Legal Professional Privilege
Colin Liew
Reviewed by David Foxton

Subject: Legal professional privilege
Other Related Subjects: Evidence; Civil Procedure

Once worthy of only a single chapter in textbooks on the law of evidence, legal professional privilege has come to be recognised as a fundamental and substantive legal right in common law systems. The dualist character of the law of privilege, straddling the divide between adjectival and substantive law, and the increasing complexity of the legal rules which govern its creation, application and loss, have generated a number of specialist monographs on the subject, including Thanki and others, The Law of Privilege in England and Wales, Desiatnik, Legal Professional Privilege in Australia and Adam Dodek, Solicitor-client Privilege in Canada. To their number we can now add a Singapore contribution of the highest quality – Colin Liew’s Legal Professional Privilege, the first Singapore publication on this subject, and one which leaves little scope for any local competitor.

Liew is monumental work – 628 pages of text and a case index which spans 30 pages and every major common law jurisdiction – in a book which confines its attention to the two species of LPP rather than other evidential immunities such as public interest immunity, “without prejudice” privilege and the privilege against self-incrimination. Mr Liew is an independent advocate, practising from what has become Duxton Hill Chambers in Singapore. He has appeared in some important decisions on the law of LPP and the Evidence Act in Singapore, including Rahimah bteMohd Salim v Public Prosecutor and ARX v Comptroller of Income Tax. This is clearly the text of a practitioner who knows his subject, the text addressing practical issues such as, how to claim, or challenge a claim, to LPP, and what to do about recovering privileged documents which have been disclosed by mistake, and the text includes a very helpful tabular summary of the law relating to legal advice privilege.

But Liew is much more than a practitioner text. The conceptual underpinning of the law of LPP is analysed with a view to offering a principled exploration of its obscurities or inconsistencies. The transition of the law of privilege from procedural rule to fundamental right is carefully traced across five jurisdictions. The book’s aim to be more than simply a well-structured case digest is apparent from the first page, in which the juridical nature of an assertion of privilege is analysed in Hohfeldian terms. That ambition is fully realised.

The work begins with three chapters which address both species of LPP – legal advice privilege and litigation privilege. Chapter 1 explores the concept of “privilege” generally, delineating LPP from other evidential privileges. This is followed by a discussion of one of the key features – and it might be thought, limitations – on the law of LPP in Singapore: the co-existence of a nineteenth-century statute purporting to codify the law of evidence alongside a common law of privilege which survives only to the extent that it is not inconsistent with the statute. The challenges created by the historic legacy of Sir James Fitzjames Stephen’s Indian Evidence Act 1872, passed into Singapore law as the Evidence Act in 1893, and the means by which they have been overcome, is one of the themes running through the book. Section 2(2) of the Act provides that all non-statutory rules of evidence, so far as they are inconsistent with the Act, are repealed. The Act applies “to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor
to proceedings before an arbitrator”, with the result that the common law of evidence still applies to interlocutory hearings.\textsuperscript{15} Even the arbitration exclusion has proved problematic.\textsuperscript{16}

The extent of the gaps left by the Evidence Act, and the creativity of the Singapore courts in filling them, is quite remarkable. This included recognising privilege in communications with in-house counsel, when the Act only refers to an “advocate or solicitor”, a term defined by s.2(1) of the Interpretation Act\textsuperscript{17} to mean those admitted as advocates and solicitors of the Supreme Court of Singapore pursuant to the Legal Profession Act.\textsuperscript{18} A Law Reform Committee report had expressed real doubt as to whether legal advice privilege extended this form,\textsuperscript{19} leading statutory intervention in the form of the Evidence (Amendment) Act 2012,\textsuperscript{20} but even then, further development at common law was required.\textsuperscript{21} A crime-fraud exception to privilege is another creature of common law, developed alongside the statutory code.\textsuperscript{22} Most striking of all is litigation privilege is not mentioned at all in the Evidence Act, and as \textit{Liew} notes, there is very good reason for concluding that legal advice privilege is the only form of LPP which the Act recognises.\textsuperscript{23} However, the Singapore Court of Appeal in \textit{Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd}\textsuperscript{24} held that litigation privilege survived at common law. The methods by which this conclusion is reached are rightly described in \textit{Liew} as not “entirely convincing”.\textsuperscript{25}

As \textit{Liew} notes, these developments have not come entirely without cost. The codifying purpose of the Act is “more honoured in the breach than the observance … resulting in reasoning which is increasingly artificial if not completely defiant of the legislative wording”.\textsuperscript{26} And yet the alternative was surely much worse. Stephens’ Evidence Act was enacted in Malaysia as the Evidence Act 1950.\textsuperscript{27} The constraints imposed by the 1950 Act led one Malaysian Court of Appeal to hold that litigation privilege at common law had been abolished,\textsuperscript{28} only for another to reach the contrary view shortly thereafter.\textsuperscript{29} The approach of the Singapore courts represents, it is suggested, the lesser of two evils, but the Singapore and Malaysian experiences do not provide a compelling case for codifying an area of law so susceptible to changing commercial and societal conditions – at least for so long as codifying statutes are treated as exhaustive of their subject-matter, rather than providing a new base from which further common law development remains possible.

