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DL/OUT/24306/05

**All Defence Legal Officers**  
**(Civilian and ADF Permanent and Reserve)**

## **HDL AND DGADFLS JOINT DIRECTIVE 1/2005<sup>i</sup>**

### **LEGAL PROFESSIONAL PRIVILEGE – PROCEDURES TO BE FOLLOWED**

#### **Introduction**

1. Following the ACT Supreme Court decision of Crispin J. in *Vance v McCormack and the Commonwealth (2004) ACTSC 78* we have come to the conclusion that Defence Legal Officers require guidance on advising clients about legal professional privilege. The Commonwealth appealed the decision of Crispin J and the appeal was heard on 12 and 13 May 2005. Pending the decision of the ACT Court of Appeal, the Commonwealth continues to assert the right to claim legal professional privilege both at common law and in accordance with the *Evidence Act 1995*.

#### **Purpose**

2. The purpose of this directive is to ensure that all Defence Legal Officers, when providing legal advice, follow a common procedure and advise clients about legal professional privilege.

#### **Legal Professional Privilege**

3. Legal professional privilege is a rule of law at common law and statute that provides that confidential communications between a legal practitioner and client, for the dominant purpose of the client obtaining, or the legal practitioner giving, legal advice, or for use in existing or contemplated litigation, need not be given in evidence nor need it be disclosed by the client or by the legal practitioner except with the consent of the client. In the context of Defence and sections 117 - 119 of the *Evidence Act 1995*, the legal practitioner is a Defence Legal Officer or any legal practitioner who gives legal advice to Defence and the client would be the Commonwealth or, in some circumstances, may be an individual within Defence.

4. Unless it is waived or lost, legal professional privilege attaches as a matter of law to any confidential written or oral communication between a legal practitioner and a client without the need for such a communication to state so expressly.

5. Legal professional privilege is a right that belongs to the client. The client can decide to waive it; that is, despite having the benefit of the rule, the client can decide to release the communication if they wish to. The client also may lose the right if the communication is not kept confidential. To keep the document confidential, the client must show it only to persons who need to see it, for example, to implement the legal advice or to make a decision concerning it, and on the basis that those persons themselves keep the document confidential. Revealing the purpose or content of a communication to which legal professional privilege would attach may result in the loss of the privilege, for example, if in a decision the decision-maker says the decision is made 'taking account of the legal advice provided'. Once the legal professional privilege is waived or lost the privilege cannot be re-established.

6. Legal professional privilege also may be lost when legal advice is shared with organisations outside Defence.

### Direction

7. All Defence Legal Officers providing written (including e-mail) legal advice to a client must:

- a. Insert the words LEGAL-IN-CONFIDENCE in the header and footer of each page of the written advice;
- b. Insert within the written advice, the following words (as a minimum):

This document contains legal advice and may be subject to legal professional privilege. Unless it is waived or lost, legal professional privilege is a rule of law that, in part, provides that the client need not disclose confidential communications between a legal practitioner and client. To keep this privilege, the purpose and content of this advice must only be disclosed to persons who have a need to know and on the basis that those persons also keep it confidential.

- c. Where legal advice is to be shared with an organisation outside Defence, insert the following words (choosing the relevant option below):

I am enclosing a copy of confidential legal advice received by Defence. The advice is provided because of *[the common and corresponding interest which both our agencies have in the subject matter of the advice / your need to see the advice to be able to provide professional services to Defence]*.

Defence wishes to maintain the confidentiality of the advice and the privilege which protects that confidentiality. Accordingly, the advice is provided on the express condition that it will be kept by your *[agency/company]* and not disclosed to any person or party outside your *[agency/company]*, and that within your *[agency/company]* access will be restricted to those officers who are engaged in dealing with the subject matter of the advice. I would be grateful for confirmation of your acceptance of these conditions.

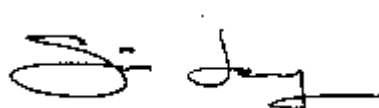
8. This directive takes effect from 1 Aug 05.



**Mark Cunliffe**

Head, Defence Legal

14 Jul 05



**S.J. HARVEY**

AIRCDRE  
DGADFLS

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<sup>i</sup> This Directive is of a permanent nature and remains in force until cancelled. It will be reviewed as required and repromulgated only where a significant change is necessary. Directives can be accessed on the Defence Legal web site [www.defence.gov.au/legal](http://www.defence.gov.au/legal)