

The Honourable Anthony M. North KC
Chair
Victorian Law Reform Commission
3/333 Queen Street
Melbourne VIC 3000

By email: legal.privilege@lawreform.vic.gov.au

Dear Mr. North

Re: Legal Privilege and Integrated Legal Assistance Services

The Law Institute of Victoria ('LIV') welcomes the opportunity to provide its views to the Victorian Law Reform Commission ('VLRC') on the inquiry into legal privilege and integrated legal assistance services. In the letter that follows, the LIV responds to the seven questions provided in the accompanying consultation paper alongside some additional comments on relevant issues.

This letter is informed by a cross section of members from the LIV's Family Violence Committee, Health and Disability Law Committee, Tech and Innovation Executive Committee and Ethics and Practice Support Department. The LIV have also heard directly from practitioners who work in community legal centres ('CLCs') like First Step and Westjustice. Each of these members offers feedback guided by their own experience working in or alongside legal assistance service providers and social services.

Executive Summary

Background

The LIV strongly believes that vulnerable people should not feel discouraged from accessing therapeutic services due to a fear of compromising privileged information. Clients with access to support services that restore and preserve their wellbeing are more equipped to understand their rights and responsibilities, realise their legal needs and participate in the justice system. Throughout consultation with our members, the LIV has repeatedly heard that integrated legal assistance providers deliver services to a category of clientele that, if not for the mode of integrated delivery, would never seek out legal help.

As demand for the services delivered by integrated models continues to grow (noting that CLC's have witnessed an average increase in demand of 6.85% in the last year),¹ the sector must look to remove the barriers facing integrated legal assistance providers and ensure they are incentivised to expand and

¹ Federal of Community Legal Centres Victoria, *Annual Report 2024-2025* (17 November 2025) 22.

meet the needs of a growing population. The VLRC's inquiry is therefore timely in addressing an anxiety that the LIV has heard is relatively commonplace among lawyers working within the sector.

Importantly, the LIV has not heard from our members of any situations where a lawyer working in a CLC or loosely integrated capacity has been subpoenaed to provide information otherwise subject to privilege that might be compromised by proximity to a social worker. In some respects, the risk of situations like those described in the VLRC consultation paper manifesting seems relatively remote. However, the LIV has heard from closely integrated legal service providers that the uncertainty created by the status quo has discouraged practitioners from integrating their services and engaging with the more sophisticated service delivery models employed by some CLCs. So, while the associated risk may be remote, the lack of clarity around LPP in legal assistance contexts could be having a chilling effect on the sector.

While this uncertainty is undesirable, the LIV also notes that claims of privilege by legal professionals are facing higher levels of scrutiny than ever before. In 2023, the Australian Government tasked the Attorney-General's Department and Treasury to conduct a joint review regarding the use of legal professional privilege in Commonwealth investigations, and to present Government with options for possible reform, following the PwC tax leaks scandal.² Although the substance of this review related to federal investigations and regulatory action, it carried with it unsubstantiated assertions of sporadic, or potentially systemic, misuses of LPP. Within this context, it is not surprising that much of the feedback received from LIV members advocates for caution in relation to altering LPP in any way that may draw greater scrutiny, encourage litigation or erode its inviolability.

LIV position

The LIV was unable to reach a consensus on the preferred options within the consultation paper. Although many of our members recognised the utility of enhancing protections for communications between clients, lawyers and social service professionals, there was a significant departure in views about which option (if any) was the appropriate way to achieve this outcome. Many practitioners were particularly concerned that the risk of altering the core of lawyers' ethical and professional duties – duties that are foundational to the way that the profession operates on a day-to-day basis, and to the way that the profession is structured and regulated – outweighed the benefits of resolving this uncertainty for integrated legal service providers and their clients.

Members were uncertain about whether the proposed modifications of privilege are trying to address what is essentially a protocol and resource issue. While some claimed that sophisticated service providers like CLCs were already effectively managing this risk (though could be supported to hold more effective information barriers and confidentiality protocols through better funding), others argued that adherence to existing protocols encouraged inefficiencies, such as requiring clients to recount their

² Attorney-General's Department, *Review of the use of legal professional privilege in Commonwealth investigations* (Webpage, 28 Feb 2025) <https://consultations.ag.gov.au/legal-system/lpp-review/>.

experiences multiple times as social workers leave the room, and limited the scope of client information that lawyers might receive if a social worker was more present in discussions.

