ATTACHMENT 1

The Submissions of the International Association for the Protection of Intellectual Property (AIPPI) on Protection of Clients' Intellectual Property Professional Advice in response to the WIPO Report SCP/16/4 Rev – 'Confidentiality of Communications between Clients and their Patent Advisors', for the meeting SCP/16/4

1. Introduction

1.1 AIPPI congratulates WIPO on its Report SCP/16/4 Rev. This Report brings a very helpful focus onto the similarities of common and civil law in relation to the protection of confidential information in communications between clients and their patent advisers, and the problems of maintaining that protection.

1.2 The Report acknowledges the common purpose which applies to privilege in common law and professional secrecy in civil law, that is, the supporting of full and frank communications between clients and their patent advisers. The common law defines the purpose of such full and frank communications as supporting the obtaining of correct advice. The common law further defines that purpose as being to achieve two public interests – first, enforcement of the law and secondly, (efficiency in) the administration of justice.[1] The civil law defines the purpose of professional secrecy as providing what is necessary for the accomplishment of their professional tasks.[2] The word 'necessary' relates to anyone affected, i.e. clients, professional advisers and the public.

1.3 The Report constructively projects potential studies by the SCP of the problems of failings in protecting IP professional advice from disclosure,[3] and of the mechanisms which could be applied in solving the problems.[4]

1.4 AIPPI feels that some further information gathering by the SCP might be required for WIPO to provide further information on the relevant mechanisms which are, in effect, options for solving the problems.[5] For that purpose, AIPPI submits WIPO should be mandated to carry out whatever necessary information gathering is required.

1.5 AIPPI further submits that the SCP should mandate WIPO to study and report on how the SCP should decide which of the mechanisms identified by WIPO should be preferred by the SCP for solving the problems of CAP.

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1 Paras. 17 and 29 of SCP/16/4 Rev.

2 Paras. 22 and 29 of SCP/16/4 Rev.

3 See Section V of SCP/16/4 Rev.

4 Paras. 38-51, 63 and 64 of SCP/16/4 Rev.

5 See Section V entitled 'Subjects for International Cooperation', in SCP/16/4 Rev.

1.6 AIPPI has some important reservations and comments on some of the detail of the Report. They are non-exhaustively described in these Submissions. However, AIPPI's reservations and comments should not be allowed to obscure AIPPI's overall support for the Report.

2. Further acknowledgement by AIPPI of the achievements of WIPO and the SCP on CAP.

2.1 AIPPI considers that the following points have been well-established in the WIPO/AIPPI Conference on Privilege in May 2008,[6] and since then in the proceedings of the SCP including WIPO's Reports SCP/13/4, SCP/14/2 and SCP/16/4 Rev, and the oral and written Submissions of the IP NGOs including by AIPPI.[7]

(i) Nearly every country provides some level of protection in maintaining the confidentiality in communications between clients and their patent advisers from forcible disclosure. However, problems arise from a lack of harmonization in respect of cross-border recognition of this protection.

(ii) The problems of the lack of cross-border recognition of national protection of the confidentiality of client/patent adviser communications can only be solved by international agreements.

(iii) The two main forms of protection of the relevant communications between clients and their patent advisers are privilege (common law) and professional secrecy (civil law).

(iv) The origin of common law privilege was in English jurisprudence from the 16th Century (1577).[8] It has been applied in England and over time in common law countries generally since then. An origin of professional secrecy was in French jurisprudence from about the end of the first decade of the 19th Century (1810)[9] and has been applied in France and over time in most civil law countries at least since then.

(v) Both privilege and professional secrecy exist to enable full and frank communications between clients and their legal advisers.[10] The objectives of such communications have been described by commentators differently, ie. for common law – enabling correct legal advice for obtaining public interests in the enforcement of the law and efficiency in the administration of justice, and for civil law – providing

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6 http://www.wipo.int/meetings/en/2008/aippi_ipap_ge/index.html

7 AIPPI SCP/14 submissions: http://www.wipo.int/scp/en/meetings/session_14/studies.html
AIPPI SCP/15 submissions: http://www.wipo.int/scp/en/meetings/session_15/studies.html
AIPPI SCP/16 submissions: http://www.wipo.int/scp/en/meetings/session_16/studies.html

8 *Berd v Lovelace* (1577), 21 ER 33 (Ch) and *Greenough v Gaskell* (1833) 39 ER 618 (Ch).

