, and the law withholds the protection on the ground of the disability or circumstance that creates the need.

3. The consultation paper contains no human rights analysis. Sections 8(3), 13, 24 and 25(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are engaged, as are the provisions of international human rights instruments, such as articles 12 and 13 of the *Convention on the Rights of Persons with Disabilities* (CRPD). The limitation on those rights is not demonstrably justified under s 7(2) of the Charter, because a less restrictive means is available.

4. A new category of legal privilege should be enacted, protecting confidential communications between a client, a lawyer and a social service professional made in connection with the provision of an integrated legal assistance service. It should be absolute, apply before courts and investigative bodies, protect communications and documents, be held by the client alone, and attach automatically when the statutory criteria are met, without an accreditation or designation scheme.

5. Victorian law already supplies a model. Section 117(1) of the *Evidence Act 2008* (Vic) defines "lawyer" to include an employee or agent of a lawyer, so a paralegal, clerk or interpreter is already covered by ss 118 and 119. The Uniform Law and the conduct rules made under it supply the corresponding duties of confidentiality and supervision.

6. The consultation paper does not distinguish when a social service professional *may* disclose confidential information from when that professional *must* disclose it. Both questions should be answered by applying the tests that apply to lawyers. The permissive tests of the two professions do not differ materially. On mandatory disclosure, privilege should prevail, as it already does for lawyers under s 327(7)(b) of the *Crimes Act 1958* (Vic).

7. No separate safety exception is needed. Rules 9.2.4 and 9.2.5 of the Australian Solicitors' Conduct Rules should apply to every professional covered by the privilege.

8. Option 1 would not solve the problem. In Case Study 4 in the consultation paper the court overrode the qualified protection claimed over the counselling records and upheld the absolute privilege claimed over the legal file.

Question 1

> *Integrated legal assistance services involve the delivery of legal and social services by professionals working for the same organisation or partnership. Loosely integrated legal assistance services impose strict information barriers between lawyers and social service professionals providing services to clients. Closely integrated legal assistance services promote the joint delivery of legal and social services to clients at the same time, sometimes after obtaining client consent to potentially compromise privilege. How easy or difficult is it to implement these two models of integrated legal assistance services in practice?*

Services are already delivering closely integrated assistance without a clear legal basis for doing so. Eastern Community Legal Centre's ELSA and ROSE programs combine legal advice and casework, advocacy and financial counselling, and hold joint appointments as a matter of routine. Our evaluation found that the model produced results that separate services could not.[10] The evaluation also found the legal position unresolved, recording that "Victorian law is unclear as to the extent to which information provided to the advocates and the financial counsellor is protected from subpoena in the way legal files are".[11] Recommendation 23, directed to the Victorian Government, was to "[p]rovide clarity on legal professional privilege for integrated practice settings".[12] We made that recommendation in February 2023, in a report to Eastern Community Legal Centre.

Victoria Legal Aid's Remand Support Service shows the same pattern in a criminal setting. Remand support practitioners work at the Melbourne Custody Centre alongside the remand duty lawyer service, and Victoria Legal Aid describes them as working in close collaboration with lawyers to support and facilitate clients' participation in the legal process, addressing needs such as medical

[10] Maylea et al, *ROSE and ELSA* (n 4) 13.
[11] Ibid 16.
[12] Ibid 7 (Recommendation 23).

treatment, contact with family and employers, and care arrangements for children and pets. The Victorian Legal Services Board funded the service as a two-year pilot from July 2025.[13]

Loose integration is difficult to sustain and imposes its own costs. The consultation paper's account of the consequences of risk mitigation matches our findings. Where services separate their work in order to preserve privilege, clients with cognitive disability cannot have a trusted supporter present, lawyers withdraw from the discussion once it moves beyond strictly legal matters, and clients must reconcile advice from professionals who are not permitted to speak to one another.

Practitioners have managed the problem by applying the law practice's own rules. In our 2018 study of three integrated practices in Melbourne, lawyers were reluctant to work with social workers where they were concerned that doing so could compromise confidentiality and harm the client's legal interests. Social workers generally reported that they were required to follow the organisation's policy on client confidentiality, and had accepted the necessity of this because they worked in a legal setting under the lawyers' public liability insurance.[14] We return to that finding at Question 7.

