Practical Legal Ethics in Personal Injury Litigation

Should I Disclose that Document?

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Introduction.

1 In 2011 the ALRC observed that "*in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most-costly and the most in need of court supervision and control*".[2]

2 Since then, attempts have been made to control abuse and rein in the costs of the process.[3]

3 This paper examines some practical aspects of disclosure in *personal injury* litigation in Queensland.

4 This is only one small part of the total picture of disclosure.

5 This paper nonetheless seeks to ameliorate (hopefully) the confusion that many practitioners experience about the scope of their disclosure obligations (both legal and ethical).

Core Ethical Obligations.

6 The ethical obligations to the law and the administration of justice are the prime directives of legal practice.

7 These obligations are of particular relevance during document disclosure.

8 The most relevant rules, for current purposes at least, are set out in Table 1.

9 There are many reasons why proper disclosure may not always be given.

10 It is rarely because of a conscious or deliberate attempt to obscure damaging information.

11 The scope of a disclosure obligation is not always clear cut.

12 Indeed, I suspect no practitioner will always have made the right call in every case.

13 This is particularly so for younger practitioners less experienced in the law, and for senior practitioners working outside their usual scope of practice.

14 Even when a correct answer may be uncertain, circumstances still require that a decision be made between:

a) disclosing a document that may not be discoverable; on the one hand, and

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2 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000), [6.67].

3 Law Council of Australia/Federal Court of Australia, *Case Management Handbook*, 2011, Chapters 5, 7; Qld Supreme Court, *Practice Direction 18 of 2018, Efficient Conduct of Civil Litigation*.

b) not disclosing a document that may be discoverable on the other.

15 When error occurs, it is often through oversight, ignorance, or innocent mistake as to the requirements of the law.

16 I hope this article clarifies more than it confuses.

Table 1. Paramount Duty of Lawyers.

Australian Solicitors Conduct Rules:
3.1. A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty. … *4.1. A solicitor must also: …* *4.1.2 be honest and courteous in all dealings in the course of legal practice; …* *4.1.4 avoid any compromise to their integrity and professional independence;* *…* *19.1. A solicitor must not deceive or knowingly or recklessly mislead the court.*
Australian Barrister's Conduct Rules:
25. A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice. *26. A barrister must not deceive or knowingly or recklessly mislead the Court.* … *48. A barrister must not knowingly make a false statement to an opponent in relation to the case (including its compromise).*

Ethical Obligations are Personal.

17 Every lawyer is expected to apply *independent judgement* about the work that they do.

18 This is particularly so with regard to ensuring clients meet their disclosure obligations.

19 If you feel uneasy about something, then do not ignore it.

20 Never allow yourself (even as a very junior lawyer) to act in a manner that you know, or even reasonably believe, to be unethical.

21 Always remember that *you* not only owe duties to the *client*, but also owe paramount duties to the *Court* and the *administration of justice*.

22 These are *personal* duties.

23 The *Nuremberg* Defence[4] is not a defence at all.

[4] The "Nuremberg Defence", also called the "Superior Orders" defence, was resorted to by some appearing at the Nuremberg war crimes hearings. It was based on the notion that because military discipline required soldiers to follow orders, that this exculpated them from the consequences of so doing.

24 Question counsel's advice (if a solicitor) or senior counsel's advice (if a junior) if you believe it may be wrong or confusing.[5]

25 Do not blithely follow advice if you suspect it to be incorrect.[6]

26 The same applies with respect to the advice of law partners or your supervisors in law firms.

27 Never permit the demands of a client (no matter how important to you or your firm) to subvert your professional obligations to the law and the administration of justice.

28 And avoid the tendency, in the face of uncertainty, to believe in the position that best suits your client.

29 In other words, do your research.

The Duty to Give Full Discovery.

30 As lawyers we do not get to pick and choose what we should discover.

31 It is the law that says what is discoverable.

32 Some documents are embarrassing, damaging, and even fatal to a client's case.

33 But if those documents are discoverable, they *must be produced*.

34 Disclosure is not some annoying formality that must be "ticked off" in the course of acting for a claimant, respondent, defendant, plaintiff, or contributor.

35 In fact it is one of the most important and fundamental tasks faced by lawyers.

36 That is because it concerns your conduct as an *officer of the Court engaged in the administration of justice*.

37 As noted above, that obligation is paramount.

38 Any conduct antithetical to giving full disclosure is a serious matter

Examples of Conduct Antithetical to Full Discovery.

39 Antithetical conduct *includes*:

a) failing to instruct a client about the obligation to give full disclosure.

b) encouraging, aiding, or causing the destruction of discoverable documents.

c) failing to reasonably search for (or instruct the client to search for) all discoverable documents.

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5 *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736, Rose LJ 747, Ward LJ at 751. Cited with approval by Beazley JA in *Keddie & Ors v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254 [131-132].

6 *White Industries (Qld) Pty Ltd v Flower & Hart* (a firm) [1998] FCA 806; 156 ALR 169, per Goldberg J at 249.

d) knowingly or carelessly not revealing discoverable documents.

e) aiding a client to adopt document creation and/or document destruction policies that are designed to frustrate due disclosure.

Consequences of Incomplete Disclosure.

40 The consequences of failing to give proper disclosure can be severe.

41 These involve:

a) inability to use documents not disclosed as part of your client's case.

b) striking out your client's pleadings (in whole or in part).

c) costs orders against the lawyer and/or the client.

d) judgement against the party that knowingly obstructs disclosure.

e) referral of a practitioner to the Legal Services Commission.

f) punishment for contempt of Court.

42 If you discover you have given incomplete disclosure, then correct the oversight immediately.

43 It may be embarrassing (and even costly), to own up to a failure to discover a relevant document, but it will be much worse to knowingly ignore the prior breach.

Scope of Disclosure in Court Proceedings.

Prior Common Law:

44 Absent a valid claim for privilege, a party was required to give general discovery of all documents that would lead to a train of inquiry with respect to a matter in issue in the proceedings, either by advancing or damaging a party's case.[7]

45 The scope of discovery so defined was amenable to abuse by well-resourced parties by conduct that included:[8]

a) fishing and/or seeking oppressive and aggravating discovery in the hope of running up costs, delaying proceedings, and ultimately forcing a favourable settlement.

b) destruction of discoverable documents.

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7 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 and locally, *Mulley v Manifold*(1959) 103 CLR 341. See *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863, per Logan J at [4].

8 *ALRC report Managing Justice: A Review of the Federal Civil Justice System, 2000,* at [6.68].

c) concealing damaging documents within a massive production of dubiously relevant material such that they became a *needle in a haystack*; or

d) manufacturing issues that imposed onerous and expensive disclosure obligations on their opponents.

Current Scope of Disclosure:

46 In 2000 the ALRC report *Managing Justice: A Review of the Civil Justice System*, recommended changes to the scope and means of disclosure in the Federal Court.

47 These and other recommendations have resulted in changes to the scope and practice of disclosure in Australian courts.

48 For example, (and subject to a valid claim for privilege):

a) in the Federal Court disclosure (there still called "discovery") now requires a Court order;[9]

b) Federal Court standard discovery in FCR 20.14(1) is limited to documents:

a) that are "…*directly relevant* to the issues raised by the *pleadings* or in the *affidavits*"; and

b) of which, after a "…*reasonable search*, the party is aware"; and

c) that "are, or have been, in the party's control".

c) The *Qld UCPR* now limits disclosure only to those documents:[10]

a) in the "…possession or under the control of" the disclosing party; and

b) "…*directly relevant* to an allegation in *issue* in the *pleadings*" (or, if no pleading, "…*directly relevant*" to an *issue* in the proceeding).

d) *QSC Practice Direction 18-2018* further restricts the scope of disclosure by encouraging the parties to suspend the requirements of formal disclosure and reach agreement to narrow the issues and arrive at a cost effective and efficient means of managing documents (including disclosure).

49 The word "document" as used in the:

a) Federal Court Rules is defined in Schedule 1 FCR.

b) Qld UCPR is defined in Schedule 1 of the *Acts Interpretation Act 1954*.

50 The definitions are broad.

51 The scope of disclosure obligation in other Australian jurisdictions will often vary.

Use of Disclosed Documents.

9 FCR r 20.12.

10 Qld UCPR r 211.

Benefits of Disclosure:

52 It is in your client's interest to ensure the opponent gives full disclosure.

53 First is the obvious benefit of obtaining documents that may:

a) advance your client's case.

b) damage an opponent's case.

54 A further advantage is that a document disclosed by your opponent may be tendered in evidence against that party as being:[11]

a) relevant.

b) what it purports to be.