9 Paras. 2.5-2.9 AIPPI Submissions to WIPO on WIPO Report SCP/13/4 dated 31 August 2009.

10 See para 29 of SCP/16/4 Rev – 'Both regimes have developed their own mechanisms of protecting confidential communications with lawyers for the sake of ensuring frank and open communications necessary for the accomplishment of their professional tasks'.

what is necessary for legal advisers to accomplish their professional tasks. It is obvious that these descriptions apply to both privilege and professional secrecy.

(vi) An exception to the application of both privilege and professional secrecy is crime/fraud. In other words, the protection will not be applied to prohibit forced disclosure of communications where the subjects of the action and the communications sought to be disclosed, are related to crime or fraud.

(vii) The protection from forcible disclosure is not in conflict with the disclosure requirements of the patent law.[11]

(viii) In relation to overcoming the cross-border problems of CAP, there are mechanisms which Member States could adopt which would supplement their national protection whilst allowing flexibility as to differences particularly in relation to exceptions and limitations.[12]

2.2 In the light of what has been established as described in paragraph 2.1 above, AIPPI submits –

(i) **the acceptance and application by nearly every country on the basis of laws that have been in existence for between 200 and 500 years and the absence of any proposal to abrogate those laws means that the right starting point for the work of WIPO and the SCP should be – how the problems of these laws should be solved so that the laws are made effective in relation to international transmissions of IP professional advice,**

(ii) the recent developments of the law of privilege in Switzerland and Sweden should be studied and brought to the attention of the delegates of the Member States,

(iii) the same (as in (i)) for the emerging proposals to develop the law of privilege in Australia and Malaysia,

(iv) the SCP should mandate WIPO to ascertain from the Member States by Questionnaire such information as is necessary or desirable for WIPO to study and report to the SCP in relation to options for overcoming the problems of cross-border recognition of national protection of confidentiality in patent adviser communications, and

(v) the SCP should mandate WIPO to study and report on how the SCP should decide which mechanism should be preferred by it as the course to be recommended to the Member States for adoption.

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11 See para. 52 of SCP/16/4 Rev. See also Section 3 'Disclosure required by patent law and its relationship with privilege' of the AIPPI Submissions to WIPO for SCP 16 dated 28 February, 2011. Further, the reservation that privilege might be used as an instrument of fraud suggested by a few delegates and the TWN is a misleading speculation. See para. 52 of SCP/16/4 Rev and paras 3.17 to 3.20 of these Submissions by AIPPI to WIPO.

12 3 Ibid.

3. Matters of detail

The public interest bases of privilege and professional secrecy

3.1 AIPPI has already commented that there is a well-established common purpose of privilege and professional secrecy in enabling a frank and open dialogue between professional advisers and their clients. This is not surprising because the outcome they seek is the same – effective protection from forcible disclosure.

3.2 In paragraph 7 of SCP/16/4 Rev the following comment is made as to the downside of loss of confidentiality.

> Such an inadvertent loss of confidentiality could have a negative impact on the quality of intellectual property advice obtained from patent advisors, since a frank and open dialogue between the patent advisors and their clients could be discouraged due to the fear that the advice could be made public in the future.

This statement in effect warns that the quality of intellectual property advice could be adversely affected through poor communications between the client and the adviser. In other words, the fear of advice being made public involves for the client a complex range of factors negative to open communications. Those factors produce major barriers in the instructing on facts and advising process. In the common law context, 'the fear' includes the prospect of being cross-examined on the process of obtaining and giving of the advice, being subjected to criticism for failure to provide the facts fully, or failure to accept and act on the advice, and such like. Similar barriers apply to the clients of civil law advisers. The same barriers which apply to clients advised in common law countries (absent the protection), exist for clients in civil law countries where they may have the prospect of having to litigate the same rights in common law countries. The importance of potential for 'negative impact on the quality of intellectual property advice' to which WIPO refers, should not be underestimated in view of the history of the law in both common law and civil law countries. The obtaining of advice which is correct (a quality Member States clearly accept as fundamental to achieve) is reflected in the provision of protection which has existed for centuries.