Question 2

> *What are the benefits of integrated legal assistance services for clients, service providers and the justice system? Do you have case studies, examples or other evidence you can share?*

Three findings bear on this question.

Clients present with legal and social circumstances that are already connected. In the Law School's clinics, a client attending a legal appointment at a community program for older people may raise elder abuse, a power of attorney, a Centrelink debt, a rental dispute and an unpaid fine in a single conversation. The clinic is staffed by law, social work and criminology students under supervision, so that the legal and non-legal parts of that conversation can be dealt with at the one time. Our evaluation of ELSA and ROSE recorded the same pattern in a community legal centre.[15]

Locating a non-legal service inside a legal organisation improves access and reduces cost, even where the integration is limited. The Independent Family Advocacy and Support pilot placed non-legal advocates within Victoria Legal Aid to support parents before child protection matters reached court. Our evaluation found that the pilot diverted approximately twenty per cent of families from court and six per cent from out of home care, and saved $3.52 for every dollar invested. We found no evidence that children were left in unsafe circumstances. In every case in which a child was not removed, a child protection practitioner assessed that the child was no longer at risk of significant harm.[16] The evaluation also identified the location of the service as a cause of its effectiveness. Placing the service within legal aid, rather than within a department, a charity or a non-government organisation, protected it from influence and gave parents reason to trust it, particularly parents whose information had previously been shared without their knowledge.[17] Independent Mental Health Advocacy is a non-legal advocacy service located within Victoria Legal Aid. Our evaluation found that stakeholders across the mental health and legal systems valued it highly.[18] Following the introduction of opt-out referral under the *Mental Health and Wellbeing Act 2022* (Vic), our 2026 interim evaluation found that opt-out advocacy has increased equity of access to legal services.[19] Neither service is closely integrated in the Commission's sense. Each is a non-legal service delivered by a legal organisation in a legal setting, and the lawyer and the advocate act for the client separately. Their bearing on this reference is confined to the value of the location.

The non-legal professional often contributes to the legal matter itself rather than to separate non-legal needs. Advocates assemble the material the lawyer needs, and where that does not happen the consequences are procedural. One parent described documents not reaching either solicitor before a hearing, with the result that "the magistrate didn't have a chance to read it and the magistrate would make another out of home accommodation order due to those factors".[20]

---

[13] Victoria Legal Aid, 'Remand Support Service' <https://www.legalaid.vic.gov.au/remand-support-service>; Victoria Legal Aid, 'Our New Remand Support Service Pilot Begins Operations' (9 July 2025) <https://www.legalaid.vic.gov.au/our-new-remand-support-service-pilot-begins-operations>.
[14] Maylea et al, 'Socialising the Law' (n 1).
[15] Maylea et al, *ROSE and ELSA* (n 4).
[16] Chris Maylea et al, 'Advocacy as a Human Rights Enabler for Parents in the Child Protection System' (2023) 17(3) *Ethics and Social Welfare* 275.
[17] Maylea et al, 'Advocacy as a Human Rights Enabler' (n 16).
[18] Maylea et al, *IMHA* (n 2).
[19] Maylea et al, *IMHA Expansion* (n 2).
[20] Maylea et al, 'Advocacy as a Human Rights Enabler' (n 16) (Parent 10).

Question 3

Integrated legal assistance services may compromise a client's ability to retain legal privilege and expose their private information, including through the professional reporting obligations of social service professionals. Do you have case studies, examples or other evidence that indicate how easy or difficult it is for lawyers, social service professionals or clients to manage information disclosure requirements and requests in this context?

Douglas and Walsh found clients avoiding social services, health services and police for fear of a report to child protection.[21] ANROWS found that co-locating family violence services with child protection services can increase women's fears of child removal.[22] Integrating services without protecting what clients say in them deters clients from using them. Practitioners face the same uncertainty. Our 2018 study reported that the law is unclear about client files shared by lawyers and social workers, and about information shared between them.[23]

Two features of the Victorian statute book bear on this question.

First, Chapter 4 of the consultation paper does not distinguish permissive disclosure from mandatory disclosure. The information sharing schemes in Part 6A of the *Child Wellbeing and Safety Act 2005* (Vic) and Part 5A of the *Family Violence Protection Act 2008* (Vic) permit a professional to disclose. Mandatory reporting under s 184 of the *Children, Youth and Families Act 2005* (Vic) and the offence in s 327 of the *Crimes Act 1958* (Vic) require a professional to disclose. That distinction is central to the design of any exception, and we return to it at Question 7.

