



Express law fast track information for clients

20 September 2004

Limitations of legal professional privilege to communications of in-house Defence lawyers

Claims of legal professional privilege (LPP) for communications by lawyers serving in the Australian Defence Force (ADF), or employed in the Department of Defence, to their Defence clients failed because, on the facts, the working environment in which the communications were made was not that of a professional relationship between lawyer and client necessary for the attraction of LPP.

Supporting this position is the fact that these lawyers, in the absence of a statutory right to practise, do not generally hold practising certificates. On the other hand, communications with counsel at the private bar, who also happened to be Defence Reservists, did attract LPP.

Vance v Air Marshal McCormack in his capacity as Chief of the Air Force and the Commonwealth

Supreme Court of the Australian Capital Territory, 2 September 2004, Crispin J, [2004] ACTSC 78 and [2004] ACTSC 85

On 8 September 2004, Crispin J ordered that the judgment be recalled and certain portions of its reasons be amended (see [2004] ACTSC 85).

Also, Air Marshal McCormack and the Commonwealth have since filed an application for leave to appeal against Crispin J's decision of 2 September. What is said in this note is subject to the outcome of any appeal, if leave is granted.

Background

The plaintiff had been a serving officer of the RAAF. He instituted a claim for damages and other relief against the Chief of the Air Force and the Commonwealth for what he alleges was unlawful termination of his employment in the RAAF in August 1998.

He alleges, in essence, that the termination, although purportedly made on medical grounds, was motivated by a desire to remove him from the RAAF, on account of allegations in a report of a board of inquiry into his performance of duties whilst an officer in charge of an overseas RAAF base. Alternatively, the plaintiff alleges that the Commonwealth was negligent in terminating his employment when it knew, or ought to have known, that the recommendation to take that step had not in fact been based upon medical grounds and, or, that the Commonwealth failed to make enquiries that would have revealed that fact.

LPP claim

On discovery, the defendants opposed production for inspection of a number of documents on the ground of LPP.

The LPP claim involved communications with:

- lawyers who were part of the then Defence Legal Office, essentially the in-house lawyers of the Department of Defence; and
- lawyers who were Reserve officers.

Categories of lawyer involved

The Defence Legal Office comprised lawyers, generically referred to as Defence Legal Officers (DLOs), who were either serving in the ADF (military DLOs) or civilians employed in the Department of Defence (civilian DLOs). The Defence Legal Office also drew upon the services of legal officers of the Reserve components of the Navy, Army and Air Force, many of whom were members of the private bar (these being referred to here as Reserve officers).

The military DLOs apparently did not have practising certificates, and had no statutory right to practise. According to the evidence, they were expected to provide advice independently of any influence from superior officers, but were employed within an authoritarian structure in which obedience could be enforced by penal sanctions.

The civilian DLOs apparently, like the military DLOs, did not hold practising certificates, and had no statutory right to practise. (There was in fact only one civilian DLO whose communications were involved.) They were not open to prosecution for disobedience to superior orders.

The Reserve officers, Mr Hilton SC and Dr Renwick, were both in private practice at the Sydney Bar, holding practising certificates in that capacity. They had been briefed to carry out what they later described as an 'independent' review of the board of inquiry into the plaintiff's performance of duties. (There were actually two other Reserve officers from the private bar involved as well, though no mention is made of them in the judgment.)

Documents covered by the LPP claim

The documents in dispute essentially comprised:

- the 'Hilton documents' – most of which consisted of communications between Mr Hilton SC and Dr Renwick (as Reserve officers), on the one hand, and military and civilian DLOs, on the other, in relation to advice given regarding the termination of the plaintiff's employment and the drafting of a termination notice; and
- the 'DLO documents' – which consisted of communications with the military and civilian DLOs in connection with requests for, or the provision of, legal advice.

Decision of Crispin J

Crispin J upheld the claim to LPP in relation to the 'Hilton documents', but not the DLO documents. Only the advice of the Reserve Officers, Mr Hilton SC and Dr Renwick, attracted LPP. The advice given by the military DLOs or the civilian DLO, on the other hand, among other things, lacked the necessary independence for LPP to apply to their advice.

Practising certificates

Crispin J noted statutory provisions which conferred a limited right to practise on government lawyers employed by particular agencies. Sections 55E and 55Q of the *Judiciary Act 1903* were cited as examples of these.

Crispin J rejected the suggestion that s.123 of the *Defence Act 1903* was such a provision. (Section 123 provides that a member of the Defence Force is not bound by any law of a State or Territory that would require the member to have permission, whether in the form of a licence or otherwise, to do anything in the course of his or her duties as a member of the Defence Force.) Crispin J saw s 123 as only conferring an exemption from the need to obtain certain permissions, not the professional standing necessary to undertake professional practice.