Harmon Undertaking Scope:[12]

55 Lawyers (and parties) give an *implied undertaking* to the Court that discovered material will *only* be used for the *sole* purpose of the litigation.[13]

56 This is often called the *Harman undertaking*.[14]

57 Its scope and application are often misunderstood.

58 The purpose behind the undertaking is explained in *Riddick v Thames Board Mills Ltd* [1977] QB 881, 896 per Lord Denning MR:[15]

> "*Compulsion is an invasion of a private right to keep one's documents to oneself*. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. *The court should, therefore, not allow the other party — or anyone else — to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice*."

59 The use of disclosed material for an ulterior or collateral purpose in breach of the implied undertaking is a *contempt of court*.[16]

60 A party in contempt may be prevented from continuing with the proceedings in which the breach occurred until the contempt is purged.[17]

61 Ignorance of the undertaking (or its scope) is no excuse.

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11 Qld UCPR r 227(1).

12 In compiling this section I have benefited from, and acknowledge, the excellent article by Rashelle Seidon SC *et al., The Harmon Undertaking*, Wentworth Chambers CPD Seminar, 20 September 2016.

13 *Hearne v Street* (2008) 235 CLR 125; 82 ALJR 1259; [2008] HCA 36 at [96]-[97]; *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509. In NSW the UCPR r 21.7 expressly states the undertaking.

14 As it is derived from *Harman v Secretary of State for Home Dept* [1983] 1 AC 280 at 896.

15 Also see *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571 at [20].

16 *Harman*; also see *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 per Kirby P at 168-9.

17 *Hadkinson v Hadkinson* [1952] 2 All ER 567 per Denning LJ at 573-575, Romer LJ at 586-573.

62 Some examples where the implied undertaking has been breached *include*:[18]

a) media interviews.

b) separate criminal investigations or proceedings against the disclosing party.

c) defamation proceedings over comments obtained via disclosure in other proceedings.

d) cross-claims against new or existing parties.

63 The obligation also extends also to third-parties who knowingly receive documents from legal proceedings, even if not aware of the undertaking.[19]

64 It also extends to *pleadings* (other than the originating process), statements of *admitted facts*, *affidavits*, *documents* produced in *taxation of costs*, and even *information obtained from such documents*, etc.[20]

65 The principle is nonetheless subject to some necessary and reasonable exceptions required for the conduct of litigation.

66 In *Cadence Asset Management Pty Ltd v Concept Sports Limited* [2006] FCA 711 at [10] Finkelstein J observed:

> "The view that I take is that the implied undertaking does not prevent absolutely a party giving discovered documents to a non-party. There are circumstances in which a party has a legitimate interest in disclosing discovered documents to a non-party. Obvious examples include showing a discovered document to an actual or prospective witness or to an expert non-witness. Of course that is permissible; because in each case the document is being used for the action. There are also cases where a non-party has a legitimate interest in seeing discovered documents. I have in mind, for example, a parent company whose subsidiary is involved in litigation to which the parent is not a party. Or take the case of an insured person whose insurer has not assumed the conduct of an action and the insured wishes to keep his insurer informed of what is going on in a case where he claims to be indemnified. I have never heard it suggested that in those instances it would be wrong to hand the documents over. No doubt this is what occurs every day, without anyone believing that it is necessary to approach the court for permission. *The reason permission is not required is that the provision of the documents is not for an ulterior or foreign purpose. Another way of putting it is that the non-party is not a true stranger to the action*."

67 Another exception is where a party obtains documents under discovery which then become discoverable (or are subpoenaed) in later proceedings against a different party.[21]

68 The Court may release a party from the undertaking in certain circumstances.[22]

69 S*pecial circumstances* must exist to justify any exercise of a Court's discretion to release this undertaking.[23]

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18 Rashelle Seidon SC *et al., The Harmon Undertaking*, Wentworth Chambers CPD Seminar, 20 September 2016 at [44].

19 *Hearne v Street* (2008) 235 CLR 125; 82 ALJR 1259; [2008] HCA 36 at [109]-[112].

20 See Rashelle Seidon SC *et al., The Harmon Undertaking*, Wentworth Chambers CPD Seminar, 20 September 2016 at [10]. This paper gives an excellent explanation of the scope and complexities of the *Harmon* undertaking.

21 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 32, 3, 36-37, 46; Also see *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 398 per Gordon J at [13].

22 *Bailey v Australian Broadcasting Corp* [1995] 1 Qd R 476; *Holpit Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576.

23 *Springfield Nominees Pty ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225

70 In *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225 Wilcox J listed several discretionary considerations, including:

> "*… perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding*."

71 The disclosing party's consent will not suffice to release a person from an undertaking to the court (although it is a discretionary consideration for the Court).[24]

72 Further, absent an order releasing from the undertaking, a plaintiff's lawyers cannot refer to the earlier documents, or use the information contained in those documents, for the purposes of advising subsequent claimants wishing to proceed against the same defendant.

73 Generally, the tender of discovered material into evidence will usually terminate the undertaking with respect to that material.[25]

74 An exception to that rule will exist if the tendered material contains information of a *personal or confidential nature*.[26]

75 The implied undertaking *does not then cease* merely because the document is tendered into evidence.[27]

76 A person *probably* can legitimately use *information* that has fully entered the *public domain* (via, for example, the court proceedings.[28]

77 But the exact point at which that occurs is often difficult to identify.

78 For example, documents tendered into evidence, but not read out in court or not discussed in cross examination or in final addresses, cannot easily be said to have entered the public domain.

79 FCR r 20.03 is an exception as it expressly says that an implied undertaking ceases (absent any order to the contrary) when a document is "…*read or referred to in open court in a way that discloses its contents…*".

80 The Qld UCPR is silent on the issue.

Avoiding or Acting on a Breach of Harmon Undertaking:

81 The best approach is always to pre-emptively apply for a release from any implied undertaking.

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24 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 at 321, per Ipp J. Also see *TAL Life Ltd v Shuetrim, MetLife Insurance Ltd v Shuetrim [2016] NSWSCA 68*; *Gavan v FSS Trustee Corporation* [2019] NSWSC 667. But, in the absence of any acknowledgement or relevance, there must be some evidence that the social media accounts contain material of relevance before an order for disclosure is applied for. This will not be too difficult if the social media account is publicly available. Refer to the section about compelling disclosure in this paper.

25 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 32-33.

26 *British American Tobacco Australia Services Limited v Cowell* (No 2) (2003) 8 VR 571; VSCA 43 at [35], [48]-[49].

27 *British American Tobacco Australia Services Limited v Cowell* (No 2) (2003) 8 VR 571; VSCA 43 at [48]-[49].

28 *Plate Glass Holdings Pty Ltd v Fraser Gordon Investments Pty Ltd*, [2012] FCA 1487 per Flick J at [26].

82 But that assumes you have advance knowledge of a potential for a breach.

83 If you believe you have already breached an undertaking (and are thereby arguably in contempt) then the appropriate course is to:[29]

a) inform the court.

b) apologise.

c) make an offer of repatriation and costs.

84 Breach of an undertaking to the Court is potentially a serious matter.

85 The Court's response to a breach is always discretionary.

86 Degrees of culpability for any breach may range from minor and technical to major and intentional.

87 Important discretionary considerations include:

a) lack of intent to harm.

b) absence of any prejudice.

c) lack of any objection from the person whose interests were breached (assuming full knowledge about the breach).

88 A frank explanation, a demonstration of remorse, and an offer to make good for any prejudice, will often purge any contempt.

Pre-Action Disclosure Obligations:

Statutory Disclosure Obligations:

89 The Qld Court's disclosure requirements under the UCPR have been supplemented, in personal injury claims (and in some respects fundamentally altered), by the pre-action requirements of the:

a) *Workers Compensation & Rehabilitation Act 2003* (WCRA).

b) *Personal Injuries Proceedings Act 2002* (PIPA).

c) *Motor Accident Insurance Act 1994* (MAIA).

90 It is these obligations that cause most difficulty for:

a) less experienced lawyers and para-legal staff supervising pre-action disclosure; and

b) interstate practitioners unfamiliar with the pre-action requirements of Qld legislation.

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[29] Judicial Commission of NSW, *Civil Trials Bench Book*, [10-0710]. It cites *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 489; *Evans v Citibank Ltd* [2000] NSWSC 1017.

91 In *James v Workcover* [2000] QCA 507 Byrne J observed:

> [39] The statutory disclosure obligations are designed to enhance the quality and efficiency of the processes of resolving damages claims. Consensus is encouraged through emphasis on pre-litigation negotiation, including a compulsory conference and mediation where other attempts at agreement fail. These steps are to be informed by exchanges of material to facilitate early, fair compromise.
>
> [40] A proper appreciation of the strengths and weaknesses of the respective cases on the issue of liability would usually contribute to the prospects of reaching agreement quickly on just terms.