Second, Victorian law already treats privilege as a complete answer to both kinds of obligation. Both information sharing schemes exclude from their operation information that "would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege".[24] Section 327(7)(b) of the *Crimes Act 1958* (Vic) provides that a person does not contravene the failure to disclose offence where the information "would be privileged under Part 3.10 of Chapter 3 of the Evidence Act 2008", and s 327(7)(c) extends the same treatment to confidential communications under the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).[25] In an integrated service, all three provisions presently exclude the lawyer's file, and none of them excludes the social service professional's file on the same client.

Question 4

Should the law enhance protection for communications between clients, lawyers and social service professionals in integrated legal assistance service settings? Why or why not?

Yes, for the following two reasons.

THE DOCTRINAL POSITION IS UNSTABLE

Section 118 of the *Evidence Act 2008* (Vic) protects confidential communications between the client and a lawyer, and confidential documents prepared by "the client, lawyer or another person". Section 119 protects a confidential communication "between the client and another person" only once litigation is anticipated. A document prepared by a social service professional may therefore attract advice privilege while the same professional's conversation with the client does not, and that conversation is protected only if litigation is in prospect. That result does not reflect any assessment of the client's need for protection.

At common law, the position turns on whether the social service professional is an agent of the client, a third party performing a function that enables the client to obtain legal advice, or a stranger to the relationship. In *Pratt Holdings Pty Ltd v Commissioner of Taxation*, Finn J held that the important consideration "is not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party", and that denying privilege where a person lacks the

[21] Heather Douglas and Tamara Walsh, 'Mandatory Reporting of Child Abuse and Marginalised Families' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 491.
[22] Marcia Langton et al, *Improving Family Violence Legal and Support Services for Aboriginal and Torres Strait Islander Women* (Research Report, ANROWS, 2020).
[23] Maylea et al, 'Socialising the Law' (n 1).
[24] *Child Wellbeing and Safety Act 2005* (Vic) s 41Q; *Family Violence Protection Act 2008* (Vic) s 144C.
[25] *Crimes Act 1958* (Vic) s 327(7).

resources to communicate with a lawyer unaided would "undercut the privilege itself".[26] Four paragraphs later his Honour held that advice from other professional sources "will rarely be capable of attracting privilege" because each advice has "a distinctive function and purpose in the principal's decision making".[27] Both propositions are correct on their facts. A commercial client who consults a merchant banker and a solicitor obtains two independent services. A client who speaks to a lawyer and a social worker together, in one appointment, about one set of circumstances, obtains a single service. The common law does not distinguish those two cases reliably, and legislation should do so.

THE CURRENT POSITION LIMITS HUMAN RIGHTS

The consultation paper does not refer to the Charter, to any Charter right, or to any international human rights instrument. A Bill implementing the Commission's recommendations will require a statement of compatibility under s 28 of the Charter. We invite the Commission to undertake that analysis in its report.

Section 24(1) of the Charter guarantees a fair hearing, and s 25(2)(b) guarantees a person charged with a criminal offence adequate time and facilities "to prepare their defence and to communicate with a lawyer or advisor chosen by that person". Section 13(a) protects against arbitrary interference with privacy, family, home or correspondence. Section 8(3) guarantees equal and effective protection of the law without discrimination.[28] Article 13(1) of the CRPD requires "procedural and age-appropriate accommodations" to ensure effective access to justice, and article 12(3) requires access to the support a person requires in exercising legal capacity.[29] Other instruments may also be engaged, including article 12 of the *Convention on the Rights of the Child* where the client is a child, and articles 13(2) and 40 of the *United Nations Declaration on the Rights of Indigenous Peoples* where the client is an Aboriginal or Torres Strait Islander person.[30]

Effective participation in a legal process requires a client to be able to speak frankly to the people assisting them. Clients with cognitive disability, psychosocial disability, communication support needs or trauma histories often require a supporter present in order to do so. That support is the accommodation article 13 requires. Victorian law makes the presence of the supporter the event that defeats privilege, so a client who can instruct a lawyer unaided retains an absolute privilege and a client who cannot either loses it or is asked to consent to losing it.