3.3 The queries which have been raised by some delegates and observers in the SCP to date as to the wisdom of applying protection from forcible disclosure to legal advice given by patent advisers stand in the face of the protection existing for such a long time without public controversy and without there being any proposal that those laws be abrogated. It is not a question of having a fair balance of the views of those who are in favour of the protection on the one hand and those who are not in favour of it on the other. What is the logical basis for the protection not being applied to patent advisers (bearing in mind that the very same advice will continue to be protected in the case of patent lawyers)? What is the basis of support for the position of those that raise the queries in face of Member States' acceptance and application of laws providing protection from forcible disclosure of legal advice for hundreds of years? 'Patent advisors' (as defined in the Report) are giving legal advice. The failure to take the long history of the protection into account in favour of maintaining the protection of clients whose protection has been reduced by the development of a new category of professional legal advisers, produces in the SCP a negative bias against the protection for which there is no proper foundation.

3.4 In paragraph 14 of SCP/16/4 Rev, the following statement is made in the last sentence:

> In parallel with the professional duty of confidentiality, the client-attorney privilege is intended to promote the broader public interest in the observance of law and the administration of justice by creating a specific exception to the discovery of information in litigation.

AIPPI agrees. By way of reinforcement, AIPPI further observes that the reverse of this proposition is that without the support of the protection, there is greater potential for wrong advice through an incomplete analysis of the facts or through the adoption of a factual position which is incomplete or wrong. The centuries old position of the Member States asks in effect - how can it be expected that not applying protection from forcible disclosure would provide the best opportunity for obtaining or giving the correct legal advice?

3.5 In paragraph 17 of SCP/16/4 Rev, the Report refers to reasons justifying client-patent adviser privilege and refers to the competing public interest to use all rational means for ascertaining truth during an *inter partes* procedure. AIPPI observes that the balance between the public interests in having protection from forcible disclosure or having forcible disclosure, has been decided for centuries in favour of applying the protection and there is no present controversy about that being correct.

3.6 Another surprising feature of the questioning of privilege is why the protection is not supported for clients of 'patent advisors' when the advice given by such advisers is protected from disclosure if a lawyer gives the same advice. AIPPI observes that WIPO comes to this same point in the second sentence of paragraph 17 of SCP/16/4 Rev which reads:

> Another argument supporting the client-patent advisor privilege is that, even if not all patent advisors are qualified lawyers, patent advisors provide legal advice relating to patent law, such as the patentability of inventions or the legal scope of patent protection.

AIPPI has already pointed out[13] that the application of the protection to non-lawyer patent advisers is not an extension of the law – such patent advisers are doing the same job for clients that patent lawyers, to whom the protection applies, can do. AIPPI again observes that applying privilege to client-patent adviser relationships simply supports maintaining for the clients the same protection for advice which they would have had if the advice were obtained from patent lawyers.

3.7 In paragraph 30 of SCP/16/4 Rev, the following comment is made:

> Whether under the common law system or under the civil law system, if the protection of confidentiality of communications with patent advisors is not adequate, a client may be inclined to consult a lawyer and not a patent advisor on intellectual property matters. This does not appear to encourage the activities of patent advisors and to promote a better recognition of the important work carried out by patent advisors.

WIPO correctly observes that the lack of adequate protection for communications with a 'patent advisor' (as compared with a lawyer) also raises a fundamental question in respect of access to justice. Moreover, there is an additional issue which should be mentioned in

[13] Para. 3.7 of AIPPI's Submissions to WIPO dated 30 August 2010: http://www.wipo.int/scp/en/meetings/session_15/studies.html.

this context. Whilst the protection of confidentiality of communications with non-lawyer patent advisors remains inadequate, there is a serious risk that the protection of confidentiality applied to client/lawyer advice will be lost by its transmission from the client-lawyer side to the non-lawyer patent attorney side. That is another reason why correcting the imbalance is necessary to encourage clients and their non-lawyer patent attorneys to get the legal advice right and to promote a better recognition of the important work which those patent attorneys carry out.

The common factor that lies behind the application of privilege in common law countries

3.8 In paragraphs 18-21 of SCP/16/4 Rev, the Report comments on an argument that CAP was introduced not because of the legal nature of lawyer advice, but because of rights to appear in court and obligations which lawyers have under codes of ethics. The argument concludes that as the rights and obligations do not apply to non-lawyer patent advisers so, in effect, privilege should not be applied to them. Unfortunately, this argument referred to in the Report (it is not WIPO's argument) is wrong from the start. Privilege was introduced neither 'because of the legal nature of lawyer advice' nor because of 'rights to appear in court and obligations which lawyers have under codes of ethics'. It was introduced, as stated previously, both in England in the 16th Century[14] and France in the 19th Century to give clients better prospects of getting correct legal advice through supporting full and frank communications by protecting those from forcible disclosure.