92 While this comment related to disclosure obligations under s 283 of the prior *Workcover Queensland Act 1996*, the observation is generally accurate with respect to all the pre-action disclosure regimes.

93 That said, differences in scope occur between the various Acts, because of differences in wording, the expressed objects of the Acts, and the extent of any duties to cooperate under those Acts.[30]

94 For example, differences exist between key expressions used in the sections defining what is required for the pre-action disclosure of *documents* under each of WCRA, PIPA and MAIA:

a) the WCRA refers to *"circumstances of the event"*;[31]

b) the PIPA refers to *"the incident"*,[32] and in medical negligence cases further requires production of documents *"about the medical services"*;[33] and

c) the MAIA refers to *"circumstances of the accident"*.[34]

95 These differences are expanded upon in the provisions that define what answers to *information* may be sought from an opponent:

a) the WCRA refers to information about the *"circumstances of the event"*;[35]

b) the PIPA refers to information by a respondent about the *"circumstances of, or reasons for, the incident"*;[36] and

c) the MAIA refers to information by a respondent about the *"circumstances of, or reasons for, the accident"*.[37]

96 The differences in the analogous sections of these Acts may appear minor, but disputes under the different Acts have not always produced consistent outcomes.

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30 As for the objects of each Act, see s 5 WCRA (in particular, s 5(4)(b)), s 3 MAIA, and s 4 PIPA. As a result of these factors, the WCRA generally imposes the highest obligations to disclose information in the pre-litigation process.

31 Section 279((1)(a) WCRA.

32 Section 22(1)(a)(i) and 27(1)(a)(i) PIPA.

33 Section 9A(8)(b) PIPA.

34 Section 45(1)(a) and 47(1)(a) MAIA.

35 Section 279(b)(1) WCRA.

36 Section 27(1)(b)(i) and (ii).

37 Section 47(1)(b) MAIA.

97 Table 2 sets out the relevant disclosure obligations included in these Act (italics are added for emphasis).

98 I have annotated the table with (what I believe to be) the most illustrative decisions interpreting different words and phrases.

Table 2. Pre-Action Disclosure Obligations Actions Governed by Qld Choice of Law.

Workers Compensation & Rehabilitation Act 2003 (WCRA).
279 Parties to cooperate (1) The parties must cooperate in relation to a claim, *in particular*[38] by— (a) giving each other copies of relevant documents about— (i) the circumstances of *the event*[39] resulting in the injury; and (ii) the worker's *injury*; and (iii) the worker's *prospects of rehabilitation*; and (b) giving *information*[40] reasonably requested by each other party about— (i) the circumstances of *the event* resulting in the injury; and (ii) the nature of the injury and of any impairment or financial loss resulting from the injury; and (iii) if applicable—the *medical treatment*[41] and rehabilitation the worker has sought from, or been provided with, by the worker's employer or the insurer; and (iv) the worker's medical history, as far as it is relevant to the claim; and (v) any applications for compensation made by the claimant or worker for any injury resulting from the same event. (2) Subsection (1)(a) applies to relevant documents that— (a) are in the possession of a party; or (b) are reasonably required by WorkCover from the worker's employer under section 280. ... (5) This section is subject to section 284.

38 In *Healy v Logan City Council* [2016] QDC 15 "*in particular*" was found by McGill DCJ not to mean "including". As a result, the scope of the section was limited solely to the "*documents*" identified in ss (a), and the "*information*" *particularised* in ss (b). When so doing the Court noted at [33] the section did not give power to interrogate, and that the test of "reasonableness" of requests for information under ss (b) were tested by reference solely to the provisions of ss 273 and 274 and" "*…which suggests that the focus should be on the achievement of justice, the avoidance of undue delay and expense, and the resolution of the real issues in a claim*." The court refused a request for "risk assessments" as it was not a request of information *"about the circumstances of the event resulting in the injur*y", and also refused requests for information about things which was already within the possession or knowledge of the Plaintiff as not being *reasonable*.

39 In *Higgs v Australia Meat Holdings Pty Ltd* [2006] QSC 070 Atkinson J found that the "event" referred to in s 283 of the prior *WorkCover Queensland Act 1996* (materially similar to s 279 WCRA) was defined in s 33 to be: "*anything that results in injury*", and *"…therefore encompasses all of the circumstances which resulted in injury of which complaint is made*". Disclosure was therefore ordered with respect to documents relating to prior repairs effected to the ramp where the worker's slip injury occurred.

40 In *RSL (Queensland) War Veterans Homes Limited & Anor v Palma* [2010] QSC 222, (a psychological injury statutory claim), Wilson J refused to order disclosure of "information" about a claimant's prior attendances at a women's shelter as it was not "medical treatment" within the meaning of the Act.

41 *Ibid*.

(6) In this section—

relevant documents means *reports and other documentary material, including written statements made by the claimant, the worker's employer, a contributor, or by witnesses*.

Personal Injuries Proceedings Act 2002 (PIPA).

9A Particular provision for notice of a claim procedure for medical negligence cases

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(8) A person to whom an initial notice is given must, within 1 month after receiving the initial notice, give the claimant—

(a) a written response advising whether any documents are held in relation to the medical services mentioned in the notice; and

(b) *copies of all documents held by the person about the medical services*.[42]

22 Duty of claimant to provide documents and information to respondent

(1) A claimant must give a respondent—

(a) copies of the following in the claimant's possession—

(i) reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates;

(ii) reports about the claimant's medical condition or prospects of rehabilitation;

(iii) reports about the claimant's cognitive, functional or vocational capacity; and

(b) information reasonably requested by the respondent about any of the following—

(i) the incident;

(ii) the nature of the personal injury and of any consequent disabilities;

(iii) if applicable, the medical treatment and rehabilitation services the claimant has sought or obtained;

(iv) the claimant's medical history, as far as it is relevant to the claim, and any other claims for damages for personal injury made by the claimant;

(v) the claimant's claim for past and future economic loss;

(vi) any claim known to the claimant for gratuitous services or loss of consortium or servitium consequent on the claimant's personal injury.

(2) If the claim is a health care claim, the claimant must, if reasonably requested by a respondent, give the respondent a single report from a doctor with appropriate qualifications and experience in the relevant field that includes an opinion regarding—

(a) the nature and extent of the personal injury alleged to have been suffered; and

(b) the causal relationship between the incident and the personal injury alleged to have arisen from the incident.

…

27 Duty of respondent to give documents and information to claimant

(1) A respondent must give a claimant—

[42] In *State of Queensland v Allen* [2011] QCA 311 White JA at [43-44] observed that the PIPA thus sets a higher threshold for a claimant who wishes to seek compensation for personal injury at the hands of a doctor, and this may impact upon the extent to which legal professional privilege may be claimed for certain documents by doctors involved in the incident. Fryberg JA made similar observations at [68-69]. Both Fryberg and White JJA agreed that a medical practitioner who gave a statement or proof of evidence to their solicitor, for the dominant purpose of seeking legal advice, would not thereby be making a "medical report" within the meaning of s 30(2) PIPA. But documents brought into existence for the purpose of making and investigation or review of a medical incident would not ordinarily be privileged. Further, it would be inappropriate for a hospital to conceal the facts of an incident by attempting to cloth documents with legal privilege via some artificial document creating policy.

(a) copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim—

(i) reports and other documentary material[43] about the *incident*[44] *alleged to have given rise to the personal injury to which the claim relates;*

(ii) reports about the claimant's medical condition or prospects of rehabilitation;

(iii) reports about the claimant's cognitive, functional or vocational capacity; and

(b) if asked by the claimant—

(i) information that is in the respondent's possession about the circumstances of, or the reasons for, the incident;[45] *or*

(ii) if the respondent is an insurer of a person for the claim, information that can be found out from the insured person for the claim, about the circumstances of, or the reasons for, the incident.

…

(3) If the claimant requires information provided by a respondent under this section to be verified by statutory declaration, the respondent must verify the information by statutory declaration.

…

Schedule:

***Incident** in relation to a personal injury, means the accident, or other act, omission or circumstance, alleged to have caused all or part of the personal injury.*

Motor Accident Insurance Act 1994 (MAIA).

45 Duty of claimant to cooperate with insurer

(1) A claimant must cooperate with the insurer and, in particular—

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43 *Watkins v State of Queensland* [2008] 1 Qd R 564. A file note made by respondent's lawyer as a result of a phone consultation with a liability expert witness was within the description of *"reports and other documentary material"* under s 27(1)(a)(i). Further, privilege did not apply to that file note under PIPA. See Jerrard JA at [23], Keane JA at [73].