Communication support needs also arise for children, for people with low or no literacy, for people who require an interpreter, and for people in acute distress or pain. The class of clients affected by the present position is therefore wider than the class of clients with disability.

Section 7(2) of the Charter permits limits that are demonstrably justified, having regard among other things to "any less restrictive means reasonably available".[31] The limitation in this case results from a dominant purpose test designed for commercial litigation, and no legislative purpose supports it. A less restrictive means is available, namely the privilege proposed in this submission. The limitation is therefore not demonstrably justified.

Question 5

Are you in favour of establishing:

a. *[Option 1] a social service professional privilege that would enhance protection for communications between clients and social service professionals in loosely integrated legal assistance service settings and/or*
b. *[Option 2] a new category of legal privilege that would enhance protection for communications between clients, lawyers and social service professionals in closely integrated legal assistance service settings?*

Why or why not?

---

[26] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, [42]–[44] (Finn J).
[27] Ibid [47].
[28] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8(3), 13(a), 24(1), 25(2)(b).
[29] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 12(3), 13(1).
[30] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 13(2), 40.
[31] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

La Trobe Law School supports Option 2, a new category of legal privilege for closely integrated services. We do not support Option 1 as the answer to the problem before the Commission.

Only an absolute privilege removes the choice the terms of reference identify. A qualified privilege replaces that choice with another, in which the client must predict whether a court will later exercise a discretion in their favour. Neither clients nor their advisers can make that prediction, and the consultation paper accepts that qualified privileges are vulnerable to being overridden by judicial discretion.

Case Study 4 in the consultation paper demonstrates the difference. A community legal centre and a counselling service maintained strict information barriers, kept separate records, and did not meet clients together. After two hearings on a subpoena, the court ordered disclosure of the counselling records and upheld privilege over the centre's documents. The services implemented the loosely integrated model correctly and the qualified protection still failed.

Close integration is also the better service model. The ELSA and ROSE evaluation found that joint delivery produced outcomes that separate services could not, and the IFAS analysis found that placing the service within legal assistance infrastructure produced the trust on which it depended. A reform that protected only loosely integrated services would give providers a reason to remain in the model that produces worse outcomes.

Question 6

> *If you support a social service professional privilege for loosely integrated legal assistance service settings, do you have a view on the scope, elements, eligibility requirements or implications of the privilege? If so, what is it?*

Option 1 would not answer the problem before the Commission, for three reasons.

First, it is qualified, and Case Study 4 shows what that means in practice. Second, it would apply only in court proceedings, while much of the exposure in child protection, mental health and family violence arises before investigative bodies, and Chapter 2 of the consultation paper notes that the common law still largely governs that field. Third, confining a new protection to loosely integrated services would give a legal advantage to the model that produces worse outcomes.

Victoria's failure to enact a professional confidential relationship privilege is a separate and long-standing defect. Divisions 1A and 1B of Part 3.10 of the *Evidence Act 2008* (Vic) remain in the statute book as headings with no sections beneath them, twenty years after the joint recommendation of the Australian Law Reform Commission, the New South Wales Law Reform Commission and this Commission.[32] We would support a recommendation that those Divisions be filled as a matter of general evidence law reform. That reform would not answer the question in this reference.

Question 7

> *If you support a new category of legal privilege for closely integrated legal assistance service settings, do you have a view on the scope, elements, eligibility requirements or implications of the privilege? If so, what is it? We are particularly keen to hear your views on the definition of closely integrated legal assistance services, eligibility requirements for the privilege, a safety exception to the privilege, and the implications of the privilege for social service professionals.*

DEFINING THE SERVICE

The definition should turn on the character of the service rather than on the way appointments are arranged. A definition based on joint meetings would exclude services that alternate between joint and separate appointments, which is what most services do, and would make a client's privilege depend on a scheduling decision.

We propose that the privilege attach to a communication made in connection with the provision of an integrated legal assistance service. An integrated legal assistance service should be defined as a service in which a lawyer and one or more social service professionals are engaged, in a coordinated way, to address a client's connected legal and social circumstances, and in which the

[32] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005) rec 15–1.

client has a reasonable expectation of confidentiality. The requirement of coordination distinguishes an integrated service from the position of a client who happens to have both a lawyer and a social worker. Reasonable expectation of confidentiality is a criterion the general law already applies. Social service professional should be defined to include a social worker, financial counsellor, non-legal advocate, community worker or other non-legal professional engaged to deliver the service. The definition should turn on the function the professional performs rather than on their qualification, so that a service is not excluded because a worker holds no formal social work qualification.

