

## Privilege key fact sheet

### What is Privilege?

Privilege entitles a party to withhold evidence that is either oral or written from being disclosed to a third-party. Privilege is an absolute right subject to certain exceptions. Certain criteria must be fulfilled in order for privilege to apply. It is essential that any communication is made in a confidential setting and that such confidentiality is maintained, this applies to all forms of privilege. There are different forms of privilege. The most common types are legal advice privilege and litigation privilege.

### Legal Advice Privilege

- Legal advice privilege protects confidential communications (either written or oral) between a lawyer and their client which take place for the dominant purpose of giving or receiving legal advice about what should be done in the relevant legal context.
- The principle of legal advice privilege therefore allows a client to place unrestricted confidence in their lawyer.
- This privilege extends to and can protect from disclosure (a) any information contained in the confidential communication; (b) any reference to the communication or information in another document; and (c) any opinion based on the communication or information.

### Things to note:

- Legal advice privilege does not apply to a client receiving advice from other professions for example accountants giving tax advice. The advice has to be received from a lawyer which includes all members of the English legal profession including solicitors, barristers, and in-house lawyers with a current practising certificate, as well as foreign-qualified lawyers.
- The communication has to be confidential meaning the group of people privy to the communication should be kept very small.
- Communications relating to purely commercial, non-legal advice will not attract privilege.

### Litigation Privilege

- Litigation privilege protects confidential communications between a lawyer and their client and a third party, or between a client and a third party that is created for the dominant purpose of being used in connection with actual, pending or contemplated litigation.
- What does litigation mean in the context of privilege? Litigation must be in process or reasonably in prospect, litigation must be more than a mere possibility and any contemplated proceedings must be adversarial. General investigations on the basis that someone might claim in the future will be insufficient.
- What is meant by the dominant purpose? Documents that fail the dominant purpose test will not attract privilege. If the dominant purpose was to obtain information relating to a matter in which litigation was reasonably contemplated it will likely meet the dominant purpose test.

### Practical Tips – things to remember

- Consider privilege from the outset of any incident and/or a claim. Remember that should a claim become litigated in the future, parties will be required to disclose documents that both support and adversely impact its case.
- Internal discussions, emails and notes following an incident should be kept to a minimum. Where the creation of a document containing sensitive information is unavoidable, endeavour to ensure that the contents are kept to a minimum level of factual detail only.
- Simply because a document is marked as 'Confidential and Privileged' does not necessarily mean that it will fall within the scope of either legal advice or litigation privilege.

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- There is a risk that privilege will not attach if the communication has more than one purpose.
- Privilege can inadvertently be waived and/or lost if the contents of a privileged document, or even its existence, is mentioned in a non-privileged document.
- Give thought to the timing of any expert input and whether litigation privilege would apply to any reports that are created as initial expert views might be disclosable in the future.
- Loss adjusters reports do not fall within the scope of legal advice privilege as it is not a communication from a lawyer. Such reports would only be protected by litigation privilege if they were created for the dominant purpose of litigation which is pending, reasonably contemplated or already in existence. It is the contemplation of the insurer in requesting the loss adjustor report that is decisive and not the intention of the loss adjuster in writing the report that is important.

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If you have any questions, please contact us:



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