

# Guidelines on Accessing Legal Advice and Maintaining Legal Professional Privilege for Advisory Councils

January 2010

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## Abbreviations and definitions:

- **Advisory Council** means an Advisory Council established under the *Health Care Act 2008*, including but not limited to the health advisory councils and the Health Performance Council.
- **agency** means any division, site, unit, branch, office, hospital etc of SA Health (which includes SAAS and incorporated hospitals)
- **Chief Executive** means the Chief Executive of the Department of Health
- **CSO:** Crown Solicitor's Office
- **DFC:** Department of Families and Communities
- **DH:** Department of Health
- **"document"** includes anything in which information is stored or from which information may be reproduced, and therefore includes any information stored in electronic records systems such as OACIS
- **HC Act:** *Health Care Act 2008*
- **incorporated hospitals** means Central Northern Adelaide Health Service Incorporated (CNAHS), Southern Adelaide Health Service Incorporated (SAHS), Children Youth and Women's Health Service Incorporated (CYWHS) and Country Health SA Hospital Incorporated (CHSA).
- **lawyer** includes solicitors, Crown Solicitors and Legal Officers
- **LGU:** Legal and Governance Unit of the Department of Health
- **OCE:** Office of the Chief Executive, Department of Health
- **PSM Act** *Public Sector Management Act 1995* and any subsequent legislation (including the Public Sector Act 2009 which commences on 1 February 2010)

- Regions SAHS, Department of Health, CYWHS, CHSA and SAAS and CNAHS
- SAAS: SA Ambulance Service Inc.
- SA Health: includes the Department of Health and all agencies (including Regions)

## 1. INTRODUCTION

These Guidelines aim to assist Advisory Council members in understanding how to seek legal advice, the function of legal professional privilege and when it may apply to documents. **The recommendations contained in these Guidelines are not exhaustive.**

Freedom of Information is not included. The State Records' "Processing FOI Applications Guideline" ([http://www.archives.sa.gov.au/files/foi\\_guidelines\\_process.pdf](http://www.archives.sa.gov.au/files/foi_guidelines_process.pdf)) should be consulted for detailed procedures for dealing with these applications along with the Principal Policy Officer – FOI, Department of Health.

These Guidelines should be read along with the following:

- Department of the Premier and Cabinet Information Privacy Principles Instruction <http://www.premcab.sa.gov.au/pdf/circulars/Privacy.pdf>
- Code of Fair Information Practice and Information Sheets (in particular, Information Sheet 9 in relation to the use and disclosure of personal information)  
[http://10.22.161.35:8080/policies/documents/Code\\_of\\_fair\\_info\\_practice.pdf](http://10.22.161.35:8080/policies/documents/Code_of_fair_info_practice.pdf)
- Procedures for Accessing Legal Services Across SA Health 2008  
[http://10.22.161.35:8080/policies/documents/Procedure\\_Access\\_Legal\\_Services.pdf](http://10.22.161.35:8080/policies/documents/Procedure_Access_Legal_Services.pdf)
- Protocols for Police requests for Information and Witness Statements in the Public Health System in South Australia  
[http://10.22.161.35:8080/policies/documents/\[insert address once uploaded\]](http://10.22.161.35:8080/policies/documents/[insert address once uploaded])

### **Requirement to maintain confidentiality before 1 February 2010**

Advisory Council's are instrumentalities of the Crown in accordance with section 16(3) of the HC Act and are, therefore, classified as Public Sector Agencies under the PSM Act. Accordingly, Advisory Council members should have regard, Department of the Premier and Cabinet Circular 12 and the PSM Act when carrying out their functions.

Under DPC Circular 12 agencies have an obligation not to disclose any personal information to third parties (unless an exemption applies) and such information must be securely stored and not misused.

Disclosure (of information gained during the course of your membership) which is unauthorised could also lead to civil action for breach of confidentiality. In case of doubt, it is advisable to obtain assistance from the LGU.

