

## DEPARTMENTAL PROCUREMENT POLICY INSTRUCTION NO 9/2009

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### WAIVER OF LEGAL PROFESSIONAL PRIVILEGE IN PROCUREMENT AND CONTRACTING

#### Purpose

1. This *Departmental Procurement Policy Instruction* (DPPI) replaces DPPI 15/2008—*Waiver of Legal Professional Privilege in procurement and contracting* following amendments to the *Evidence Act 1995* (Evidence Act) in 2008.
2. This DPPI is promulgated to provide updated advice on dealing with legal professional privilege in connection with procurement and contracting in the Department of Defence and Defence Materiel Organisation (DMO) and particularly waiver of such privilege. It also highlights the ease with which privilege may be waived (lost) if proper care is not taken of legal advice forming the subject of the privilege.

#### Introduction

3. Defence seeks and receives legal advice from a variety of sources (both internal and external) concerning its procurement and contracting activities.
4. An obligation may arise to disclose particular information held by Defence. For example, under the discovery process in litigation or in response to a freedom of information (FOI) request. Where relevant documents contain legal advice or disclose the contents of legal advice, it will be necessary to decide whether information attracts legal professional privilege and may be exempted from disclosure.

#### Circumstances in which legal professional privilege arises

5. Legal professional privilege is a privilege against disclosure which attaches to communications made for the **dominant** purpose of obtaining legal advice or for use in legal proceedings. The privilege can also attach to copies of documents provided to a legal adviser where the **dominant** purpose of providing that copy was to obtain legal advice or for use in legal proceedings. The **dominant** purpose is defined as the prevailing or most influential purpose.
6. Legal professional privilege arises from the public interest in enabling frank and full disclosure between a lawyer and a client in order that the lawyer may properly advise their client. The privilege is the client's and it is for the client to maintain or waive the privilege.
7. A claim of legal professional privilege may be challenged in two ways. First, it may be argued that the communication in question was not protected from disclosure on the grounds that legal professional privilege was never available (for example, because the **dominant** purpose of the communication was not to obtain legal advice or for use in legal proceedings). Alternatively, it may be argued that the right to claim privilege was waived by the privilege holder (in this case, Defence). The onus is on the party asserting the privilege to establish an appropriate basis for that claim.
8. In relation to Defence procurement, a claim for legal professional privilege should succeed provided the following criteria are satisfied:
  - a. the communication is made as part of a lawyer/client relationship and is given and received in confidence;
  - b. the *dominant purpose* for the creation of the communication must be to enable the giving or receiving of legal advice, or its use in existing or anticipated litigation;
  - c. legal professional privilege in respect of the communication must not have been waived by Defence (see below); and

- d. the communication (whether or not it ultimately reaches the intended recipient) is between:
- (1) Defence as the client and its lawyer; or
  - (2) two or more lawyers acting for Defence; or
  - (3) Defence and an employee or agent of its lawyer; or
  - (4) Defence/Defence's lawyer and a third party. Where a third party such as an accountant has provided documentation for the purpose of assisting a lawyer to provide legal advice to a client, those documents are privileged where they are confidential and created for the dominant purpose of providing legal advice. Defence should exercise caution in such circumstances, for example, the third party should be informed that the purpose for the document is to assist in the provision of legal advice, or to assist in current or anticipated legal proceedings (as appropriate) and should be instructed to minimise the number of drafts produced and to treat the document as confidential; or
  - (5) Defence and its **in-house** legal counsel, provided:
    - (a) the advisors are qualified lawyers (with or without a practising certificate) working with Defence Legal or DMO Legal (including Special Counsel to Chief Executive Officer DMO);
    - (b) the provision of legal services is attended by a sufficient degree of independence; and
    - (c) the advice is not being given purely as part of an administrative decision-making or policy development process.

9. Privilege can also extend to services provided by lawyers from a foreign jurisdiction, provided that the dominant purpose of the communication is to provide legal advice. For the purposes of paragraph 8.d (1)–(3), the relevant lawyer client/relationship will exist in relation to any **external** legal adviser who is admitted to practice and who is acting on the instructions of Defence.

