

## Book Review

### LEGAL PROFESSIONAL PRIVILEGE<sup>1</sup>

By Colin Liew

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1 If there was ever a local monograph on evidence law that simply had to be written, it would have been on the subject of legal professional privilege. With the release of Colin Liew's *Legal Professional Privilege*, we now finally have a local text that focuses on an aspect of evidence law that has assumed ever-increasing importance in practice, and in all likelihood would be influential in future judicial developments or law reform efforts in this field.

2 Indeed, in much of the common law world, privilege is often asserted and contested rigorously, and this has produced a rich vein of jurisprudence as well as a wide spectrum of subsidiary doctrines that continue to attract fierce debate. As Liew observes, this has not been the case in Singapore; even though in my view privilege is probably the only rule of evidence that Singapore lawyers would feel a strong need to be properly acquainted with. It is therefore helpful that *Legal Professional Privilege* does not just concern itself with Singapore law, but also draws appropriate comparisons with what has been happening in the UK, Australia, Canada, Hong Kong, and even internationally. Admirably, Liew is quick to point out that by virtue of s 2(2) of the Evidence Act<sup>2</sup> ("EA"), not all such developments can be imported uninhibitedly,<sup>3</sup> as one absolutely cannot readily assume that they are consistent with the statute.<sup>4</sup> This is despite the fact that the EA is almost 150 years old, and the scope of protection given by privilege back then has now broadened considerably in the light of how modern legal practice works.

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1 Academy Publishing, 2020.

2 Cap 97, 1997 Rev Ed.

3 While numerous cases also pointed this out following *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, s 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) has not been applied with as much rigour for the larger part.

4 One who has never read s 128 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), for instance, would no doubt be struck by how broadly phrased it is as compared to how the common law rules have evolved. To be clear, the EA does not apply to all kinds of proceedings (see s 2(1)), which Liew addresses in the book as well.

3 The book begins with a necessary overview of what privilege entails given that, as mentioned, it is quite a multifaceted concept that has evolved over time and also needs to be properly situated *vis-à-vis* other related domains such as admissibility and confidence.<sup>5</sup> The introductory chapter thus identifies just under ten different types of privilege and objections to disclosure, including types that have not been discussed much in our local jurisprudence and require elaboration, such as joint and common interest privilege. But as the name of the book suggests, the focus is on legal professional privilege, which is traditionally understood as comprising legal advice privilege and litigation privilege. Much of the remaining chapters is devoted to examining these two fundamental privileges – both in civil and criminal proceedings,<sup>6</sup> albeit understandably with greater emphasis on civil proceedings – in greater detail.

4 Readers familiar with how legal professional privilege operates in Singapore would know what some of the areas that require further clarification are. Some examples would be the classification of the rule as a right *versus* a mere evidential rule; whether the rule ought to be absolute; the degree of the extension of the right to third parties; and the applicability of the rule to *ad hoc* legal advisors, to name but a few. Liew attempts to answer many of these questions over the various chapters, and much thought has been put into the precise structure of each chapter and how each chapter feeds into another. As regards the former, the discourse often begins with the conceptual before moving into a series of practical considerations that lawyers should bear in mind, peppered with many cases and rules along the way.<sup>7</sup> Where relevant, reference is made to the pretrial process as well, bearing in mind that discovery is a critical juncture in which privilege may be contested.

5 Equally important as the question of when privilege arises is when privilege may be lost – or may not even attach to begin with. The EA gives limited guidance on this issue, and much has fallen on the common law to fill in the gaps. However, the problem is that even the common law (at least in terms of local case law) has been slow to respond. A good portion of the book addresses the issues of exceptions, losses, and waivers

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5 Certainly, in the context of the Evidence Act (Cap 97, 1997 Rev Ed), admissibility is purely a matter of relevance – and, with the exception of perhaps ss 32 and 47, nothing else.

6 The Evidence Act (Cap 97, 1997 Rev Ed) (“EA”) generally does not distinguish between civil and criminal proceedings, and yet the only privilege that tends to be asserted in the latter is a markedly different type of privilege: the privilege against self-incrimination, which is not captured by the EA.

7 To illustrate, in the context of legal advice privilege, there are many definitional hurdles when establishing who the advisor is, who the client is, whether third parties are included, what is a communication, how long the privilege lasts, and so on.

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of privilege, and this is fittingly done in the final two chapters. The topic of non-express waivers would have in itself warranted a full-length article and its treatment in the book is unsurprisingly substantial.

6 All things considered, there is no conceivable reason not to get a copy of this book. Typically, a book that tries to be relevant to students, teachers, practitioners, and judges at the same time tries to do too much and ends up pleasing nobody in particular, as it can be challenging to integrate the descriptive and prescriptive into a structurally sound whole. This book, I think, would probably be useful for anyone who wants to properly understand the fundamentals of the law on legal professional privilege in Singapore. My guess is that many here would either tend to severely overestimate when privilege might be asserted, or severely underestimate when privilege might not be. Liew's *Legal Professional Privilege* gives one little excuse to remain that way.

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