The LIV provides specific feedback on each option below, in the hope that the combined insights of LIV members and the sector more broadly assist the VLRC in reaching a conclusion.

Consultation Questions

Question 1: How easy or difficult is it to implement these two models of integrated legal assistance services in practice?

The LIV defers to integrated legal assistance service providers to provide direct feedback on the ease and difficulties of implementing loosely and closely integrated models. However, engagement with our members has revealed some insights which we provide below.

- Integrated service delivery models are varied and often very sophisticated. Generalisations about the sector are very difficult to make, particularly given that social workers themselves are also a diverse cohort with a multi-tiered regulatory environment. The LIV has heard predominantly from closely integrated providers such as CLCs, who necessarily require highly developed protocols and referral-based partnerships to meet the needs of a diverse clientele with complex needs (such as those who have no fixed address, low legal literacy and immediate health and wellbeing concerns).
- Closely integrated service providers face difficulties when attempting outreach in rural, regional and remote ('RRR') areas. A member who works at Westjustice cited difficulties with recruiting and partnering with organisations and practitioners in these areas, who currently favour bespoke, loosely integrated ways of working. While there are likely geographic and population-based pressures at play, the member noted that RRR practitioners prefer more conservative models of integration because they are more removed from the LPP-related risks associated with closely-integrated models.
- There are broader risks associated with providing integrated legal assistance. One LIV member who practices in family law alongside support workers noted that it is not uncommon for clients to confuse the advice they receive from social workers with legal advice. This is exacerbated in situations where the support workers are operating in a volunteer capacity and are more likely to be unregulated or lack any formal training or expertise. In these situations, when the client is not made aware of the clear demarcation between the role of a lawyer and a support worker, they can often adopt unfounded expectations about their legal rights or prospects based upon the advice received from social workers. The LIV member cited multiple situations where, for example, a support worker who was working with a client came to a conclusion about the existence of family violence and communicated this to a client, when the facts of the case and the law clearly indicated a contrary position should be adopted. While there are closely integrated legal services that avoid this confusion, the VLRC should note the risk of

exacerbating this confusion if Option 1 is adopted. Affording all social workers a form of privilege may legitimise any legal-like advice and assumptions in the eyes of clients.

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?

Holistic care with wrap around supports typically provides better outcomes and experiences for clients and lawyers. The LIV has heard from its members that the presence of medical professionals, social workers and case workers improves their capacity to communicate with clients, understand their needs and advocate effectively on their behalf.

One member referenced their work at the AlfredHealth Legal Partnership (HeLP) Patient Legal Clinic. This clinic is a partnership between Maurice Blackburn Lawyers, Bayside Health Alfred, Justice Connect and the Michael Kirby Centre for Public Health and Human Rights at Monash University to provide free legal assistance and referrals to all patients and families at Bayside Health Alfred for their health-related legal problems. The member noted that for some high-risk patients, the need for integrated legal assistance with psychiatrists and social workers was less an option and more so a requirement in order to provide the best possible advice and ensure genuine, informed consent was achieved.

The LIV also spoke with First Step, who provided some representative examples of their work. For example, a healthcare worker partnered with First Step may be conducting outreach to high-risk clientele who are currently homeless and have complex medical needs. Whilst speaking to a client, they might become aware that they have outstanding legal needs (such as unpaid fines, outstanding warrants due to not appearing before court, victims of criminal behaviour, etc). The healthcare worker will then contact First Step who may have a lawyer come and speak to the client in an initial conversation to understand their needs while the healthcare worker is present. The client may then transition into crisis accommodation, and upon entering a more stable position, have the capacity to engage the lawyer and resolve those outstanding issues. First Step highlighted that the majority of clients like this would never seek legal advice, or acknowledge their own legal need, without the integration of services.

Finally, select criminal lawyers also offered their insights into the criticality of health and social care services in preparing a successful plea or bail application. They noted that preparatory work before a case often becomes rehabilitation focused, and while communications relating to accommodation, support services and counselling may not attract legal privilege where they have a separate non-legal purpose, they are often relevant to broader sentencing considerations.

Question 3: 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?