44 *Huag v Jupiters Limited trading as Conrad Treasury Brisbane* [2007] QCA 199 at [23, 24 & 26]. The word *"incident"* in both 27(1)(a) and 27(1)(b) limits the extent of disclosure to documents *directly relevant* to the *incident,* and did not extend to disclosure of material concerning the training of staff, location of CCTV cameras, etc. Also see *Oliver v Mulp Pty Ltd* [2009] QSC 340 per Martin J; *Hare v Mount Isa City Council* [2009] QDC 39 per McGill DCJ; *Curry v Brisbane City Council* [2010] QDC 148 per Reid DCJ at [53-54 & 60.

45 The obligation of disclosure in s 27(1)(b)(i) is broader than that in s 27(1)(a), in that it relates to information that is in the respondent's possession "about the circumstances of, or the reasons for, the incident," and is not limited by the requirement that it be directly relevant to an incident, per Williams JA in *Haug v Jupiters Limited* [2007] QCA 99 at [26]. In *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor* [2020] QSC 253 Crow J found that the *reasons for* an *incident* encompass a *strand* in the *rope* of causation without necessarily being an indisputable link in the chain and found that disclosure there was not required unless the reasons would have had a causative effect in the incident. On appeal in *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor* [2021] QCA 172, Morrison JA generally agreed with that analysis but found that the existence of prior incidents of sexual abuse could have put the diocese on notice and that was sufficient to require their disclosure. Fraser JA further found that the definition of "incident" in the Act's schedule should be consistently read into other relevant provisions using that word, and in the context of the allegations in the Notice of Claim (NOC), (which included a claim that the respondent was vicariously liable for failing to take necessary precautions to prevent sexual abuse), disclosure was required as to any prior complaints of abuse by the alleged abuser. This case underscores the importance of ensuring a NOC correctly engages the issues causing or contributing to the alleged *incident*, as the definition of *incident* will give context to the obligation of disclosure under s 27(1)(b)(i) PIPA. Contrast prior decisions where courts have found that disclosure of knowledge about prior events and risks was not disclosable where it solely goes to the existence of a *duty of care*, as opposed to the *cause* of the *incident* itself. See for example, *Curry v Brisbane City Council* [2010] QDC 148 per Reid DCJ at [53-54]; *Wright v KB Nut Holdings Pty Ltd* [2010] QDC 91 per McGill DCJ at [37].

(a) must provide the insurer with *copies of reports and other documentary material* (including written statements made by the claimant or by witnesses) in the claimant's possession about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation; and

(b) must give *information* reasonably requested by the insurer about—

(i) the *circumstances of the accident*[46] out of which the claim arose; and

(ii) the nature of the injuries resulting from the accident and of any consequent disabilities and financial loss; and

(iii) if applicable—the medical treatment and rehabilitation services the claimant has sought or obtained; and

(iv) the claimant's medical history (as far as it is relevant to the claim), and any other claims for compensation for personal injury made by the claimant.

...

47 Duty of insurer to cooperate with claimant

(1) The insurer must cooperate with a claimant and, in particular—

(a) must provide the claimant with copies of reports[47] *and other documentary material*[48] *in the insurer's possession about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation; and*

(b) must, at the claimant's request, give the claimant information that is in the insurer's possession, or can be found out from the insured person, about the circumstances of, or the reasons for, the accident.

...

(3) If the claimant requires information provided by an insurer under this section to be verified by statutory declaration,[49] *the information must be verified by statutory declaration.*

Scope of Legal Privilege.

Common Law Privilege:

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46 In *Ogilvie v Bowers and RACQ GIO Insurance Limited* [2001] QSC 37 Ambrose J at [26] "…In my view, *"circumstances of the accident"* are not limited to events contemporaneous with the accident observable perhaps by an independent witness having the opportunity to view it. A circumstance of the accident is any fact to which the occurrence of the accident may be attributed. In my view, upon its proper construction, "circumstances of the accident" within the meaning of s 45(1)(a) encompass all events which appertain to or are causes of the accident in which a claimant suffers personal injury. The term certainly includes the degree of a driver's intoxication either from drugs or alcohol if they may be causative of a collision to which personal injury is attributed. It would also include intoxication of a claimant by alcohol or drugs should that be relevant to questions of contributory negligence."

47 *Zavodny v Couper & QBE* [2018] QSC 238. A surveillance report that did not reveal fraud was discoverable as relevant to the claimant's rehabilitation and injuries.

48 *Turpin v Allianz Australia Insurance Ltd* [2001] QSC 299. Mullins J found that witness statements attached to an investigators report were within s 47(1)(a). In *Cameron v RACQ Insurance Limited* [2013] QSC 124, a pedestrian claim against a driver for personal injury, the Court found that the driver's phone records leading up to the time of the accident were discoverable under s 47(1)(a). The case is also relevant to s 47(1)(b) requests for information.

49 *Dillon v RACQ AMP General Insurance Ltd* [2001] QSC 347. The obligation to provide a statutory declaration did not extend to one confirming that all relevant documents had been disclosed under s 47(1)(a).

99 While a party is obliged to disclose the existence of all relevant material, a party is not obliged to produce or reveal the contents of a document that is protected by a *privilege*.

100 That is, disclosure of all documents is mandatory, but the production of privileged material is not.

101 The practise, employed by many lawyers, of referring to privileged documents in bulk using boilerplate descriptions, can obscure the character of individual documents that are arguably discoverable.

102 It must never be misused for that purpose.

103 There are five areas of privilege:[50]

a) legal professional privilege;

b) privilege against self-incrimination;

c) public interest privilege;

d) without prejudice communications; and

e) statutory privilege.

104 At common law, *legal professional privilege* applies to confidential *communications* between the client:[51]

a) and the client's professional legal advisor made for the purpose of seeking or giving any legal advice or related legal assistance.

b) or the client's legal advisor and a third party (such as a witness) that comes into existence for the dominant purpose of being used in connection with actual, pending, or contemplated litigation.

105 These two limbs of the *legal professional privilege* are commonly called "advice privilege" and "litigation privilege" respectively.

106 Legal professional privilege (in the broad sense) applies if the *dominant purpose* for creation of the document is to provide or obtain legal advice.[52]

107 The privilege belongs to the client, not the lawyer, though a lawyer may expressly or impliedly waive their client's privilege by words or conduct.

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50 *Queensland Civil Practice*, Thompson Reuters 2020, commentary to r 212.

51 See Passmore, *Privilege*, 3rd Edn, Sweet & Maxwell, London, 2013, p. 2; Also see *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, there the HOL found that *legal advice privilege* and *litigation privilege* comprised parts of the one single and integral *legal professional privilege.*

52 See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67, per Gleeson CJ with Gaudron and Gummow JJ., which replaced the prior *sole purpose test* recognised in *Grant v Downs* (1976) 135 CLR 674; [1976] HCA 63.

108 The privilege may arise over witness statements obtained by a third party (for example a loss adjuster) on the instructions of the lawyer, if the dominant purpose for obtaining the statements is their use in pending or contemplated litigation.[53]

Statutory Restrictions to Legal Professional Privilege:

109 The following discussion applies specifically to Queensland.

110 Inter-state lawyers should be aware that the position in Queensland may differ substantially from that in your local jurisdiction.

111 Table 3 sets out statutory restrictions on the scope of *legal professional privilege* in Queensland.

112 As noted previously, the different legislative provisions do not always employ consistent expressions.

113 For example:

a) the UCPR refers to *"a document consisting of a statement or report of an expert"* as not being privileged;[54]

b) the WCRA refers broadly to *"investigative reports", "medical reports"*, and *"reports relevant to the worker's rehabilitation", "relevant documents mentioned in section 279, other than correspondence between a party and the party's lawyer"*;[55]

c) the PIPA and MAIA each refer to *"investigative reports"*, *"medical reports"* and *"reports relevant to a claimant's rehabilitation"* but permit the redaction of *"statements of opinion"* in these *"reports"*[56]

114 The table below is annotated with references to a number of decisions that illustrate these provisions.

115 Please refer to the footnotes in that regard.

Table 3. Partial Restriction of Legal Professional Privilege Queensland Law.

Queensland Uniform Civil Procedure Rules 1999 (UCPR).	
212	**Documents to which disclosure does not apply**
(1)	The duty of disclosure does not apply to the following documents –
	(a) a *document to which there is a valid claim to privilege* from disclosure.
	(b) a document *relevant only to credit*.

53 *Mahoney v Salt* [2012] QSC 43 per Boddice J at [18], [27-30].
54 Rule 212(2) UCPR.
55 Section 284(2) WCRA.
56 Section 30(2) PIPA; s 48(2) MAIA.

