

LAW OF PRIVILEGE by Suzanne B McNicol, Sydney, Law Book Co Ltd, 1992, lxi + 485, Index 479-501pp, ISBN 0 455 21149 3 (cloth \$120).

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Over the last one hundred years, reforms to the laws of evidence and procedure have been concerned largely with abolishing those legal impediments which prevented the courts from hearing relevant evidence. The old rules of incompetence have been largely set aside. Now, most witnesses are both competent and compellable to give evidence in proceedings which come before our courts. Similarly, the corroboration rules have been relaxed. It still surprises me that until quite recently, it was necessary for complainants in sexual cases to have their evidence corroborated. This rule, which especially impacted on women and children, is now no longer with us for most purposes. In the field of procedure, reforms have gone a long way to ensuring that in civil matters, litigants have pre-trial access to most of the relevant information. This has meant that "trial by ambush" is largely a thing of the past. Even the rule forbidding the adduction of oral hearsay evidence is under attack. (See the statements by the High Court judges in *Pollitt v R* (1992) 174 CLR 558.) These legal reforms in evidence and procedure have gone hand in hand with measures which have given citizens increased access to information. (See, for example, *Freedom of Information Act* 1982 (Cth) and its State counterparts.)

While more and more evidence is coming before our courts, there is still a large island of privileged information which is immune from disclosure in legal proceedings. The nature, role and purposes of the various privileges is the subject matter of this scholarly volume by Associate Professor Suzanne McNicol. It is the first book of its kind in which all the privileges are subject to detailed scrutiny.

Chapters 2 and 3 which analyze legal professional privilege and the privilege against self-incrimination respectively, form the centrepiece of this work. Each of these chapters opens with a statement of the privilege or rule. After examining the history and rationales which have been put forward to justify each privilege, a detailed account is given of its scope and operation. During the 1980s and 1990s, a tussle has taken place between the parliaments and the courts over the scope of these privileges. In order to widen the reach of various investigative bodies and agencies, the parliaments have endeavoured to abrogate one or both of these privileges. In response, the courts have countered that as these privileges amount to fundamental rights of citizens, Parliament may only abrogate them through the use of express words or by necessary intendment. (See, for example, *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.) These battles are chronicled in a thorough and accurate manner.

Chapters 4, 5 and 6 chart the common law and the statutory provisions relating to the privileges of married persons, clergy and communicant, and of course doctors and their patients. The remaining two chapters explore the rules relating to public interest immunity and without prejudice privilege. Already, this important volume has been cited in the law reports. (See, for example, *Rogers v Moore* (1993) 41 FCR 301, 328 per Sheppard J; and *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 118 ALR 392, 436 per McHugh J.)

Australian legal scholarship has blossomed over the last two decades. On the one hand, there are monographs which take discrete areas of law and catalogue the relevant case law and statutes. On the other hand, there are volumes in which laws are examined and argued over with vigour, having regard to their historical, sociological, theoretical and economic contexts. As this is the first such book on privilege, however, much of the energy of the author has been taken up with finding and cataloguing this hitherto uncharted area of law. It has been no mean feat to gather together not merely all the relevant cases, but also to cover the applicable statutes, regulations and rules in the various Australian jurisdictions. The tables of cases, statutes, regulations and rules, together with the index and bibliography, facilitate the use of this work, either to find the case law on a statutory provision, or to obtain a concise statement of the scope of any of these privileges. Yet, McNicol is alive to the theoretical dimensions of these laws. Although her criticisms are measured (and perhaps a little cautious), the reader cannot help but be fully aware of her deep conviction that these privileges play a valuable role in the legal process. Without legal professional privilege, for example, clients would be inhibited from frankly disclosing their affairs to their lawyers, and the administration of justice would be curtailed.

The first chapter in this book is a detailed account of the nature of privilege. One area which I found rather interesting, is the case law on when and under what circumstances the various privileges will be lost. Usually, a holder of privilege will lose that status by waiver of the privilege; and the manner in which privilege can be waived has taxed the minds of a number of judges.

My one criticism of this work relates to this first chapter. In it, McNicol discusses the claims by journalists, social workers and merchant bankers that the information obtained from their sources or clients should be privileged. In my view, it would have been preferable to discuss these matters in a concluding chapter, after the scope and operation of the law of privilege had been analyzed. The concerns of these and other professions are real, and in my view their claims to some form of limited immunity are worthy of greater scrutiny.

In summation, this book, which is the first treatise on the law of privilege, is a truly fine piece of legal scholarship. This volume is encyclopedic in its detail and coverage; yet, the author strongly focuses upon the rationales of these various privileges. It is a work which the busy practitioner will use to speedily look up a point of law. Owing to its clarity, it will be also extensively used by students and by laypersons whenever they wish to comprehend any facet of these privileges. In my judgment, this book will come to be regarded as a classic of its type; and will sit alongside *Cross on Evidence* as one of those indispensable volumes on the law of evidence. It is also my hope that others will use this work as their jumping off point. It is my wish that scholars will build upon this edifice by engaging in empirical research upon the operation of these privileges in Australian investigations, inquiries and in litigation.

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