Section 6K of the PSM Act applies to unincorporated Advisory Councils. It places a duty on members to act honestly in the performance of the functions. Under section 6L an Advisory Council member must declare a direct or indirect personal or pecuniary interest in a matter decided or under consideration of the body. They must disclose the details of the interest in writing to the Minister for Health and must not take part, vote on the matter or be in the room when the matter is discussed.

Sections 6D, 6E, 6F, 6G and 6H of the PSM Act applies to incorporated Advisory Councils members. These sections detail obligations on members to exercise care and diligence in the performance of their functions, act honestly, not get involved in unauthorised transactions, not have any unauthorised interests and to disclose any direct or indirect personal or pecuniary interests. Contraventions of the provisions by members can result in an offence under section 6J of the PSM Act.

*Please note that new legislation will be introduced in 1 February 2010 and the requirements above may change.*

## **2. ACCESSING LEGAL ADVICE**

In accordance with Treasurer's Instruction 10, Advisory Council's must not engage lawyers outside of the CSO. If circumstances arise where it is necessary to engage lawyers outside of the CSO, from a private firm or a sole practitioner, a briefing should be prepared and sent to the LGU explaining the situation. The Director, LGU will then assess the request and if it is appropriate that non-CSO lawyers be engaged, the Director, LGU will write to the Crown Solicitor to seek and an exemption.

At first instance any request for legal advice should be directed to either the Director of the relevant country health service, General Manager of SAAS for the SAAS Volunteer's Health Advisory Council, the General Manger, Repatriation General Hospital for the Veterans' Health Advisory Council, Director of the Health Performance Council Secretariat, Executive Officer of the South Australian Institute for Medical Education and Training and the Executive Officer of the Ethics Health Advisory Council. For all other Advisory Councils requests for legal advice should be forwarded to the appropriate Director of the SA Health agency. The Director or General Manager will then refer the request to the LGU, DH for review and CSO advice will be obtained, if necessary.

It is not appropriate for any Advisory Council to go directly to the CSO with a request for legal advice.

### **Legal assistance**

**If legal assistance is required for the production of documentation that may be privileged, the LGU should be contacted by Directors/General Managers at first instance in accordance with the "Procedures for Accessing Legal Services Across SA Health 2008". The LGU will provide assistance and may refer the matter to the Crown Solicitor's Office if there are complicated legal issues or legal representation is required.**

### **3. LEGAL PROFESSIONAL PRIVILEGE**

#### **WHAT IS LEGAL PROFESSIONAL PRIVILEGE?**

Legal Professional Privilege is a privilege recognised by the courts that protects the confidentiality of communications between lawyers and their clients for the purpose of court proceedings (actual or anticipated). Legal Professional Privilege is held by the client not by the lawyer, so only the client can choose to waive the privilege. It may not necessarily be obvious if communications are privileged. These guidelines primarily deal with what steps can be taken to increase the possibility that communications between lawyers and clients will be protected under privilege, including the need for the lawyer to be independent when providing the advice. For the purposes of advice originating from the CSO or the LGU, the client will be the Advisory Council, the Minister or the relevant Government Agency.

#### **OPERATION OF LEGAL PROFESSIONAL PRIVILEGE**

Legal Professional Privilege generally attaches to communications between a lawyer (including Legal Officers and Crown Solicitors) if the dominant purpose of the communication is to obtain legal advice for proceedings. However, legal professional privilege may also attach to advice that is not strictly legal advice (for example policy, practical or general information), provided the lawyer could reasonably anticipate that legal advice on the issue may be required in the future.

Documents that may attract legal professional privilege include requests for legal advice, formal documents (for example, minutes and letters) and emails written by Crown Solicitors and Legal Officers in the LGU. Legal Professional Privilege can also extend to comments on documents or verbal advice. Often documents prepared by a lawyer may contain a footer advising that the document might contain privileged information.