(c) an additional copy of a document already disclosed, if it is reasonable to suppose the additional copy contains no change, obliteration or other mark or feature likely to affect the outcome of the proceeding.

(2) *A document consisting of a statement or report of an expert is not privileged from disclosure*.[57]

Workers Compensation & Rehabilitation Act 2003 (WCRA).

281 Parties to attempt to resolve claim

…

(4) The written notice must—

(a) state whether liability in connection with the event to which the claim relates is admitted or denied and—

…

(b) state whether the insurer accepts or rejects any offer of settlement that may be made by the claimant; and

(c) if the claimant did not make an offer of settlement in the notice of claim or the insurer is rejecting the offer—contain a genuine offer or counter-offer of settlement, or a statement of the reasons why an offer or counter-offer of settlement cannot yet be made; and

(d) *be accompanied by copies of all medical reports, assessments of cognitive, functional or vocational capacity, or other material in the insurer's possession not previously given to the claimant that may help the claimant to make a proper assessment of the offer.*[58]

…

284 Nondisclosure of certain material

(1) A party is not obliged to disclose information or a document if the information or document is protected by *legal professional privilege*.

(2) However, the following must be disclosed even though otherwise protected by *legal professional privilege*—

(a) investigative reports;

(b) medical reports;

(c) reports relevant to the worker's rehabilitation;

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[57] See generally *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141 per White J. This decision relates to the prior O 35 r 5(2) SCR. There the court held there was no privilege with respect to an expert report, prior draft reports, the expert's working papers, or other documents on which the expert's opinion is based, and there was an implied waiver of privilege with respect to *all instructions to the expert to the extent that they might be said to influence the content of the expert's report*. Therefore all contents of *letters of instruction* ('LOI's') are discoverable if they may directly or indirectly influence the expert's opinion, even if the material is not specifically referred to in the expert's report. In *Enklemann & Ors v Stewart & Anor* [2023] QCA 155 the court found that notes of a solicitor as to discussions with an expert, where the expert was not asked to provide a report as to the subject matter of the discussions, did not comprise *"a statement or report of an expert"* and were therefore privileged.

[58] In *James v Workcover Queensland* [2001] 2 Qd R 626; [2000] QCA 507 (considering s 280 and s 288(1)-(2) of the prior *Workcover Queensland Act 1996*) it was found, for differing reasons, that a witness statement attached to a loss adjusters report was not privileged. Pincus JA and Byrne J found that the report annexing a statement was a single document and therefore not privileged. Byrne J further found that when the statement was created litigation was probably not contemplated, and therefore the dominant purpose for the statement was not established (on the evidence) to have been for advising in contemplated legal proceedings. Also see *Watkins v State of Queensland* [2008] 1 Qd R 564, which concerned the analogous provision, s 20(2), in PIPA. Keane JA at [60], s 20 PIPA was *"…not to be interpreted with a presumption in favour of the preservation of privilege: the PIPA intends that the claimant should have as full and correct an understanding of the bases of a respondent's denial of liability and offer of settlement as the respondent itself does"* Therefore privilege did not apply to that file note under PIPA when the report was deployed by the respondent for the purpose of s 20 PIPA. See Jerrard JA at [23], Keane JA at [73].

(d) relevant documents mentioned in *section 279*, *other than correspondence*[59] *between a party and the party's lawyer.* …
Personal Injuries Proceedings Act 2002 (PIPA).
20 Respondent must attempt to resolve claim … (3) An offer, or counteroffer, of settlement *must be accompanied by a copy of medical reports, assessments of cognitive, functional or vocational capacity and all other material, including documents relevant to assessing economic loss, in the offeror's possession that may help the person to whom the offer is made make a proper assessment of the offer*.[60] … 30 Nondisclosure of particular material (1) A party is not obliged to disclose information or documentary material under division 1 or this division if the information or documentary material is protected by *legal professional privilege*.[61] (2) *However, investigative reports,*[62] *medical reports*[63] *and reports relevant to the claimant's rehabilitation must be disclosed even though otherwise protected by legal professional privilege*

59 A client's statement signed and returned to the solicitor by post is not *correspondence*, see: *WorkCover Queensland v Jones* [2009] QDC 274.

60 *Watkins v State of Queensland* [2008] 1 Qd R 564. A file note made by respondent's lawyer as a result of a phone consultation with a liability expert witness was within the description of "reports and other documentary material" under s 27(1)(a)(i). But see the recent decision of *Enklemann & Ors v Stewart & Anor* [2023] QCA 155, which decided, on different facts, that a solicitor's note of a discussion with an expert, where the expert was not asked to provide a report about the matters discussed, remained privileged (albeit under the UCPR provision).

61 The specific reference to *legal professional privilege* is interesting. There is no mention of the other important common law privileges, such as the privilege against self-incrimination, without prejudice communications, public interest privilege, etc. In *Felgate v Tucker* Margaret McMurdo P at [54] (with whom Fraser JA and White JJA agreed at 56-57]) found that disclosure of a document in the course of a compulsory conference occurred *without prejudice*, and struck out paragraphs of an affidavit that was otherwise relevant to the determination of whether the document was covered by legal professional privilege. It was not argued whether that the statutory disclosure requirements in PIPA also extended to override the "without prejudice" privilege.

62 *Mahoney v Salt* [2012] QSC 43 per Boddice J at [21] and [24]. Here it was held that draft signed witness statements obtained by a loss adjuster on instructions from the respondent's solicitor, which were not included within the investigator's report, and were forwarded to the solicitor separately to the report, were not part of any "investigative report" under s 30(2) PIPA. This remained so even though the report contained reference to a witness's version of events. But the report itself was required to be disclosed. In *State of Queensland v Allen* [2011] QCA 311 Fraser JA at [27]; White JA at [66-69]; and Fryberg JA at [82], [88], and [96-97], each found that a respondent medical practitioner who gave a statement or proof of evidence to their solicitor, for the purpose of seeking legal advice, would not thereby be making a *medical* or an *investigative report* within the meaning of s 30(2) PIPA. Further, they agreed that in s 30(2) PIPA *investigative reports* and *medical reports* might each relate to reports about *both* liability and/or quantum. In that regard see White JA at [64] and Fryberg JA at [99]. Witness statements obtained by a loss adjuster at the specific request of a respondent's solicitor, and which do not form part of the loss adjuster's report and are returned separately to the report, do not comprise part of an "investigative report" and remain privileged when brought into existence for the dominant purpose of the litigation.

63 In *Felgate v Tucker* [2011] QCA 194, a medical negligence claim against an anaesthetist, at the PIPA conference the respondent's solicitors disclosed information based on a statement they obtained from the respondent. The claimant sought disclosure of the document, but the respondent then claimed legal professional privilege. Held per McMurdo P, Fraser and White JJA (after considering and distinguishing , *inter alia, Watkins* and *James v Workcover Queensland* [2001] 2 Qd R 626; [2000] QCA 507 (the latter concerning a since repealed provision in the WCRA 2003), that a client's statements to legal advisors were not ordinarily considered to be "reports" and were therefore privileged from production as they were

but they may be disclosed with the omission of passages consisting only of statements of opinion.[64] (3) If a respondent has reasonable grounds to suspect a claimant of fraud, the respondent may apply, ex parte, to the court for approval to withhold from disclosure under division 1 or this division information or documentary material, including a class of documents, that— (a) would alert the claimant to the suspicion; or (b) could help further the fraud. (4) If the court gives approval on application under subsection (3), the respondent may withhold from disclosure the information or documentary material in accordance with the approval. (5) In this section— **investigative reports** does not include any document prepared in relation to an application for, an opinion on or a decision about, indemnity against the claim from the State.
Motor Accident Insurance Act 1994 (MAIA).
41 Insurer must attempt to resolve claim … (4) *An offer (or counteroffer) of settlement must be accompanied by a copy of medical reports, assessments of cognitive, functional or vocational capacity, or other material in the offeror's possession that may help the person to whom the offer is made make a proper assessment of the offer.*[65] … **48 Non-disclosure of certain material** (1) A claimant or insurer is not obliged to disclose information or documentary material under this division if the information or documentary material is protected by *legal professional privilege*. (2) *However, investigative reports,*[66] *medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though protected by legal professional privilege but they may be disclosed with the omission of passages consisting only of statements of opinion.*

prepared for the dominant purpose of the litigation. In *State of Queensland v Allen* [2011] QCA 311 the file notes prepared by the respondent's solicitor after conferring with two of the respondent's employee doctors were not "reports" within the ordinary meaning of the term, and therefore could not be "investigative reports" under s 30(2). But the Court held that a written report by another of the doctors was in the form of a "report" and had to be disclosed. That said, Fraser JA at [69] and Fryberg J at [99] opined written statements, if obtained from other medical witnesses (i.e., other than a client), will be disclosable. But also see In *Enklemann & Ors v Stewart & Anor* [2023] QCA 155, referred to in this paper.

