



LAWASIA RESOLUTION ON LEGAL PROFESSIONAL PRIVILEGE / LEGAL PROFESSIONAL SECRECY

RESOLVED BY THE LAWASIA COUNCIL AT ITS MEETING ON 12 AUGUST 2016 IN COLOMBO, SRI
LANKA

THE LAWASIA COUNCIL:

Ever seeking to advance, promote and protect the rule of law and the administration of justice;

Recognising that the law associations which make up LAWASIA are from many varied jurisdictions, in which the precise formulation of the principles underpinning the rule of law and the administration of justice will differ, particularly between common law jurisdictions and civil law jurisdictions;

Affirming that the principles of legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions are distinct principles applicable in different jurisdictions but have many elements in common including, fundamentally, a near absolute protection from disclosure of information passing between a client and their lawyer, deemed necessary to protect the administration of justice and the rule of law

Emphasising that the principle of legal professional privilege as understood in common law jurisdictions and

legal professional secrecy as understood in civil law jurisdictions confers to clients a right and expectation to have their affairs, communication, information and documents provided to their lawyers in the course of seeking legal advice and/or representation kept and maintained in strict confidence, and imposes a corresponding stringent duty on lawyers to keep and maintain in strict confidence the affairs, communications, information and documents of their clients;

Noting that the rationale and policy underpinning the principle of legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions are that:

- (a) it is of fundamental importance for the proper administration of justice that clients should have absolute confidence in respect of all communications with their lawyers for the provision of legal advice and/or representation;
- (b) it is an essential element of the lawyer-client relationship in reinforcing the lawyer's commitment to the client's cause;
- (c) it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by their legal advisors – the law being a complex and complicated discipline; and
- (d) 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;

Recognising that there are strict and limited exceptions to legal professional privilege as understood in common

law jurisdictions and legal professional secrecy as understood in civil law jurisdictions, which generally arise in the following circumstances:

- (a) where the client expressly waives the privilege or otherwise the confidential information becomes public;
- (b) where the communication, information or documents facilitate or are made in furtherance of a criminal, fraudulent or unlawful purpose; or
- (c) where the communication is of an intention to commit a crime involving imminent danger of death or substantial bodily harm;

Noting that there is and has been legislation which interferes with, displaces or infringes upon legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions, particularly in legislation dealing with anti-money laundering, anti-terrorism financing, prevention of financing or profiteering from activities of serious crime, and inland revenue;

Cognisant that legislation enacted for the purposes or objectives of combating money laundering, terrorist financing, or other legislation providing for the prevention of financing or profiteering from activities of serious crime, or for inland revenue, has been premised on the public policies of national security, and public safety and order;

Nevertheless, reaffirming the primacy of legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions as being fundamental to the integrity of the

administration of justice;

Noting further that legislation which interferes with, displaces and infringes upon the principle of legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions, or is beyond the ambit of the strict and limited exceptions recited above in jurisdictions which admit of such exceptions, is repugnant to and undermines the administration of justice, or is in any event not necessary and/or is disproportionate for the purposes or objectives of such legislation;

Recalling that the presidents of law associations in Asia had, at the 25th POLA Summit in Wellington in June 2014, expressed concern with the various inroads and infringements into legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions presented by legislation combating money laundering, terrorist financing, other legislation providing for the prevention and detection of serious crime, and inland revenue;

HEREBY RESOLVES AND RE-AFFIRMS THAT:

1. the LAWASIA Council calls upon national governments to commit and give efficacy to, respect, promote, reinforce and preserve, the principle of legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions;
2. legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions is a fundamental tenet of the lawyer-client relationship;
3. legal professional privilege as understood in common law jurisdictions and legal professional secrecy as

understood in civil law jurisdictions, which underpins a lawyer's duty to the client, is of paramount and fundamental importance and is essential to the integrity of the administration of justice;

4. legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions is a facilitative component of the principle of the independence of the Bar, which *inter-alia* provides that lawyers shall be entitled to represent their clients and serve their clients' legitimate interest without fear or favour, and without state interference;

5. any state intrusion into legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions, save for the strict and limited exceptions enunciated above, undermines:-
 - (a) the fundamental tenet of the lawyer-client relationship, namely that of strict confidence, and subverts the ability of a lawyer to advise and represent the client to the best of the lawyer's ability;

 - (b) the independence of the Bar in that it intrudes into the duty and commitment of lawyers to advise and represent their clients, where lawyers are made 'reporting or state agents' required to breach their duty and divulge confidential client information to state authorities;

 - (c) a foundation, and the integrity, of the administration of justice;

6. as a principle of fundamental justice, the state ought not to impose by legislation obligations on lawyers that undermine or subvert their duty of confidence to their clients and their independence in representing their clients' legitimate interests;

7. while recognising state policies, practices, regulations and laws pertaining to national security, and public safety and order, as being important in the public interest, nevertheless the public interest policies of national security, and of public safety and order must not supplant or ride rough shod over the equally compelling public interest policy of ensuring and protecting the integrity of a just and effective administration of justice according to law;

8. legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions is at the heart of the public interest in promoting and preserving the integrity of the administration of justice;

9. legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions must remain inviolate and absolute, save for the exceptions recited above in jurisdictions which admit such exceptions and any legislative interference with legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions, whether for the purposes or objectives of criminal matters, such as combating money laundering, terrorist financing, or other legislation providing for the prevention of financing or profiteering from activities of serious crime or for inland revenue, must be consistent with and confined to these recognised exceptions in jurisdictions which admit such exceptions and the provisions providing for such legislative interference shall be no more than is absolutely necessary and proportionate to the purposes or objectives stated. In jurisdictions where legal professional privilege as understood in common law jurisdictions and legal professional secrecy as understood in civil law jurisdictions is absolute and cannot be waived, it must remain inviolate and absolute in order to maintain purity of the system of administration of justice.