The set up of the LGU ensures that advice from its Legal Officers and Crown Solicitors are independent by its reporting arrangements, and does not alter its legal views to meet policy or administrative objectives. To ensure that the legal independence of the LGU is maintained it is important that Advisory Council members understand and take a consistent approach to maintaining privilege. Legal advice obtained from other firms outside of CSO or the LGU will also attract legal professional privilege (Treasurer's Instruction 10 must be followed if seeking advice from firms outside of SA Health).

#### **WHEN MIGHT A SITUATION ARISE WHERE LEGAL PROFESSIONAL PRIVILEGE MUST BE ASSERTED**

The need to assert that a document(s) is privileged can occur in many situations, including, but not limited to:

- legal proceedings
- freedom of information requests
- communications with people/entities outside of your Advisory Council or Government agency
- tenders.

If you are requested to produce a document and you know it is privileged you should not produce it and you should inform the requestor the document is

legally professionally privileged. If you are unsure as to whether privilege applies you should not produce the document without seeking advice from the LGU.

#### **HOW CAN LEGAL PROFESSIONAL PRIVILEGE BE WAIVED?**

Legal Professional Privilege can be waived deliberately or unintentionally by the client. It is important to be aware of what constitutes a waiver of privilege to avoid accidentally relinquishing it. Legal Professional Privilege will be deemed to be waived if the client does something which is inconsistent with keeping the information confidential (for example, telling a member of the public about what legal advice you have received). Telling a person/entity about the gist, content, substance, legal conclusion or a short summary of the legal advice you have received can amount to a waiver of privilege (for example, a Health Advisory Council issuing a press release to say that based on legal advice it has decided not to implement the recommendations of a report). **Once legal professional privilege over a document is lost it can never be recovered, it can also potentially waive privilege over other related documents.**

## **4. GUIDE TO MAINTAINING LEGAL PROFESSIONAL PRIVILEGE**

### **PRACTICAL STEPS TO MAINTAINING LEGAL PROFESSIONAL PRIVILEGE**

Whether all of the recommendations outlined below should be followed in a particular case will depend on the nature of the matter. If the matter is sensitive, involves questions of liability or is reasonably likely to result in legal proceedings and/or an application under the FOI Act, then it is strongly recommended that a strict approach be adopted.

#### 4.1 Advice received from the Crown Solicitor

4.1.1 CSO advice should not be forwarded anywhere else within the South Australian Government or outside of a Health Advisory Council without first contacting the solicitor who prepared the advice. If permission is granted, the solicitor will usually notify by sending a covering memo/fax sheet or email, the advice should be forwarded with a statement to inform the recipient that the advice is confidential and should not be further disclosed so as to avoid the risk of unintentional waiver of legal professional privilege.

4.1.2 CSO advice should not be forwarded or disclosed outside the Health Advisory Council (except if it is to a Chief Executive Officer of a Region, Chief Executive, DH or the Minister for Health) as legal professional privilege will probably be lost over the advice, creating risk to your position and the Government's position. Non-Government bodies are expected to obtain their own legal advice. If there is a particular need to do so, it should be discussed first with the Crown Solicitor. It is likely that a senior executive will also need to discuss the matter with the Crown Solicitor, or the Minister may need to discuss with the Attorney-General, depending on the circumstances.

4.1.3 It is strongly advised that legal advice not be copied and pasted into or paraphrased in other documents for sending outside of the Advisory Council, as legal professional privilege may be lost over the entire advice.

4.1.4 It is further recommended that, when inserting or paraphrasing legal advice for internal purposes, such as a letter to the Chief Executive Officer a footer be used that states: *“This document contains a discussion of legal advice which is subject to legal professional privilege. It is recommended that the Director, LGU be consulted before disclosing the discussion of legal advice outside SA Health.”*

4.1.5 Great care should be taken before forwarding emails that contain legal advice. If it is necessary to do so, it is advised that the words above in 4.1.4 be typed in a different colour at the top of the forwarding email. Best practice is to attach the email containing legal advice, rather than incorporating it as part of an email chain.