3.9 The consequence of the 'starting point error' in the argument commented on by WIPO in paragraphs 18-21, is that the commentary misses the point which should be made based on the real origin and purpose of privilege. That is, the main reason to apply privilege to the communications client's of non-lawyer patent attorneys who are giving them legal advice is exactly the same as it was for lawyers (and still is) – ie. to give clients 'a fair go' at getting correct legal advice through protecting full and frank communications. It should be unnecessary to spell out that creating those conditions serves the same public interests as it does for lawyers. The protection is essentially founded on the relationship of trust and dependence necessary between client and the legal adviser. The client knows the facts. The adviser knows the law and how to apply it to the facts. Hence, the mutual dependence.

3.10 In paragraph 21, the Report asks whether there are any common factors applicable to all common law countries for determining whether to apply CAP or not. Based on the 'information gathered to date' , the Report concludes that there are none.[15].

3.11 However, there is a common factor applicable to all common law countries – it is recognition of the need to support the obtaining of correct legal advice by providing the conditions (ie. by protection from forcible disclosure) in which full and frank communications between clients and their lawyers in the process of advising on the law, can occur. That same need exists in relation to obtaining correct legal advice from non-lawyer patent advisers just as it does for the clients of lawyers.

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14 See the Appendix to these Submissions.

15 Para 21 of SCP/16/4 Rev.

3.12 As of now, acceptance of the need referred to in the previous paragraph is being reinforced by the providing of privilege from forcible disclosure of non-lawyer patent advice to the clients of such patent attorneys in, for example, New Zealand, Australia, Switzerland and Sweden. Malaysia is presently considering providing the same protection and Australia is reviewing its law with a view to protecting from disclosure within Australia client/patent adviser communications including overseas non-lawyer patent advisers. It seems reasonable to conclude that the efforts of the SCP (supported by WIPO) in relation to the failings of national protection, have not gone unnoticed!

The need for certainty as to the protection which is provided.

3.13 In paragraph 36 of SCP/16/4 Rev, the following statements are made:

> The above scenarios describe cases where the national rules regarding the preservation of confidential communication with foreign patent advisors are clearly regulated. In reality, there is much uncertainty in many countries in this area for two reasons: first, the issue has never been addressed; and second, varied decisions have been rendered by courts depending on how they treat the issue. Such uncertainty is obviously a risk factor for clients who have to seek advice from patent advisors or who are increasingly exposed to patent disputes in foreign countries.

AIPPI agrees with these statements and would add that the 'risk factor' referred to by WIPO is one of the factors creating 'fear' in the minds of clients as to their freedom to have frank and open communications with their advisors.[16] In the WIPO/AIPPI Conference on Privilege in May 2008, the view of Justice William Rehnquist of the Supreme Court of the US, was accepted as a principle which the law or amendments made to the law in relation to the protection, must achieve. The comment made by Rehnquist J in *Upjohn Co v United States*, 449 US 383 (1981) was as follows:

> If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions (Ed. also 'communications') will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts is little better than no privilege at all.

3.14 AIPPI submits that it is therefore highly desirable within each country to have the standard of protection of clients against forcible disclosure of confidential information in their patent advisors' communications, at the one level or scope. Failure to achieve this, means that national protection is uncertain which is, as Rehnquist J has stated, little better than no protection at all. A similar position should be obtained internationally but possibly allowing for differences at the margin having regard to the different needs of particular countries.

Analysis of the *Nobelpharma* case in relation to the suggestion that protection against forcible disclosure may be an instrument of fraud.

3.15 In paragraph 53 of SCP/16/4 Rev, the Report refers to:

> … concerns have been expressed that the confidentiality of communications between a patent advisor and his client may hinder courts and patent offices from reviewing evidence relevant to the determination of the case, such as a document relevant to patentability.

[16] See paragraph 3.2 above.

The Report then mentions as an 'example' a case which is cited as the *Nobelpharma* case. Thus, the Report goes on to say:

> For example, a case has been cited where a patent agent, who had received from an inventor a draft specification containing reference to a book that could become critical prior art for the determination of the patentability of an invention, had deleted the reference to that book from the patent application as filed, and the patent was granted. As this example suggests … the privilege or the professional secrecy obligation for patent advisors might be misused and could result in keeping critical information for the determination of the case away from public inspection.