#### **Waiver of legal professional privilege**

10. If privilege is waived it means the advice or other relevant communication is no longer protected from disclosure. Importantly, once waiver has occurred, it cannot be retrieved.

11. Waiver of legal professional privilege is governed by the Common Law and by statutory provisions contained in the [Evidence Act](#). The Evidence Act applies only to the submission of evidence in legal proceedings, including at an interlocutory stage. In other circumstances, such as responding to a summons, subpoenas or FOI requests, the Common Law principles in respect of waiver will apply. With regard to FOI requests, it is important to note that the [Freedom of Information Act 1982](#) does not override legal professional privilege. Where an FOI request is made, [POLMAN 2—Freedom of Information Manual](#) should be consulted.

#### **Common Law waiver of legal professional privilege**

12. Waiver of legal professional privilege will occur at Common Law when the person entitled to rely on the privilege (the client) treats the privileged communication in a manner which is *inconsistent* with the maintenance of confidentiality which underpins the privilege. Waiver by inconsistent treatment may occur intentionally or inadvertently.

13. In the case of **inadvertent** waiver, the fact that Defence did not intend to waive privilege is irrelevant if Defence's actions are inconsistent with asserting privilege. Also, case law clearly demonstrates how easy it is to 'inadvertently' waive privilege. As further explained in paragraph 14.d., privilege may be lost where the client voluntarily discloses the 'gist', substance or effect of legal advice. It may also be lost where the client discloses the existence of advice when making comments about certain conduct taken or views reached by the client (the implication of this reference being that the legal advice supports the client's position).

14. It is important to bear in mind that questions of waiver are matters of fact and degree. There are no hard and fast rules about when waiver will have occurred. Some of the most common ways in which waiver of legal professional privilege may occur are set out in detail below. However, whether or not privilege has been waived in a particular circumstance will always be a question of whether or not the client's treatment of the communication is inconsistent with the maintenance of confidentiality in that communication:

- a. **Intentional waiver of legal professional privilege.** Legal professional privilege may be intentionally waived by the client if they do not wish to rely on the privilege, that is, where no harm will be occasioned by disclosure of a privileged communication. Intentional waiver will occur where a privileged document is knowingly and voluntarily disclosed to a third party.
- b. **Unconditional disclosure to third parties.** An unintentional or inadvertent waiver of privilege may occur where a privileged communication is unconditionally disclosed to a third party—that is, is disclosed without any obligation of confidence being attached to that communication. Conceivably, such disclosures may occur where contracted personnel are working side-by-side with Defence personnel (but not on the same matter) and may overhear or see written material that informs them of Defence's legal position with regard to a particular matter.

However, legal professional privilege will not generally be waived where the substance of legal advice is disclosed to a third party on a confidential basis (for example, under a deed of confidentiality) and for a specified purpose. In addition, it is possible for advice to be shared with entities having a common interest, for example, other parts of Defence, or other departments, without privilege being waived.

- c. **Use of privileged material as source material for the preparation of other documents which are not privileged.** Where a privileged communication informs the preparation of a document which is not privileged, privilege in respect of the source document may be waived to the extent that a true understanding of the second document cannot be reached without reference to the first document. This may occur in a number of circumstances including where:
  - (1) legal advice is sought concerning a perceived failure by a contractor to perform, or where the Commonwealth is in dispute about liabilities under a contract, and the legal advice received is referred to or forms the basis of reports (which are not privileged and are made generally available), to the extent the reports cannot truly be understood without recourse to the legal advice;
  - (2) an expert is briefed by means of a privileged communication and that communication determines the framework of the expert's response (if the response is not privileged); or
  - (3) legal advice informs the making of an administrative decision and the content of the advice appears in the notice of decision.
- d. **Reference to the content, substance or existence of privileged material.** There may be circumstances in which it is thought convenient or useful for Defence to inform a third party that a decision, opinion or position reached or taken by Defence is supported by legal advice. However, this practice is best avoided if Defence wishes to maintain privilege in the relevant legal advice. On the basis of court decisions, it is clear that privilege can be lost by making any statement that:
  - (1) discloses the conclusion expressed in legal advice (without also revealing any legal reasoning);
  - (2) summarises or discloses the 'gist', or the substance or effect, of legal advice; or
  - (3) refers to the existence of legal advice, together with comments about the conduct, or any decision or position reached or taken by the client on a matter at issue;

where the disclosure of that information is inconsistent with the maintenance of privilege over the information.