We do not support distinguishing closely integrated from loosely integrated services in the operative provision. The distinction is descriptive, it does not correspond to any stable feature of practice, and it would invite litigation about where on the continuum a particular service sits.

SCOPE AND ELEMENTS

The privilege should be absolute, for the reasons given at Question 5. It should apply before courts and before investigative bodies, because a provider cannot maintain a practice that is protected in one forum and unprotected in another. It should cover communications and documents, because the distinction ss 118 and 119 draw between them has no application in this setting.

On the purpose test, we support the Commission's second formulation, under which the dominant purpose is the obtaining of integrated legal assistance services. An appreciable purpose test would import the difficulty identified in *Grant v Downs* and *Esso*, which concerns communications made for purposes of equal weight, into a setting in which the legal and social purposes are always of equal weight.

The privilege should extend to communications between the lawyer and the social service professional about the client, whether or not the client is present. A privilege confined to communications involving all three would protect the joint appointment and leave unprotected the discussion in which the two professionals decide what to do.

Confidentiality should be defined so that advocacy on the client's instructions does not destroy it. A disclosure made on the client's instructions, for the purpose of advancing the client's interests, should not affect confidentiality or constitute waiver. That result is consistent with the limited purpose principle in *Mann v Carnell*, and the legislation should put it beyond doubt.

ELIGIBILITY

The privilege should attach automatically when the statutory criteria are met. We do not support an accreditation scheme or ministerial designation.

Each would make a client's right depend on the administrative capacity of their provider, so that a client of a small rural centre that has not completed accreditation would be less protected than an identically situated client elsewhere. Ministerial designation would also place the availability of a privilege in the hands of the executive, in a field in which the executive is frequently the opposing party.

The consultation paper raises the concern that a self-executing privilege may require lengthy and costly litigation to resolve. The available evidence does not support that concern. There is no reported Australian decision on whether the records of a non-lawyer in an integrated legal assistance service attract privilege. The consultation paper cites none, and we have not identified one. We recorded the same position in print in 2019, in a text on social work and the law, noting that no court had ruled on whether information or files shared between a lawyer and a social worker are protected by client legal privilege and that there was no clear legislation to provide guidance.[33] The position is unchanged.

The absence of authority does not show that the problem is rare. Clients of legal assistance services cannot fund litigation, and a privilege claim over a third party's file is not the matter for which they sought help. Subpoena disputes are resolved at the registry, by negotiation or by narrowing the schedule, and matters settle before any ruling is made. Where the argument is run, it is run in the Children's Court, the Magistrates' Court or the Federal Circuit and Family Court, which produce no reported judgments.

Two consequences follow. First, the common law will not resolve the question, because no case capable of resolving it will reach a court that can, so legislation is required. Second, the litigation risk of a self-executing privilege is low, because a clear statutory rule would be applied when the subpoena is answered rather than at a hearing. The present uncertainty produces more contested applications than a clear rule would.

---

[33] Chris Maylea, *Social Work and the Law: A Guide for Ethical Practice* (Red Globe Press, 2019).

DISCLOSURE

The Commission asks what level and type of harm should permit, or require, disclosure. That question combines two questions that require separate answers. The first is when a professional *may* disclose confidential information. The second is when a professional *must* disclose it. The consultation paper treats professional obligations, mandatory reporting, information sharing and ethical duties as a single category of pressure on privilege, which reproduces the confusion it identifies in practice.

THE NON-LAWYER EMPLOYEE OF A LAW PRACTICE

Victorian law already contains a category of non-lawyer whose participation in a client communication does not affect privilege. Section 117(1) of the *Evidence Act 2008* (Vic) defines "lawyer" to include "an employee or agent of a lawyer".[34] A paralegal, law clerk, interpreter or typist is therefore covered by ss 118 and 119 through that definition, without any extension of principle. The same subsection defines "client" to include an employee or agent of a client.