Approximately 5% of all calls received by the LIV's Ethics and Practice Support Services in the past year are from CLC practitioners. A significant proportion of these calls relate to confidentiality and

conflicts of interest. The LIV is often asked to support CLCs through dedicated privacy and confidentiality education sessions, often focusing on the challenges of operating in a shared workspace (i.e. managing confidentiality and LPP with hot-desking arrangements, open plan offices, etc).

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?

Noting that the LIV did not reach a settled position on the proposals, we have limited our feedback to the questions below.

Question 5(a) and 6: Are you in favour of establishing a social service professional privilege that would enhance protection for communications between clients and social service professionals in loosely integrated legal assistance service settings?

While the LIV did not achieve consensus around the desirability of pursuing option 1, we provide below some brief insights which may be of assistance to the VLRC.

- As noted in question 1, some family violence practitioners expressed concerns that a distinct 'social service professional privilege' may complicate the boundaries of the professional relationship between lawyer and client, which will exacerbate situations where social workers confuse clients with legal-like advice. This risk might be ameliorated somewhat if the scope of the proposal was broadened to encompass the 'professional confidential relationship privilege' implemented in other jurisdictions (noting however that this would necessarily be a qualified privilege).
- Practitioners from CLC's spoke briefly about their conversations with NSW counterparts on whether the qualified 'professional confidential relationship privilege' resolved the issues at hand. The NSW CLC's noted that while it is an improvement, it does not provide lawyers with complete confidence in operating in a closely integrated setting. Though the LIV is not aware of any cases where this qualified privilege has been litigated, it nonetheless risks exacerbating the resource demands on CLCs who may be required to seek a judicial determination in order to uphold the qualified privilege.

Question 5(b) and 7: Are you in favour of establishing a new category of legal privilege that would enhance protection for communications between clients, lawyers and social service professionals?

The LIV understands that there is already some support for a new category of legal privilege that hinges on the dominant purpose of a communication being to obtain access to legal services. The justifications for this proposal are clear – it would enable clients to have confidence that their communications are protected from the moment of realising their legal needs to the resolution of their problems. It would similarly provide social workers and lawyers with the confidence to provide co-delivered support for their clients, incentivising greater integration and holistic service delivery.

The LIV has concerns that this approach might face practical difficulties in determining where the boundaries of a communications dominant purpose lie. The LIV envisions that in most cases, a client may appear before a social worker seeking therapeutic outcomes, and only later become aware of the option to pursue legal assistance after being prompted. Determining when in a conversation a communication turns from therapeutic to seeking access to legal services may prove practically difficult. More importantly, many LIV members highlighted that LPP remains one of the most litigated areas of law. There is a risk that this expanded category of LPP might, upon implementation, be subject to such legal contest that it would provide no immediate confidence to integrated legal assistance service providers.

Additional comments

Qualified vs Absolute Privilege

The LIV believes that there is greater scope to speak to other jurisdictions about the operation of the professional confidential relationship privilege in order to determine whether a qualified privilege achieves the outcomes sought by integrated service providers in Victoria. As it is not typical for integrated service providers to be subpoenaed for communications, the issue may not centre on the potential for a qualified privilege to be challenged, but on whether qualified privilege gives clients and providers sufficient confidence to engage in integrated practice.

If, as the limited feedback the LIV has received indicates, only absolute privilege will completely ameliorate the anxieties in the sector, then this may be the preferable approach.

Jurisdictional consistency

Section 79 of the *Judiciary Act 1903* creates uncertainty when a new state-based privilege law does not mirror federal or other state laws, acting as a "pick-up" provision that applies state laws in federal jurisdiction only where the federal law does not otherwise provide. In addition, under section 109 of the Constitution, if a state privilege provision is inconsistent with a Commonwealth statute (such as the *Evidence Act 1995* or *Family Law Act 1975*), the state law cannot be effectively picked up or applied.

The LIV notes the undesirability of creating jurisdictional friction that may lead to fragmented protections for confidential communications depending on whether a matter is heard in a state court exercising federal jurisdiction or a federal court. While there may be a pathway for alignment with other uniform law jurisdictions under Option 1 (i.e. pursuing a broader professional confidential relationship privilege), the LIV recognises that holistic reform efforts from the ALRC in the past have met with mixed success.

Next Steps

The LIV appreciates the opportunity to provide its views to the VLRC and looks forward to the opportunity to engage further on matters relating to legal privilege and legal assistance services. [REDACTED]

[REDACTED]

[REDACTED]

Sincerely yours,



Adam Awty
Chief Executive