For example, Defence may waive privilege if, during a dispute about liabilities under a contract, Defence personnel inform the other party to the contract that Defence has received legal advice that supports Defence's view of existing contractual liabilities. Privilege may also be lost if in such circumstances Defence personnel were to inform the other party that Defence has relied on legal advice in taking particular steps to enforce contractual obligations. However, privilege should not be lost if Defence personnel merely indicate, during a dispute about contractual liabilities, that Defence has received legal advice, provided such reference cannot be understood as revealing in any way the substance or effect of that advice.

Where there has been a partial disclosure, both the conduct and the context of the client are important in deciding if waiver has occurred. This includes the nature of the matter, the evident purpose in making the disclosure, and the legal and practical consequences of the disclosure. Waiver will be less readily implied where, for example, the evident purpose of the partial disclosure was to satisfy the public that due process had been followed, ie where the disclosure endeavoured to fulfil public accountability, or where the disclosure was not made on political considerations, or to gain some advantage, or to treat the individual about whom the advice was obtained unfairly.

- e. **Selective disclosure of privileged material.** If Defence personnel waive legal professional privilege selectively, for example, by disclosing legal advice in relation to a particular matter which supports their position and withholding advice in that matter which does not, legal professional privilege in relation to all relevant communications may be waived. That is, it will generally be inconsistent with the maintenance of legal professional privilege to create a misleading or unfair impression of the contents of privileged communications.
- f. **Disclosure of privileged information by mistake.** Disclosure of privileged communications by mistake can occur easily. Examples would be mistakenly disclosing privileged communications:
- (1) by faxing a copy of a privileged document to the wrong facsimile number during negotiations, thereby disclosing it to an unintended recipient;
  - (2) by providing privileged documents to the other side in litigation during discovery;
  - (3) by not being aware or not recognising that the document is the subject of privilege and not treating it accordingly; or
  - (4) by not properly checking information proposed to be provided (for example, providing information under the mistaken belief that the FOI Act overrides Legal Professional Privilege).

Mistakes are particularly easy to make in complex matters, such as Defence procurement matters, which are likely to involve large volumes of information and many different parties. Disclosure by mistake is different from inadvertent waiver of privilege (where for example, where Defence is aware that a document is privileged, but its actions are inconsistent with maintaining privilege).

Where it is clear that the disclosure of privileged communications was a mistake, no waiver will have occurred and the recipient cannot use this information in court proceedings. Nevertheless, a strategic advantage may have been lost as the recipient now has knowledge of the contents of the communication, whether it is Defence's bottom-line negotiating position in relation to a particular matter, particular lines of inquiry which may be advantageous to the recipient or other sensitive information.

- g. **Summarising and circulating legal advice.** There will be circumstances in which there is a significant advantage in circulating summaries of legal advice. The circulation of such summaries may avoid doubling up, inform staff and ultimately save money. However, care must be taken when the broad circulation of a summary of a privileged communication is contemplated, as in certain circumstances it may lead to waiver of legal professional privilege.

It will not generally be inconsistent with the maintenance of privilege to circulate a summary of an advice to individuals who have a common interest in its contents. Thus, broad internal circulation of summaries of legal advice within Defence, and even selective disclosures externally, will not necessarily result in waiver of legal professional privilege. However, it is generally the legal advice or concept that is important, not the details of the particular matter in relation to which the advice is given. To ensure the circulation of summaries of specific legal advice does not lead to waiver of privilege:

- (1) summaries should state the legal principles in the abstract without specific reference to the matter which lead to the request for advice;
- (2) circulation of summaries should be undertaken on a confidential basis; and
- (3) circulation should be kept as 'narrow' as possible, as it is generally the case that the wider the circulation, the greater the risk that privilege will be lost.

### **Waiver of legal professional privilege and the Evidence Act**

15. The [Evidence Act](#) applies to all proceedings in a Federal Court or an Australian Capital Territory (ACT) Court, as defined in the Act. Certain provisions extend beyond the limits of the Federal or ACT Courts, where the proceedings relate to bail or sentencing, or are heard in chambers or are interlocutory proceedings or similar. It also applies to external territories.