64 In *Watkins v State of Queensland* [2008] 1 Qd R 564 per Jerrard JA, Keane JA, and McKenzie J. Keane JA (with whom the others agreed) found at [73] "Section 30(2) requires that "investigative reports, [and] medical reports" must be disclosed "even though otherwise protected by legal professional privilege, but they may be disclosed with the omission of passages consisting only of statements of opinion." *It is readily apparent that s 30(2) of the PIPA is not intended to operate to preserve privilege in any of the documents described in s 20(3): it is unlikely in the extreme that the legislature intended that the "opinion section" of an expert report provided pursuant to s 20(3) would not be disclosed to the party to whom the report is provided. If the "opinion section" of such a report could be suppressed, the evident intention of s 20(1)(c) and s 20(3) would be frustrated because the report could not possibly help the person to whom the offer is made to understand the offer.* Accordingly, it is, I think, clear that the legislature did not intend by s 30 that the obligations imposed by s 20 should be subject to confidentiality as against the party in whose favour those obligations were created." Further at [82] "Accordingly, I have concluded that the communications relating to the commissioning of Prof MacLennan's report were not privileged under the general law. The point, for present purposes, is not that the PIPA has impliedly abrogated privilege in communications associated with the production of a report to be used in litigation; the point is that the effect of s 20 of the PIPA is that the report and the associated communications were never the subject of privilege."

65 See *Watkins v State of Queensland* [2008] 1 Qd R 564. This decision concerned the analogous provision, s 20(2), in PIPA.

66 In *Zavodny v Couper & QBE* [2018] QSC 238. A surveillance report that did not reveal fraud was discoverable as relevant to the claimant's rehabilitation and injuries and was disclosable as an 'investigative report'

(3)	If an insurer has reasonable grounds to suspect a claimant of fraud, the insurer may withhold from disclosure under this division information or documentary material (including reports that would, apart from this subsection, have to be disclosed under subsection (2)) to the extent the disclosure would alert the claimant to the discovery of the grounds of suspicion or could help in the furtherance of fraud.
(4)	An insurer must not withhold information or documentary material from disclosure under this division without having proper grounds.

116 Keep in mind that the statutory exclusions relate only to *legal professional privilege* (there are no restrictions as to other categories of legal privilege).

117 The word "reports" is not defined in any of the Acts or under the Qld *Acts Interpretation Act 1954*.

118 The ordinary natural meaning of the word therefore applies.

119 That meaning may be influenced by the objects stated in the Acts.[67]

120 Finally, absent falling within a defined category of document to which disclosure is waived by statute, the privilege is not waived over confidential communications between a *solicitor and a witness,* or the *client,* created for the dominant purpose of giving or receiving legal advice.

121 In this regard, see *Felgate v Tucker* [2011] QCA 194 and the *State of Queensland v Allen* [2011] QCA 311.

Disclosure of Documents Referred to in Pleadings & Affidavits:

122 Rule 222 UCPR states:

> *A party may, by written notice, require another party in whose pleadings, particulars or affidavits mention is made of a document—*
>
> *(a) to produce the document for the inspection of the party making the requirement or the solicitor for the party; and*
>
> *(b) to permit copies of the document to be made.*

123 The rule requires that there be:

> *"…direct allusion to the document, an inferred or implied reference being insufficient."*[68]

124 Rule 222 UCPR does not *itself* override *legal professional privilege*.[69]

125 See the next heading.

Common Law Waiver of Privilege:

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under s 48(2). In *Turpin v Allianz Australia Insurance Ltd* [2001] QSC 299, Mullins J found that witness statements attached to an investigators report were required to be disclosed under s 48(2) as they formed part of the report.

67 See s 4 and s 273 and s 274 of WCRA.

68 *Zavodny v Couper & QBE* [2018] QSC 238.

69 *Balnaves v Smith* [2008] QSC 215 per Douglas J.

126 In *Mann v Carnell* (1999) 201 CLR 1 the plurality (quoting *Goldberg v Ng* (1995)185 CLR 83 at 95) observed:

> "Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. ...
>
> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. ... *What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large*."

127 The *mere mention* of a privileged document, without reference to the *substance of the communication*, has been held to be insufficient to amount to waiver.[70]

128 Ultimately it is a question of fairness as to whether, and to what extent, a person who deploys parts of a privileged communication for some forensic advantage should then be permitted to then assert privilege with respect that document.[71]

129 In *Hotels Limited v Rider Levett Bucknall UK Limited* Havlock J opined:[72]

> "The test is whether the *contents of the document* rather than its *effect* are being *made use of*. This distinction is not always easy to draw. It has been held in some cases that references to a document in circumstances which betray the content is not a waiver, but the *explanation for such decisions lies in the context in which the reference was made*. If the reference is made as part of a *mere narrative*, it is probable that waiver will not result. *If the contents of a document are relied upon in order to support a point which the disclosing party wishes to make, then privilege in the document will have been waived*."

130 In *Bennett v Chief Executive Officer, Australian Customs Service* Gyles J stated:[73]

> *"…the voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole advice to which reference is made including the reasons for the conclusion."*

131 He further observed:[74]

> "The test looks to *inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other*. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. *The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.*"

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70 *Dunwell & Dunwell & Ors (Expert Evidence)* [2010] Fam CA 499, per Trench J.

71 See *Goldberg v Ng (1995) 185 CLR 83* per Deane, Dawson & Gaudron JJ at 95-97. Also refer generally to the discussions on waiver of privilege by Keane and Jerrard JJA in *Watkins v State of Queensland* [2008] 1 Qd R 564. This decision provides a useful survey of the main Australian authorities.

72 *Hotels Limited v Rider Levett Bucknall UK Limited* [2010] EWHC 767 (TCC) at 61.

73 *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237 at [65].

74 *Ibid* at [68].

132 If you have access to this, then see generally Colin Passmore, *Privilege*, 3rd edition, 2013 Sweet & Maxwell, 499-503.

133 In *Goldberg v Ng* (1995) 185 CLR 83; [1995} HCA 39 at 95-96 the plurality concluded that the question *"…ultimately falls to be resolved by reference to the requirements of fairness in all the circumstances of the case"*.

134 In *Felgate v Tucker* [2011] QCA 194 where privilege was held not to be waived for a privileged document disclosed during a without prejudice compulsory conference where the evidence disclosed no *unfairness* to the maintenance of the privilege claim (relying on comments of Deane, Dawson and Gaudron JJ in *Goldberg v Ng* (1995) 185 CLR 83; [1995] HCA 39).

135 The mere fact that an investigative report repeats a version of events provided by a witness does not necessarily result in a waiver of privilege over the witness's statement.[75]

136 In *Enklemann & Ors v Stewart & Anor [2023] QSC 111* at [31] the plurality, cited with approval the observations of Keane JA in *Watkins v State of Queensland* [2008] 1 Qd R 564, 590 at [55]:

> "It must be said, however, that the broad proposition that waiver will be imputed to ensure equality of advantage would mean that, in every case where an expert report is based on instructions as to the factual basis on which expert opinion is sought and the report is relied upon by the party that commissioned it in relation to the negotiation of a legal claim, the other party would have "a right" to see those instructions. *There are reasons of principle and authority why I am unable to accept that broad proposition.* In terms of principle, it seems to be inconsistent with the High Court's insistence upon the substantive nature of the right to confidentiality involved in legal professional privilege, that the right can be treated as so fragile as to be susceptible of abrogation in consequence of a judicial impression that the other party would be better informed than he or she might be if the confidential information were not provided. It is in the nature of things that a party who enjoys a right to keep information relevant to a forensic contest confidential will also enjoy an advantage over that party's opponent: the mere existence of that advantage cannot be a reason for the abrogation of the right. It is the abuse of the right by conduct apt to confuse or deceive the opponent which is the basis for an imputed waiver of privilege."

137 But if an expert is asked about discussions with a solicitor, and no objection is made as to that line of questioning, then there will be a waiver of privilege over the substance of that conversation.[76]

138 Also see observations on waiver of privilege in the Australian context in: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Mann v Carnell* (1999) 74 ALJR 378 at 384; *ASIC v Southcorp* (2003) 46 ACSR 438; [2003] FCA 804; *Sandvik Mining & Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2009] QSC 233; and the discussion of relevant authorities and conclusions of both Keane and Jerrard JJA in *Watkins v State of Queensland* [2008] 1 Qd R 564.

