

Book Reviews

Law of Privilege, Suzanne B McNicol

Law Book Company Limited, 1992 (RRP \$130)

Few areas of the law affect the practising barrister so much as privilege. This estimable book is a concise, yet thoroughly researched, monograph. To it a busy practitioner may safely have recourse, confident that the main authorities and the policy arguments which inform them will be set out clearly for him or her.

Chapter 1 provides a clear exposition of the rationale for the privilege, the general coercive power of the court to obtain access to documents, and questions of waiver of privilege and the like. (This last topic, especially that involving "inadvertent" waiver, has been the subject of several decisions since the book was published.)

The main areas of interest for New South Wales barristers will be the large chapters Numbers 2 and 3, in which the author examines Legal Professional Privilege and the Privilege against Self-Incrimination. Subsequent chapters examine the priest-penitent privilege, the doctor-patient privilege, public interest immunity and without prejudice communications.

The book is showing its age a little here (it was published in 1992 and the law is stated as at 15 May 1992) because of the large developments which have occurred recently in these areas. For example, the interesting discussion on whether a corporation may exercise the privilege against self-incrimination pp. 160-170, must now be read in the light of the *Caltex* decision (1993) 118 ALR 392 a result which the author anticipated at p. 170. Similarly, the views expressed on *Waterford's* case ((1987) 163 CLR 54) with respect to the privilege attaching to in-house advice (pp. 76-80) have been recently re-examined by Heerey J. in *Grofam Pty Ltd v ANZ* ((1993) 116 ALR 535). Still unresolved is the issue of the fiduciary's duty to make disclosure with respect to the handling of fiduciary assets, and the fashioning of a "civil immunity" to require disclosure: *Istel v Tully; Reid v Howard* ((1994) 31 NSWLR 298); *Re New World Alliance* ((1994) 118 ALR 699).

Related to this is an increasingly difficult problem concerning the conferral of civil immunity upon a witness as a means of protecting him against possible criminal proceedings. The question has arisen most recently in *Reid v Howard*, where the Court asserted a power to "mould" an order which required the witness to give evidence while nevertheless protecting him. (Compare Sheppard J.'s less than enthusiastic view of this in *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Basel* and the English Court of Appeal's view in *United Norwest Co-operative Ltd v Johnstone* (unreported, 11 February 1994). The High Court has granted special leave in *Howard*.

Happily, the author endorses the eminently sensible conclusion that the incidents of legal professional privilege not be extended to accountants or merchant bankers(!), however that latter occupation is defined (pp. 4-6). As mediation increases as a means of dispute resolution, the question of "mediator's privilege" (examined at pp. 455-461) will become increasingly important.

The index is full; a surprising omission is any specific reference to "copies" of documents (see the discussion at pp. 83-86). The bibliography is also complete (one notable omission is the leading article by Wood, "Challenging subpoenas duces tecum: is there a third party view?" (1984) 10 Sydney L Rev 379) and generally free from error (but surely

even Heydon was not publishing in the *Modern Law Review* at the age of four - see p. lv where a 1947(!) article is attributed to him; the error is repeated at p. 26 note 143).

All in all, a very useful book of first reference, so long as the reader then updates from 1992 in view of the tremendous changes to the law and the press of new cases which are decided almost daily in this most practical of areas. □

Lee Aitken

Criminal Law News

Butterworths

Criminal Law News is stated by its publishers, Butterworths, to be a criminal law newsletter for NSW and the ACT. It is edited by two very experienced barristers in the criminal jurisdiction, R N Howie QC and P A Johnson. The periodical has three sections, *Cases, Recent Legislation* and *Articles*. The cases are arranged in alphabetical order and are very easy to find. The case notes, of about half a column each, provide an excellent summary of the central aspect of each case. For example, *R v LKP* is a case dealing with culpable driving. The summary refers to (1) the issue: whether momentary inattention could amount to driving in a manner dangerous, and (2) the conclusion with a reference to the views of the Chief Justice that momentary inattention could amount to driving in a manner dangerous.

In the first issue there are six cases noted on questions of liability, 13 cases on sentence and three cases on trial procedure. The cases on sentence are particularly helpful. Hopefully, no longer will counsel face the Court of Criminal Appeal only to be told that a similar case had been decided a short time before. In the increasing complexity of trial procedure the cases on trial procedure are extremely useful.

In the section dealing with recent legislation the authors provide a useful analysis concerning changes to the law for review of doubtful convictions under s. 475 of the *Crimes Act*. Rather than simply summarising the legislation, the authors provide an extensive analysis of the changes and the effect that they will have on the present state of the law.

The article in the first issue of this newsletter is written by the Crown Advocate, Mr Howie QC. He examines the right to silence, both its history and the present state of the law. The article is short and to the point and is written in concise and simple language.

The newsletter is priced at \$115 which is not a large amount in comparison to many present legal publications. The importance of the newsletter is that it is a newsletter of information rather than one espousing any particular view.

In the present state of contemporary law the ability to find information simply and quickly has become increasingly difficult and necessary. Digests and short notes of cases are essential if the busy practitioner is to be aware of the latest developments in any particular jurisdiction. The opportunity to find out the latest law from fellow practitioners has become increasingly limited. It is a dying practice. The sheer volume of law and legal decisions being created each month makes such a process now virtually impossible. It is said that in comparison to previous generations our generation has more information, less knowledge and no wisdom. Wisdom cannot be conveyed through publications such as this, but information can and, with proper information, the discerning legal mind may at least have an opportunity to find the wisdom. I'm going to subscribe. What more can I say? □ Brian Donovan QC