The Uniform Law supplies the corresponding professional duties. Rule 9.1.2 of the Australian Solicitors' Conduct Rules permits a solicitor to disclose confidential client information to "an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client". Rule 37.1 requires the solicitor with designated responsibility to supervise "all other employees engaged in the provision of the legal services for that matter". Section 34(1)(b) of the *Legal Profession Uniform Law* makes principals responsible for ensuring that the legal services the practice provides comply with the Law and the Uniform Rules, and the lay associate provisions subject non-lawyer staff to regulatory oversight.[35]

Non-lawyer staff of a law practice are therefore already subject to the confidentiality rules, the supervision requirements and the regulatory scheme, and are already within the statutory definition of "lawyer" for privilege purposes. We propose that a social service professional engaged to deliver an integrated legal assistance service be treated in the same way. That proposal applies an existing category to a workforce Parliament did not have in mind in 2008.

Practitioners in integrated services are already working to those rules without the privilege. In our 2018 study, social workers reported that they were required to follow the organisation's policy on client confidentiality, and had accepted the necessity of this because they worked in a legal setting under the lawyers' public liability insurance.[36] They were working to the obligations that attach to an employee of a law practice, without the privilege that follows for a paralegal doing the same work.

WHEN A PROFESSIONAL MAY DISCLOSE

The same test should apply to every professional covered by the privilege. A social service professional in an integrated legal assistance service should be permitted to disclose confidential information in the circumstances set out in rule 9.2 of the Australian Solicitors' Conduct Rules, which are where the client authorises the disclosure, where the law compels it, where it is made for the sole purpose of avoiding the probable commission of a serious criminal offence, and where it is made for the purpose of preventing imminent serious physical harm.

That change would not materially reduce a professional's capacity to act protectively. The Australian Association of Social Workers Code of Ethics permits disclosure where "an actual, identifiable risk of harm to a specific person or persons can be prevented".[37] The solicitors' rule permits disclosure to prevent imminent serious physical harm. Each test requires a professional judgement about the risk and the seriousness of the anticipated harm, and neither sets a precise threshold. The difference between them is one of drafting rather than substance.

A single test would allow the lawyer and the social service professional to work to one rule. Close integration is difficult while each is subject to a different and partly inconsistent set of obligations. A single test would also allow them to share information with one another as freely as members of a law practice may, which is what Case Study 2 in the consultation paper describes practitioners already needing to do.

WHEN A PROFESSIONAL MUST DISCLOSE

[34] *Evidence Act 2008* (Vic) s 117(1) (definitions of 'client' and 'lawyer').
[35] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) rr 9.1.2, 9.2, 37.1; *Legal Profession Uniform Law* s 34(1)(b).
[36] Maylea et al, 'Socialising the Law' (n 1).
[37] Australian Association of Social Workers, *Code of Ethics 2020* (November 2020, amended February 2021) cl 5.4.5.

Lawyers are not mandatory reporters. They appear nowhere in s 182 of the *Children, Youth and Families Act 2005* (Vic).[38] Where a reporting duty could otherwise reach privileged material, Victorian law resolves the conflict in favour of privilege. Section 327(7)(b) of the *Crimes Act 1958* (Vic) excuses disclosure of anything privileged under Part 3.10, and s 184(2A) of the *Children, Youth and Families Act 2005* (Vic) provides that a person "is not exempt from the requirement to report … merely because the information would be privileged under section 127 of the Evidence Act 2008".[39] Parliament addressed privilege when it enacted the reporting provision. It abrogated one privilege, and the privilege it chose was the religious confessions privilege rather than client legal privilege.

The same answer should apply to a social service professional covered by the privilege.

A new Division inserted into Part 3.10 would engage s 327(7)(b) by its own terms, and would engage the exclusions in both information sharing schemes, which apply to legal professional privilege generally. No consequential amendment to those three provisions would be required. That effect would follow whether or not the Commission intends it, and we draw it to the Commission's attention for that reason.

Section 184 of the *Children, Youth and Families Act 2005* (Vic) is the exception, because it excludes no privilege other than the one dealt with in s 184(2A). It should be amended to provide expressly that the duty to report does not apply to information privileged under Part 3.10, following the drafting s 184(2A) already supplies.

HOLDER AND WAIVER

The consultation paper does not say who would hold the new privilege, and it does not address waiver. The legislation should settle both.