The origin of the information and criticism to which the Report refers is at least in part a TWN submission.[17] AIPPI has not previously responded to this submission by the TWN.

3.16 The first thing to be noted as to the reference by the Report to the *Nobelpharma* case is that that case was **not** a case in which there was an abuse of privilege. Accordingly, with respect, it is not correct to assert *Nobelpharma* as an 'example' of abuse of privilege which indicates that privilege or professional secrecy might be misused. The case involved an allegation of fraudulent practice by a patent agent in deleting a reference to prior art from documents produced in the case. TWN did not assert *Nobelpharma* as being an example of abuse of privilege. What TWN said was speculation about the possibility of privilege being misused. On page 78 of SCP/13/8 Prov. line 5 and following, the following statement by TWN is reported:

> The Representative continued that if the communication with the agent had been privileged, the Patent Office and the court would never have found out, and the patent would still be standing.

3.17 The speculation on this basis about privilege being used to defeat justice or due process in patenting is in AIPPI's view unfair and misleading. Privilege was not involved in *Nobelpharma*. Why then refer to *Nobelpharma* when the context is a questioning of the secure use of privilege?

3.18 TWN is raising as an issue whether abuse of privilege is an actual problem. That issue is something of an embarrassment for those who hint at that proposition because there is up to about 500 years of experience of the application of privilege to call on to show whether there is a problem. Failing to substantiate the problem tends to suggest that the problem which is being suggested, is not one in practice.

3.19 Unfortunately, the real point from *Nobelpharma* is a different one and one which we all knew before ie that humans at every level can behave fraudulently. That is the real point and to suggest that privilege may be a cause or catalyst of fraudulent behaviour based on *Nobelpharma* is not correct. Dealing with what may be possible (which is what TWN was doing), virtually anything which could be turned to the advantage of someone determined to behave in a fraudulent way (like money for bribery and corruption, the pen to carry out counterfeiting, or fuel to drive the getaway car in a robbery) can be an aid to crime. As a matter of commonsense, we are not going to deny ourselves the benefits of money, pens or fuel because of the possibility that someone else might use them in aid of crime. The

[17] SCP/13/8 Prov. 225.

same applies to protection from forcible disclosure of professional legal advice – there is a powerful need to secure the benefits which flow from the application of that protection.

3.20 Another point made by TWN in 225 was that there is a need for legal practitioners to have obligations to courts backed by professional codes of conduct. No evidence is cited by the TWN of the connection between such duties and codes of conduct and avoidance of fraud. As AIPPI has previously submitted in this document, whatever the duties to courts or professional codes of conduct may have been, for not less than 2 centuries countries have provided protection against forcible disclosure of legal advice as the paramount subject for achieving public interests as opposed to keeping open for disclosure by force whatever may be embargoed from disclosure by the protection. AIPPI considers it a fair point that qualifications, duties to perform standards and professional codes of conduct should be part of the mix of any solution to the problems of CAP. AIPPI further considers that it would be desirable to have flexibility around these subjects in any such solution because of the different needs of the countries involved.

3.21 In paragraph 54 of the SCP/16/4 Report Rev, the Report observes as follows:

> In the end, the issue comes down to a global policy consideration on balancing the various interests involved, and many countries have made conscious policy choices with a view to promoting the public interest in having the law respected.

AIPPI agrees with that proposition – that proposition is consistent with AIPPI's position as stated in the previous paragraph.

3.22 Both in paragraph 54 and 55, the Report suggests that the SCP may benefit by hearing the experiences of countries that provide privilege for patent advisors. Those proposals have appeal to AIPPI as possibly providing relevant information to Member States but one should bear in mind the following reality check. **First**, no case of abuse of privilege has been cited in the SCP to date. Even the reference made in the SCP to one of the tobacco cases was **not** to a case of abuse of privilege. In that case, there was an allegation of fraud relating to targeted document destruction pursuant to a so-called 'document retention policy'.[18] **Secondly** the history of the provision of privilege for patent advisers (viz Australia, UK, New Zealand) is long and the lack of citations indicating problems of abuse by reason of the existence of such protection is at least neutral, if not positive.

4. Significance for all countries of the relevant protection being applied to IP professional advisers (including non-lawyer 'patent advisors') considering the Development Agenda

4.1 WIPO has dealt with this topic in Section III B (paragraphs 56-60) of SCP/16/4 Rev. There is however, a more fundamental basis for all countries including developing ones, to support the development of their relevant national laws and to obtain respect for those laws internationally as described below.