Particular Documents.

[75] *Mahoney v Salt* [2012] QSC 43 per Boddice J at [25-26].

[76] *Enklemanm & Ors v Stewart & Anor [2023] QSC 111* at [39].

139 Categories of documents that require *special* attention when giving disclosure (particularly mandatory pre-litigation disclosure) are:

a) social media;[77]

b) investigative reports;

c) expert reports;

d) witness statements;

e) solicitors file notes summarising discussions with expert witnesses.

140 The following discussion aims to provide some (not doubt incomplete) guidance for you when deciding what is and is not disclosable.

Social Media Relevance & Disclosure.

141 The definition of document includes "*…any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)*."[78]

142 Social media falls within this definition.

143 If social media posts by a party contain information that is *discoverable* then it must be produced.[79]

144 Numerous examples exist where such discovery has been ordered.[80]

145 Most commonly, social media posts will become relevant to damages issues.

146 For example, a claimant's social media posts may be inconsistent with the claims that a person has made about their accident, their injury, or the extent of their ongoing disabilities.

147 Issues may arise where discoverable social media *also* contains *irrelevant*, yet intensely private material which may be prejudicial, controversial, personal or embarrassing, in addition to material that is *relevant*.

148 I will discuss this issue under later under the heading about redacting material from discovered documents.

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77 *Gavan v FSS Trustee Corporation* [2019] NSWSC 667.

78 Definition of "document" in Schedule 1 Qld *Acts Interpretation Act 1954*.

79 Whether under pre-litigation obligations referred to in Table 2 or under r 212 UCPR as being directly relevant to an allegation in issue in the pleadings.

80 *Munday v Court* [2013] VSCA 279 at [15], [38]; *Frost v Kourouche* (2014) 86 NSWLR 214; *Gavan v FSS Trustee Corporation* [2019] NSWSC 667. Other examples exist, though they are not specific to personal injury claims.

Suspected Incomplete Disclosure.

149 Parties are required to identify the documents over which they claim privilege.

150 Rule 214(1)(a) Qld UCPR specifically requires this.

151 As mentioned above, from time-to-time lawyers merely summarise the *categories* of documents they claim privilege over by way of boilerplate precedent driven descriptions, particularly where the material is voluminous and likely uncontentious (such as correspondence from the lawyer to the client etc).

152 But if an opponent takes issue with the way documents are described then the individual documents must be listed adequately for the opponent to contest the claims, should they wish to do so.[81]

153 Ultimately it is a matter of cost and convenience for both sides (and the Court may ultimately decide how to allocate those costs in any application, particularly where a party has been unreasonable or obstructionist).

154 If you can show the probable existence of documents that the opponent should have discovered, then an application may be made.

155 UCPR 3 213 requires that, if a party challenges a claim for privilege, the party claiming that privilege must within 7 days file an affidavit setting out the basis of their privilege claim.

156 That is all uncontentious.

157 More difficult is the situation where you merely *suspect* full disclosure has not been given.

158 In some cases, the Court will be willing to direct disclosure based on reasonable inferences about the existence of documents (or categories of documents).

159 For example, in *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255 per Crow J drew the necessary inference from the nature of the pleadings.

160 In such cases, if in doubt, the Court may direct the respondent to file and serve an affidavit swearing that the document's do not exist, or the circumstances in which they ceased to be in the power or control of the relevant party.[82]

Redacting Irrelevant & Private Material from Discoverable Documents.

Basic Rule:

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81 *Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd* (No 2) [1999] 1 Qd R 163; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7.

82 UCPR r 223(2).

161 *Sans* legislative provision, there is no *a priori* right to redact material in an otherwise discoverable document.[83]

Statements of Opinion under PIPA & WCRA:

162 As noted in Table 3, PIPA and the WCRA permit redaction of *statements of opinion* in expert reports.

163 That said, redaction is very rare, and probably is only resorted to where a party has:

a) commissioned a report without knowing what the expert is likely to say; and

b) the expert's opinion is unhelpful to the party who commissioned the report.

164 It serves no purpose to redact opinions that are favourable to your client, particularly in pre-action proceedings where the goal is to try and avoid the costs of later proceedings.

165 Regardless, service of a redacted report will alert the opponent to the existence of potentially unhelpful opinions, and probably not assist the redacting party in the long term as the entire unredacted report must be disclosed, if relevant and *if court proceedings eventuate*.[84]

166 Further, the situation probably becomes academic in situations where *Watkins* applies.[85]

Documents Containing Privileged and Non-Privileged Material:

167 Discovery obligations apply to *documents*, yet legal professional privilege (at least) is confined to protected *communications*.

168 It follows that a document may be both discoverable but also contain portions that are protected by legal professional privilege.

169 Material should also be redacted if it infringes *other privileges*, such as the privilege against self-incrimination (though case examples currently appear sparse on this issue).

170 Where a document contains both privileged and non-privileged material then the *informal practice* has been to either object to the entire document being disclosed, or to redact the privileged material and claim the relevant privilege over that portion.

171 In final analysis, it is always a matter for the court to decide whether (and to what extent) redaction of material may occur.

172 The common approach in such cases is for the disclosing party to:

a) first produce a redacted document (if that is practical).

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83 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863.

84 UCPR r 212(2) does not permit redaction of unhelpful expert opinions.

85 See the prior references in this paper regarding *Watkins v State of Queensland* [2008] 1 Qd R 564.

b) clearly identify their grounds for the redaction.

c) seek the opponent's concurrence to the redaction.

173 Strictly, redaction may only occur by:[86]

a) agreement.

b) order of the Court.

174 If any dispute is pressed, the presiding judge may (often should) peruse the documents to determine whether any claimed privilege should be upheld.[87]

175 The same position applies (in the Federal Court at least) with respect to material that is commercially sensitive, although it is less likely that any prior agreement might be achieved in such cases .[88]

176 The situation with respect to purely *private* and *personal* but *irrelevant* information is less clear, though it is likely (in an appropriate case) that redaction will be permitted where it is *irrelevant, highly personal, and unreasonably infringes the privacy of a party*.[89]

177 Another approach may be to argue (with social medial at least) the each "post" represents a *separate document* (though this may be difficult).

178 As mentioned previously, the judge may need to view the unredacted document to determine:[90]

a) the merit of the dispute; and

b) the limits (if any) to be placed on disclosure.

c) If the court concludes that a party has acted unreasonably then an adverse costs order may follow.[91]

Expert Reports.

What is Discoverable:

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86 *MG Corrosian Consultants Pty Ltd v Gilmore* [2011] FCA 1514 per Barker J at [10]; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 4) [2010] FCA 863 per Logan J at [98]; *Menkins v Wintour* [2007] 2 Qd R 40, [2006] QSC 342 per Mackenzie J at [12-13].

87 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 70; *State of Queensland v Allen* [2011] QCA 311 per Fryberg J at [87]; *Mahoney v Salt* [2012] QSC, 43 per Crowe J at [13]. This is particularly so where the outcome depends on the character or purpose of the document, when regard is had to the specific provisions of the Act or provision requiring disclosure.

88 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* [2011] FCA 1509 per Rares J at [4]; *Orora Ltd v Asahi Holdings (Australia) Pty Ltd* [2015] VSC 749 at [32].

89 See, for example, *Mackelprang v Fidelity National Title Agency of Nevada, Inc* 2007 WL 119149 (D Nev) (2007) and extra curial observations by The Hon T F Bathurst AC in the Handbook for Judicial Officers, *Tweeters, Posters, and Grammars Beware: Discovery of Social Media Evidence*, Judicial Commission of NSW, October 2021. Also see *Menkins v Wintour* [2007] 2 Qd R 40, [2006] QSC 342 per Mackenzie J at [12-13].

90 *MG Corrosian Consultants Pty Ltd v Gilmore* [2011] FCA 1514.

91 *Ibid,* [12].

179 The UCPR abrogates legal professional privilege over documents *"…consisting of a statement or report of an expert*".[92]

180 Draft expert reports, however described, are also discoverable.[93]

181 They are discoverable in the proceedings regardless of whether the commissioning party decides to deploy the report at any trial.[94]

182 Also discoverable are the experts *notes and working papers and other material* relied on by the expert in arriving at the expert's opinion.[95]

183 They are discoverable as they do not comprise *communications* falling within the scope of legal professional privilege.[96]

184 While a solicitor's letter of instruction ('LOI') to an expert is presumptively a privileged communication, that privilege is lost if:[97]

a) the expert attaches or relies on the contents of the instruction letter in the report; or

b) the expert's opinion does not itself repeat the assumptions on which the expert's opinion is based.