The client should hold the privilege alone, consistent with the position under the existing privilege, and neither the lawyer nor the social service professional should be able to waive it.

The legislation should define waiver expressly. In Case Study 4 the opposing party argued waiver from a standard clause in the client agreement and from an affidavit the centre had helped to prepare and file. Both arguments failed, and defeating them took two hearings. The legislation should provide that a disclosure made on the client's instructions for the purpose of advancing the client's interests does not constitute waiver, that a disclosure made in compliance with a statutory obligation does not constitute waiver, and that a general disclosure clause in a service agreement does not constitute waiver.

IMPLICATIONS FOR SOCIAL SERVICE PROFESSIONALS

The Commission asks about the effect of the privilege on social service professionals, and identifies a risk that they will resist a privilege that displaces their professional obligations.

Under this proposal a social service professional would work to one clear rule in place of two inconsistent ones. The permissive test does not differ materially from the test their own codes already apply. The proposal does change their obligations on mandatory disclosure. A professional covered by the privilege would be in the same position as the lawyer they work with, which is already the position for most of the relevant workforce in Victoria, because social workers are not mandatory reporters.

Workforce training on the scope of the privilege and on waiver would be required, and it should be funded. Infrastructure for that training exists. We prepared the With You toolkit for the legal assistance sector, drawing on national consultations with more than 500 clients, carers, professionals and other stakeholders, and it supports the kind of organisation-level change a new privilege would require.[40] A service that runs both integrated and non-integrated programs would need to identify which of its programs attract the privilege, which is a further reason for a definition anchored in stable features of the service.

Implementation

[38] *Children, Youth and Families Act 2005* (Vic) s 182(1), (2).
[39] Ibid s 184(2A).
[40] Maylea et al, *With You Toolkit* (n 6).

We agree that inconsistency between jurisdictions imposes a real cost, and that the Albury-Wodonga example illustrates it. That cost is not a reason for delay. New South Wales enacted the professional confidential relationship privilege in 1998 and the Commonwealth has not enacted it at all. We would support a recommendation that the Victorian Government pursue an equivalent provision through the Standing Council of Attorneys-General after enactment in Victoria.

Services already bear the cost of the present position in contested subpoenas, duplicate record systems and the consent processes built to work around the gap. A self-executing privilege would reduce those costs. Whichever model the Commission recommends, its implementation should be evaluated, and the evaluation should be designed before commencement so that baseline data is available.

Recommendations

1. That a new category of legal privilege be enacted, protecting confidential communications between clients, lawyers and social service professionals made in connection with the provision of integrated legal assistance services.
2. That the privilege be absolute, apply before courts and investigative bodies, and protect communications and documents.
3. That the dominant purpose be the obtaining of integrated legal assistance services.
4. That the privilege extend to communications between a lawyer and a social service professional concerning the client, whether or not the client is present.
5. That eligibility be determined by statutory criteria applying automatically, without an accreditation or ministerial designation scheme.
6. That the privilege be modelled on the existing treatment of an employee or agent of a lawyer under s 117(1) of the *Evidence Act 2008* (Vic), so that a social service professional engaged to deliver an integrated legal assistance service stands in the same position as a paralegal.
7. That the circumstances in which a social service professional covered by the privilege may disclose confidential information be those set out in rule 9.2 of the Australian Solicitors' Conduct Rules, and that no separate safety exception be enacted.
8. That the privilege operate on mandatory disclosure obligations as it operates for lawyers, and that s 184 of the *Children, Youth and Families Act 2005* (Vic) be amended to provide that the duty to report does not apply to information privileged under Part 3.10 of Chapter 3 of the *Evidence Act 2008* (Vic).
9. That the client hold the privilege alone, and that waiver be defined to exclude disclosure on the client's instructions, disclosure in compliance with a statutory obligation, and general disclosure clauses in service agreements.
10. That funding be provided for workforce training, drawing on the organisational change resources already developed for the legal assistance sector, and that implementation be evaluated against baseline data collected before commencement.
11. That the Victorian Government pursue an equivalent provision in other Australian jurisdictions through the Standing Council of Attorneys-General.
12. That, separately from this reference, Divisions 1A and 1B of Part 3.10 of the *Evidence Act 2008* (Vic) be filled by enacting the professional confidential relationship privilege recommended in ALRC Report 102.