4.2 AIPPI has pointed out that nearly every country provides some form of the relevant protection. Further, for those countries that do not already do so, including in the

[18] *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002).

protection the clients of non-lawyer 'patent advisors' is not extending the scope of the advice which is protected. The IP legal advice is already accepted as worthy of being protected but the law has not kept up with the scope of IP professionals who give that advice. The inclusion of non-lawyer 'patent advisors' respects the role of non-lawyer 'patent advisors' whose emergence in economies around the world, if not promoted and regulated by the relevant countries, is permitted and encouraged. Their emergence is a logical economic development to the advantage of the economies where it has occurred and is occurring.

4.3 IPRs are mainly owned by private interests. The existence and protection of IPRs are vital to trade. To develop trade, countries need to provide conditions through their laws which are attractive, or at least no barrier against owners of IPRs doing business there.

4.4 Owners of IPRs cannot but consider failure to respect the confidentiality of legal advice given in a particular country to be negative to doing business there. The same owners cannot but consider failure to respect the confidentiality of their legal advice obtained in another country, as negative to doing business there.

4.5 Reality is that economic factors like demand, price, market size, reliability of being paid etc are likely to weigh on owners of IPRs who may then take risks (including in relation to the confidentiality of their legal advice) in order to be involved in trade. However, when it comes to a developing country whose market factors may be relatively less attractive than elsewhere, the owners may not accept the risk.

4.6 For these reasons (among others such as WIPO has explained in Section III B), AIPPI asserts that it is positive for developing countries to support and react constructively to what is another aspect of their development, namely, providing appropriate protection from forcible disclosure of IP professional advice.

Appendix

Rationale for Legal Privilege

1. Client-lawyer privilege has existed at common law since at least 1577. In *Berd v Lovelace* (1577) 21 ER 33 (Ch), the court ordered that a solicitor who had been served with a subpoena to testify should not be examined:

> Thomas Hawtry, gentlemen, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hat received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same, and that he shall be in no danger of any contempt, touching the not executing of the said process

In the first treatise devoted to evidence, Chief Baron Gilbert explained the rationale for legal privilege as follows:[19]

> A Man retained as Attorney, Counsel, or Sollicitor can't give Evidence of any thing imparted after the Retainer, for after the Retainer they are considered as the same Person with their Clients, and are trusted with their Secrets, which without a Breach of Trust cannot be revealed, and without such sort of Confidence there cou'd be no Trust or Dependance on any Man, or no transacting of Affairs by the Ministry or Mediation of another, and therefore the Law in this case maintains such sort of Confidence inviolable.

This passage clearly indicates that legal privilege finds its basis in the relationship of trust and dependence necessary between client and lawyer. It makes no mention of lawyer's strict adherence to a professional code of ethics as the rationale for the privilege.

2. Chief Baron Gilbert's interpretation seems to have found wide acceptance at the time. Blackstone, who only briefly dealt with the law of evidence in his *Commentaries on the Laws of England*, specifically referred his readers to Chief Baron Gilbert's treatise for further amplification of evidence law.[20] Henry Bathurst in *The Theory of Evidence* used Chief Baron Gilbert's work as the basis of his treatise.[21]

3. Whilst the scope of legal privilege has evolved, the rationale for its existence has not significantly altered over time. In *Greenough v Gaskell* (1933) 39 ER 618 (Ch), Brougham LC (at 620–21) explained the rationale for legal privilege in similar terms to Chief Baron Gilbert:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection… If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits, begun, or intended, or expected, or apprehended, no one could safely

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19 *The Law of Evidence* (Dublin 1754) at 98; cited in Comment, 'Developments – Privileged Communications' 98 *Harvard Law Review* (1985) 1450, 1456

20 William Blackstone, *Commentaries on the Laws of England* (1763-1768) 367; cited in Comment, 'Developments – Privileged Communications' 98 *Harvard Law Review* (1985) 1450, 1456

21 Henry Bathurst, The Theory of Evidence (London, 1761); cited in Comment, 'Developments – Privileged Communications' 98 *Harvard Law Review* (1985) 1450, 1456

adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.

On behalf of the Committee of Q199
by its Co Chairman, **Michael Dowling**.

Dated 4 May 2011