16. As noted in [paragraph 1](#), the Evidence Act was amended in 2008. It now aligns more closely with the common law position regarding behaviour that is inconsistent with the maintenance of privilege over material. That is, according to section 122 of the [Evidence Act](#), privilege will have been lost and evidence may be used in proceedings where the behaviour of a party is inconsistent with their objection to allowing that evidence (where that party's reason for the objection is that it would result in the loss of privilege).

17. An example of behaviour that is inconsistent with the objection to allowing evidence for loss of privilege is also described in section 122 of the [Evidence Act](#). Section 122 applies to the submission of evidence in litigation, and provides that legal professional privilege will be waived when a client *knowingly* and *voluntarily* discloses the *substance* of a privileged communication except where the disclosure:

- a. is on a confidential basis,
- b. occurred as a result of duress or deception,
- c. occurred under the compulsion of law, or
- d. is by an agency to the responsible Minister.

### **Avoiding inadvertent waiver of legal professional privilege under the Evidence Act and at Common Law**

18. There are many risks associated with the inadvertent waiver of legal professional privilege including compromising Defence's position in particular negotiations or litigation. Waiver of legal professional privilege will in many circumstances severely compromise Defence's ability to negotiate an optimal settlement or successfully pursue court action. Such a risk represents a direct threat to Defence's capacity to fulfil its mission.

19. To assist in minimising the risk of privilege being inadvertently waived, Defence employees involved in contracting and procurement should be careful to ensure that:

- a. they do not disclose legal advice to anyone who does not have a bona fide, legitimate 'need to know' about the advice or its contents. In particular, personnel must **not** disclose the content or substance of legal advice to representatives of contractors in an attempt to influence those representatives during negotiations or at any other time;
- b. if it is necessary to disclose legal advice, the recipient should be made aware that the advice is privileged and instructed to treat it accordingly;
- c. the advice itself should be clearly marked as being legally privileged;

- d. when preparing documents based on privileged source documents, they prepare documents which stand-alone, and do not require reference to the source documents in order to be fully understood;
- e. when preparing documents, and there is a chance that legal professional privilege may apply (for example, where the document is being prepared in anticipation of litigation), ask a legal advisor whether to mark that document 'LEGAL-IN-CONFIDENCE', or have them mark it so once they receive it;
- f. when handling documents with the caveat 'LEGAL-IN-CONFIDENCE', they treat that document with the same care as though legal professional privilege applies to it;
- g. they do not selectively waive privilege to create a more favourable impression of Defence's legal position;
- h. during the course of meetings or negotiations with contractors, experts or other parties, they do not cite, summarise, disclose the substance of, or refer to the existence of legal advice as a means of supporting, explaining or justifying Defence's conduct or position on any matter at issue. Whilst a mere reference to the existence of legal advice should not result in a loss of privilege, Defence personnel should avoid making reference to legal advice in any external correspondence or public forum wherever possible. This is because of the 'fine line' and subtle distinctions that often arise between 'safe' and 'unsafe' expressions of words. If, for some reason, Defence personnel feel it necessary to refer to the existence of legal advice, particular care needs to be taken to ensure that the reference to the existence of the advice is not inconsistent with maintaining privilege over the advice;
- i. if called upon to provide documents to other parties in negotiations or in a pre-trial discovery process, they ensure that privileged documents are not provided to unintended recipients. It should be noted that it is unlikely that Defence personnel would be called upon to provide discovery without the assistance and guidance of a legal advisor; and
- j. they only circulate summaries of legal advice on a confidential basis and in a form that reflects the legal principles rather than making specific reference to the matter which gave rise to the request for advice.

#### Further information

20. If Defence employees have any questions concerning whether any information, document or other communication is protected from disclosure on the grounds of legal professional privilege, or doubts over whether any conduct or statement may constitute a waiver of that privilege, they should contact the Contracting Help Desk.

21. Also, given the ease with which privilege can be inadvertently waived, in any instance where an employee considers it necessary to disclose, or refer to the existence of, legal advice, employees should first seek legal advice from the Contracting Help Desk 1800 100 605 before making any such disclosure.



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