Citing from earlier decisions, Crispin J said that being:

- qualified to practise law;
- subject to the duty to observe professional standards; and
- liable to professional discipline

were necessary requirements for LPP to apply. He said (at para 36):

It is difficult to see how these requirements could be regarded as having been satisfied by legal advisers who did not hold practising certificates or, perhaps, worked under the supervision of others with practising certificates, unless they enjoyed a statutory right to practise such as that provided by s 55E or 55Q of the Judiciary Act. In the latter case the legislature might reasonably be taken to have been satisfied that the circumstances of employment for those legal advisers would provide alternative means of ensuring that they maintain due professional standards, keep abreast of developments in professional ethics and enjoy the necessary independence in the provision of legal advice.

Crispin J considered that, while LPP may arise even when the lawyers providing the relevant advice are employed by government bodies (e.g., see *Waterford v Commonwealth* (1987) 163 CLR 54), it is nonetheless rooted in the relationship of legal practitioner and client, rather than the relationship of legally qualified employee and employer, and that it is justified by the public interest in 'facilitating the representation' of the clients.

Crispin J emphasised that the requirements for practising certificates are not 'mere formalities', but are an important part of the legislative scheme for the regulation of the legal profession. He said (at para 47):

In my opinion, [LPP] arises to protect the confidentiality of communications with a legal adviser only when he or she has an actual right to practise and not merely when he or she has been admitted and joined the ADF, even if permitted to carry out ADF legal duties without holding a practising certificate by s 123 of the Defence Act. If for this reason alone, the present claim to privilege must fail, at least in relation to communications with military or civilian DLOs who did not hold practising certificates and were not stationed at the relevant times in Queensland or Western Australia [the legislation of which States confers a limited right of practise on government lawyers generally].

Independence

Crispin J turned his attention to the broader issue of independence in the relationship between lawyer and client. He referred to the decision of the High Court in *Grant v Downs* (1976) 135 CLR 674, as showing that the legal onus of proving the facts necessary to

support LPP rests upon the party seeking to maintain a claim of LPP. He said that, once the issue of entitlement to the claim has been properly raised by sworn evidence (from the party challenging the claim):

the claim must be rejected unless the party seeking to maintain it is able to prove that the communication arose from a relationship of lawyer and client attended by the necessary independence. (see para 53)

In looking at the situation of military DLOs, Crispin J referred to seven factors, identified by the plaintiff's counsel, which militated against them enjoying the necessary independence. These were:

- they did not have practising certificates and, unlike lawyers employed in some other government bodies, did not enjoy a statutory right to practise;
- the evidence did not establish that their independence was protected by Attorneys-General and buttressed by laws relating to the public service and, or, other more specific legislation;
- they are clearly employed within an authoritarian structure in which obedience may be enforced by penal sanctions;
- many DLOs would be under the command of superior officers who were not legally qualified and could not be expected to have a full appreciation of the ethical and professional standards which practising lawyers are expected to maintain or of the need for their subordinates to maintain their own independent judgment;
- there was no requirement for DLOs to be members of a Law Society or a Bar Association, no requirement that they keep abreast of developments in ethical rules or professional standards and no provision for peer review of their ethical standards;
- the professional standards of DLOs could not be enforced to the same extent by disciplinary proceedings and sanctions; and
- there was at least some evidence suggestive of an ADF culture within which DLOs clearly lacked the requisite independence.

These factors, to the extent they were relevant to the position of the Reserve officers and civilian DLOs, would also seem to have applied to an assessment of whether they too enjoyed the necessary independence.

Findings

In relation to the Reserve officers, Mr Hilton SC and Dr Renwick, Crispin J found that their role manifested the necessary independence. He said (at para 93):

The officers in question presumably held practising certificates and their duties would have required them to have been involved in the ADF culture on only a part-time basis. Furthermore, they maintained practices at the private bar and were apparently retained to advise as counsel. In these circumstances and in the absence of any real evidence to the contrary I think that the requisite independence should be presumed.

On the other hand, Crispin J held, having regard to the seven factors listed above, there could be no presumption that that the military DLOs had this independence.

Similarly with the civilian DLO, independence could not be presumed. He did not have a right to practise (such as existed under s 55Q of the Judiciary Act for AGS lawyers) and apparently had no practising certificate.

Text of the decision is available at:

<http://www.supremecourt.act.gov.au/judgments/vance1.htm>

This is to be read in conjunction with the order of Crispin J of 8 September 2004 which made certain amendments to the original judgment: see link:

<http://www.supremecourt.act.gov.au/judgments/vance2.htm>

For further information on LPP, see AGS *Legal Briefing* No. 65 entitled *Legal Professional Privilege and the Government* dated 2 October 2002.

For further information please contact:

Geetha Nair
Senior Executive Lawyer
T 02 6253 7422 F 02 6253 7383
geetha.nair@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:

<mailto:unsubscribe@ags.gov.au>