185 That position is different when then the privilege is modified by statute.[98]

186 For example, in *Watkins v State of Queensland* [2008] 1 Qd R 564 Keane JA (with whom the other judges agreed), with respect to a report *deployed* by a party for the purposes of s 20(3) PIPA:

> "*… It is readily apparent that s 30(2) of the PIPA is not intended to operate to preserve privilege in any of the documents described in s 20(3)…* Accordingly, it is, I think, clear that *the legislature did not intend by s 30 that the obligations imposed by s 20 should be subject to confidentiality as against the party in whose favour those obligations were created*."[99]
>
> …
>
> "Accordingly, I have concluded that *the communications relating to the commissioning of Prof MacLennan's report were not privileged under the general law*. The point, for present purposes, is not that the PIPA has impliedly abrogated privilege in communications associated with the production of a *report* to be used in litigation; *the point is that the effect of s 20 of the PIPA is that the report and the associated communications were never the subject of privilege*."[100]

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92 UCPR r 212(2). Here the judge permitted redaction of commercially sensitive material from any publicly available copy of an expert report as there was a concern that the information would assist malevolent hackers to access Optus' infrastructure.

93 As discussed above. Also see *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373, 376-377, per Douglas J at [13].

94 *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255 per Crow J at [102-104].

95 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141.

96 *Ibid.*

97 As discussed previously. Also see *Australian Securities & Investments Commission v Southcorp Ltd* [2003] FCA 804 at 441-442, per Lindgren J; Kentish Council v Bellenjuc Pty Ltd [2011] TASSC 58 at 52; *Fairhead v West Australain Newspapers Ltd [2015] WASC 368 per Martin CJ.*

98 As discussed previously.

99 *Watkins* at [73].

100 *Watkins* at [80].

187 A lawyer's notes of discussions with an expert may be discoverable in the pre-litigation phase only if their content brings them within the description of documents that are discoverable[101] and where legal privilege has been excluded (under either WCRA, PIPA or MAIA).[102]

188 In *Enklemann & Ors v Stewart* & Anor [2023] QCA 155 at [18-22], [26] the plurality (Bond and Flannagan JJA and Bradley J) found that a solicitor's notes of a conference with an expert, where the expert was not asked to produce a written report about the matters the subject of the conference, did *not* constitute either *"a statement or report of an expert"* within the meaning of r 212(2) UCPR.

189 The Court noted this approach was also consistent with *State of Queensland v Allen* [212] 2 Qd R 148 (which held that a solicitor's file notes of discussions with doctors about an anticipated negligence claim did not constitute "reports" within the meaning of s 30(2) of PIPA.

190 Note that s 41(4) MAIA and s 281(4) are roughly analogous to s 20(3) PIPA, so the *Watkins* position (discussed previously), when apposite, will likely also apply there.

191 The general approach these days is for lawyers to take care when drafting LOI's to ensure they do not contain information adverse to the client's position (wherever possible).

192 That said, it is not unheard of that an inexperienced solicitor may brief an expert with their client's *statement,* or even the client's *proof of evidence*, or the statements obtained from other witnesses, and that these (otherwise privileged documents) will then form a basis of the experts opinion, or even be attached to the expert's report, thereby resulting in the client's privilege over those documents being lost.

193 But the mere fact that an investigative report contains a version of events supplied by a witness to a solicitor for the dominant purpose of the litigation does not result in a waiver of privilege over the witness's statement to the solicitor.[103]

Notes Made by Lawyers in IME Conferences:

194 It is common for the lawyers for a party confer with independent expert medical witnesses prior to commissioning a report.

195 Often these consultations are used to decide whether to commission a *written* report, and if so, on what specific issues.

196 Lawyers will also, from time to time, become involved in editing a *preliminary draft* of the experts report before it signed.

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101 See Table 2 above.

102 See Table 3 above.

103 *Mahoney v Salt* [2012] QSC 43 per Boddice J at [25-26].

197 There is nothing improper about this practise, provided it does not subvert or misrepresent the expert's impartial opinion to the Court.[104]

198 This pre-report process often also results in the lawyers (including counsel) making file notes about their discussions with an IME expert.

199 These notes may:[105]

a) become discoverable, (at least if they relate to obtaining reports from IME's), under the pre-litigation abrogation of privilege.

b) be discoverable in any event in the court proceedings phase as a record of an "expert report" under the UCPR.[106]

200 But absent evidence showing that the notes comprise a statement of a report of the expert, and absent waiver of privilege, they will remain protected from disclosure by reason of legal professional privilege.[107]

201 There is nothing in the Acts or in the ordinary common usage of the word "reports" that confines them to only to documents *signed by the expert*.

202 If and when a solicitor's file note is covered by any statutory abrogation of privilege will depend on the circumstances.[108]

203 A solicitors rile note of conversations with an expert will, absent evidence that they intend to comprise a statement or report of the expert, will presumptively be treated as privileged.

204 In this regard see *Enklemann & Ors v Stewart & Anor* [2023] QCA 155 at [18-22], [26], referred to previously.

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104 *Boland v Yates Property Corporation Pty Limited & Anor* ([1999] HCA 64; 74 ALJR 209; 167 ALR 575 Callinan J at [279]; In *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424 Lindgren J at [19]; *Landel Pty Ltd & Anor v Insurance Australia Limited* [2021] QSC 247 Dalton J at [19-22].

105 The answer to this question will depend on the precise nature of the information recorded in the document.

106 See *Landel Pty Ltd & Anor v Insurance Australia Limited* [2021] QSC 247 Dalton J at footnote 7 (italics added): "... [T]here has been a practice of orally engaging experts and receiving, at least their initial, opinions orally. Only if the expert's initial oral opinion is favourable are documents produced. To my understanding this is a common practice and permitted by the rules. I note that the LexisNexis annotations include, "Although the consultation draft for the UCPR contained a provision that required the recording in writing and disclosure of expert's oral opinions, that provision was ultimately omitted from the Rules." *If, when an expert is giving such an oral opinion, a solicitor takes notes, those notes are disclosable in my opinion*."

107 See *Enkleman v Stewart* [2023] QCA 155 at [18-22], [26], discussed previously in this paper. Here the plurality found that a solicitor's notes of a conference with an expert, where the expert was not asked to produce a written report about the matters the subject of the conference, did *not* constitute either *"a statement or report of an expert"* within the meaning of r 212(2) UCPR. At [26] the plurality observed: *"Rule 212(2) does not abrogate the appellants' right to resist producing such a document to the respondents. It is not a statement or report of an expert, within the ordinary meaning of the words. There is no evidence to found a conclusion that the note was made by the appellants' solicitors as a statement or report of an expert. Nor that it was made as a draft of such a document."*

108 See observation by Fryberg J in *State of Queensland v Allen* [2011] QCA 311 at [88-91].

205 Declan Kelly SC and Dan Butler, *Ethical Considerations in Dealing with Experts*, Hearsay, 24/2/2011 observed (there with respect to the abrogation of legal professional privilege over expert reports in rule 212 UCPR):

> "The rules do tend to create some contrived and artificial situations. We understand that some members of the Bar direct their solicitors not to take verbatim notes of what the expert says in a preliminary conference because of a concern that the notes might be discover able under rule 212(2). The idea is that the solicitor should sit in the conference absorbing the import of what is said and can later reflect the substance of the opinion in a letter of advice to the client cloaked with privilege. …
>
> We think that there is nothing objectionable about this process, but it should be observed that if ethical behaviour is essentially meant to be grounded in norms of honesty and common sense this type of practice is at least contrived and unusual in nature which invites the question, why is it ethical? *We think the answer is that the behaviour (although contrived) protects a privilege otherwise available to the client*."

206 In summary, there appears to be no legal or ethical requirement that a lawyer *bring into existence* a document that may then become discoverable.

In Conclusion.

207 I hope the forgoing goes some small way towards demystifying the fog surrounding some of the obscure aspects of disclosure.

208 Queensland is not the only jurisdiction that has legislated for pre-litigation disclosure, or modified (to some extent at least), the common law right of legal professional privilege.

209 Further, the proliferation of Acts and rules modifying the common law means that notions of what is discoverable, and what is not discoverable, have changed over time.

210 We can no longer rely on the common law as a universal guide to practise.

211 In every case a lawyer should ask themselves if a document one that is within the categories of *documents* that an Act requires to be disclosed; if so

a) is there any valid claim to some *legal privilege* over any *content* of the document *other than legal professional privilege*?

b) if not, is the material covered by the scope of the prior common law claim for *legal professional privilege*?

c) if so, is the document one to which a claim for *legal professional privilege* has been:

(A) waived by the client; or

(B) expressly excluded by any relevant legislation.

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