The focus of chapter 3 is principally procedural, but it embraces topics which do not always receive sufficient attention in privilege monographs. These include the difficult issues of claims to privilege under foreign law, and how far the content of that law can increase or abate the extent of any immunity from production under the law of the forum\textsuperscript{30} - issues which arise from the hybrid nature of privilege as a legal right. \textit{Liew} also addresses which system of law governs claims to privilege in international arbitration and the Singapore International Commercial Court (which has eschewed a purely forum-based approach to privilege issues\textsuperscript{31}). Chapter 4 addresses legal advice privilege and explores the ways in which the traditional conception of that doctrine has been adapted to reflect the much-expanded market for legal services: one in which advice is frequently supplied by persons other than lawyers qualified to advise under the law of the forum, and the subject-matter of such advice now extends far beyond the bounds of any legal textbook. Chapter 5, on litigation privilege, explores the limits of the “adversarial proceedings” in which this type of privilege can be invoked, including criminal proceedings and regulatory investigations, and carefully considers the key control measures for this head of privilege: the predominant purpose test,\textsuperscript{32} and the requirement that adversarial proceedings be sufficiently on contemplation.\textsuperscript{33} The remaining chapters address issues common to both forms of LPP: joint and common interest privilege (chapter 6); exceptions to privilege (chapter 7); and loss of privilege (chapter 8).
All of the chapters are enriched by comparative analyses of the law in other common law jurisdictions – for example Australian and Canadian jurisprudence on qualifications to the absolute character of privilege and the law of England, Australia and Hong Kong on whether a “dominant purpose” test applies to legal advice privilege. There is also extensive discussion of area of potential reform. These include the issue of whether there needs to be a complete overhaul of the Evidence Act (one is tempted to suggest a new statute providing that henceforth the provisions of the Act as hitherto interpreted by the courts shall be treated as part of the common law of Singapore) and whether there should be more limited reform on the topic of litigation privilege.

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It is always difficult for a reviewer to test the comprehensiveness of a legal text which is intended to function as a statement of the law, rather than an attempt to advance a particular theory or argument. It is the unexpected problems thrown up by the ingenuity of advocates and the disingenuity of their clients which is true audit of any hornbook. However, on those spot checks which I did perform, the book provided clear answers which were easy to find – for example as to the effect of a statement by a lawyer as to the effect of his instructions, the circumstances in which the court will inspect documents whose privileged status is in dispute to resolve the issue and partial waiver in the course of legal proceedings. The one exception was the approach to redaction when only parts of a document were privileged. I will certainly be consulting this work whenever confronted with LPP issues in the future, and I would urge others who expect to be similarly taxed to do the same.

This review can finish where Liew begins. The law of privilege is not some indulgence to lawyers, intended to allow them to practice their profession free from public scrutiny and accountability. As Mr Liew notes in his preface, LPP “has in some senses become coterminous with the rule of law itself; a bulwark against the coercive power of the state”. The Singapore Court of Appeal confirmed in Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd that LPP “recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it”. At a time when the ability of lawyers to provide “full, free and frank” advice faces unprecedented challenges, those of us who participate in the justice system must remember why our communications have been accorded this “privilege”, and prove ourselves worthy of it.

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1 Hereafter “LPP”.
3 Ronald Desiatnik, Legal Professional Privilege in Australia (3rd) (LexisNexis, 2016).
4 Adam Dodek. The Law of Privilege in Canada (LexisNexis, 2014)
5 Hereafter Liew.
6 Evidence Act (Cap 97, 1997 Rev. Ed.).
7 [2016] 5 SLR 1259.
9 Liew, [3.62]-[3.121].
10 Liew, [3.72]-[3.82].
11 Liew, [4.206].
12 Liew, [2.72]-[2.86].
14 Liew notes at [1.26] that “the Singapore courts have so far been reluctant to give literal effect to section 2(2)
15 HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd [2015] 3 SLR 855, [55–57] (Vinodh Coomaraswamy J).
16 For issues unexpectedly raised by this exclusion, in combination with Stephen’s decision to include the parol evidence rule in the Act, see David Foxton, “Arbitration without parol?” [2018] L.M.C.L.Q. 310 and BQP v BQQ [2018] SGHC 55 (Quentin Loh J).
17 Interpretation Act (Cap 1, 2002 Rev. Ed.).
18 Legal Profession Act (Cap 161, 2009 Rev. Ed.).
19 Law Reform Committee, Singapore Academy of Law, Report of the Law Reform Committee on Reforming Legal Professional Privilege (October 2011) [107].
23 Liew, [[5.86] referring to Sir James Stephens’ A Digest of the Law of Evidence (Macmillan & Co, 1876), p.115, which the Indian Evidence Act was intended to replicate.
24 [2007] 2 SLR(R) 367, [23].
25 Liew, [5.181].
26 Liew, [2.137]-[2.138].
27 Evidence Act 1950 (Rev. 1971).
30 Liew, [3.2]-[3.32].
31 Liew, [3.33]-[3.34].
32 Liew, [5.286]-[5.371].
33 Liew, [5.202]-[5.233].
34 Liew, [2.81]-[2.87].
35 Liew, [4.38]-[4.399]
36 Liew, [2.183]-[2.186].
37 Liew, [5.102]-[5.114].
38 On which the book discusses Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd [2020] EWCA Civ 11, the reviewer’s last (unsuccessful) appearance as an advocate in the English Court of Appeal.
39 Liew, [3.106]-[3.125].
40 Liew, [8.168]-[8.201].
41 Liew, v.
42 [2007] 2 SLR(R) 367, [23].