#### 4.2. Advice received from LGU legal officers

4.2.1 Legal professional privilege can apply to legal advice provided by in-house public sector lawyers such as the LGU legal officers, as long as they are required to act in accordance with professional standards. Legal professional privilege may also attach to advice which also contains policy advice, however, it would most likely not apply to advice which does not require legal expertise.

4.2.2 The same cautions and footers should apply to paraphrasing and quoting from LGU advice as set out above for CSO advice.

#### 4.4 Disclosing legal advice within a Advisory Council or Health Region

Legal advice that has been received by an Advisory Council member should be treated in accordance with parts 4.1 and 4.2 of this guideline. The advice, regardless of the form in which it is provided (ie oral, email or written) should only be shared with other Advisory Council members on a need-to-know basis. Care should be taken to ensure that only the Advisory Council and SA Health staff members directly involved in the issue addressed by the legal advice and who need to know the content of the advice for work purposes, are aware of it. The advice should not be circulated or forwarded to members in other Advisory Councils or Regions without the approval of the relevant Legal Officer/Crown Solicitor. Any document (including emails and Internal Memorandums) that contains a copy of the legal advice or conclusions of the legal advice, should contain the footer wording in 4.1.4 to alert the recipient the advice may be subject to legal professional privilege and should not be forwarded on to without the author's consent. Under no circumstances should the advice be provided in any form to any person who is not either an Advisory Council member or employee of a Region, or to any non-Government entity. To do so could compromise legal professional privilege over the advice.

#### 4.5 Disclosing legal advice to the Chief Executive of the Department of Health or Chief Executive Officer of Regions

Legal advice can be disclosed to Chief Executive Officers and the Chief Executive without fear of waiving legal professional privilege. The Chief

Executive Officers report directly to the Chief Executive on the management of Regions. The Chief Executive is responsible for the State's public health system and reports directly to the Minister for Health and Minister for Mental Health and Substance Abuse.

When providing a copy or a summary of the legal advice to either the Chief Executive or a Chief Executive Officer, a warning the document may be subject to legal professional privilege should be included. Care should be taken that in the preparation and processing of the Internal Memorandum that only the necessary people are involved in order to minimise the risk of inadvertently waiving privilege over it.

#### 4.6 Disclosing legal advice to the Minister for Health, Minister for Mental Health and Substance Abuse, Cabinet or Parliament

Legal advice can generally be disclosed to the Ministers without fear of waiving legal professional privilege. That is because the Ministers are responsible for the administration of the health legislation, and are responsible to Parliament for the performance of the health portfolio. Any correspondence to a Minister should also include the warning the document may be subject to legal professional privilege.

It is strongly recommended that the substance or conclusions of legal advice not be disclosed to Parliament or the public. This extends to documents that are prepared for the Minister but that he will read or release in Parliament, for example, Annual Reports. To disclose the substance or reasoning will most likely waive legal professional privilege over the entire advice and to disclose conclusions would risk doing so. It is suggested that advice be sought from the LGU in the first instance whenever this is contemplated.

## **5. WHAT ACTION TO TAKE IF YOU BELIEVE LEGAL PROFESSIONAL PRIVILEGE HAS BEEN WAIVED**

### **WHAT TO DO IF YOU THINK LEGAL PROFESSIONAL PRIVILEGE HAS BEEN WAIVED**

If you have reason to believe that legal professional privilege has been waived either inadvertently or intentionally you should contact the relevant Director or General Manager of your Region who should inform the Director, LGU immediately to advise of the waiver by completing a Request for Legal Advice. This form can be found on the SA Health intranet under Directives, Guidelines and Information Bulletins – "Procedure for Accessing Legal Services". If the advice was provided by a Crown Solicitor the relevant Director or General Manager should also immediately contact the relevant Crown Solicitor to inform them of the potential waiver.