Legal professional privilege and national security

Stephen Tully reports on *Timor-Leste v Australia.*

International Court of Justice. Photo: the Peace Palace Library, International Court of Justice.

Can federal investigative agencies covertly acquire your legal advices and other communications sent to your client – which you assume to be protected from disclosure by privilege – without your knowledge or permission for national security reasons? Under Australian common law, yes. National security is capable of falling under the crime or fraud 'exception' so as to abrogate privilege. The same conclusion is likely under international law. This note explores recent proceedings where this issue was put by Australia to the International Court of Justice (ICJ or Court) in light of Australian common law and recent law reform developments.

The proceedings in Timor-Leste v Australia

The question whether legal professional privilege can be abrogated by national security under international law arose for consideration in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*. In late 2013 the Australian Security Intelligence Organisation (ASIO) executed search warrants on the Canberra premises of the legal adviser to the Democratic Republic of Timor-Leste (Timor-Leste). Timor-Leste sought provisional orders (that is, interim measures of protection) before the ICJ, the principal judicial organ of the United Nations (UN), claiming that the confidential documents and data seized by Australia related to its legal strategy in a pending Timor Sea Treaty Arbitration between the two states and its future maritime negotiations with Australia. The subject matter of that arbitration included allegations, reported in the Australian media, that Australia had committed espionage in relation to Timor-Leste's position during negotiations for a treaty concerning maritime rights in the Timor Sea. The allegations referred to a witness who was said to be a former Australian intelligence officer.

In its submissions, Australia expressed concern that an Australian intelligence officer may have committed an offence under Australian law by disclosing that Australia had allegedly conducted espionage against Timor-Leste during treaty negotiations. It contended that, even if there was an international legal principle akin to legal professional privilege, such a principle was inapplicable when the communication concerned the commission of a crime or fraud, threatened national security or the public interests of a state, or undermined the proper administration of justice. Australia's argument reflected the common law position.

Legal professional privilege under the common law

Legal professional (or client legal) privilege attaches to confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation. The rationale for the privilege is furthering the administration of justice by fostering trust and candour in the lawyer-client relationship.[1] However, the protection afforded by the privilege only attaches to communications intended for a proper or lawful purpose.

Privilege cannot be claimed over communications that frustrate legal processes.[2] Nor can privilege be used to protect communications made to further deliberate abuses of statutory power.[3] These communications are not within the ordinary scope of professional employment.

Privilege does not attach to communications made to further the commission of an offence or fraud. For example, a search warrant executed in *Propend Finance* concerned privileged material concerning tax evasion.[4] The improper and dishonest purpose considered in *AWB Limited* was knowingly and deliberately inflating transportation prices to work a trickery on the UN contrary to international and Australian sanctions regimes.[5] In the latter case, Young J concluded that expression of the principle by reference to communications that facilitated a crime or fraud did not capture its full reach. The principle encompassed a wide species of fraud, criminal activity or actions taken for illegal or improper purposes. The scope of conduct included all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances.

The crime or fraud exception would include offences against national security. Given the broad scope of the exception, committing a national security offence would, by reason of that illegality or impropriety, be sufficient to displace the privilege under Australian common law.

Covert investigations and abrogating privilege

A further issue that confronted the ICJ and has already received attention from Australian law reform organisations and legal institutions is whether covert federal investigations for national security purposes can abrogate privilege.

Some federal agencies, including ASIO, possess covert powers including the power to search and seize documents and things.[6] Their enabling legislation does not contemplate a national security exception for privileged material.[7] Because targets are unaware that information is being accessed, there is no opportunity to assert privilege at the time of access. Notifying targets may prejudice an investigation.

Concerns have been expressed in the United states that privilege is being eroded under the rubric of national security.[8] Following press reports of foreign government surveillance of American lawyers' confidential communications with overseas clients and the sharing of privileged information with the National Security Agency (NSA), the president of the American Bar Association (ABA) expressed his concerns to the NSA.[9] The NSA responded that it was firmly committed to the rule of law and the bedrock principle of attorney-client privilege.[10] It stated that it had and would continue to protect privileged communications in accordance with legislated privacy procedures.

In 2007 the Australian Law Reform Commission (ALRC) proposed that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to federal investigations.[11] Abrogation could be justified on several grounds, including where the nature and gravity of the matter was one of major public importance such as national security. The ALRC concluded that abrogation was appropriate where there was a higher competing public interest.[12] Where exceptional circumstances existed, parliament could legislate to abrogate the privilege for a particular investigation undertaken by, or a particular power of, a federal body.

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It is difficult to contend that national security is not a significant public interest. However, the effects of encroaching upon legal professional privilege in service of national security are difficult to assess.[13] Unrestricted communication between a lawyer and client is necessary for the proper functioning of the legal system. If inroads can be made by invoking a higher public interest, in such a way as to exclude the opportunity to assess the competing interests, then application of the privilege becomes uncertain and the underlying policy is effectively undermined.[14] Such challenging questions were neatly sidestepped by the ICJ.

The ICJ's provisional measures order

The majority of the ICJ was satisfied at this stage of the proceedings that Timor-Leste's claimed rights were plausible.[15] The asserted inviolability of a state's right to confidentially correspond with its lawyers could be derived from the sovereign equality of states. states who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

Australia had also argued that there was no risk of irreparable prejudice to Timor-Leste's rights following several undertakings

provided by the attorney-general, the effect of which were to limit the use of the information to national security purposes and ring-fence the information from those involved in negotiations regarding resource exploitation, the ICJ proceedings or the Timor Sea Treaty Arbitration.

A majority of the court reasoned that the undertakings significantly contributed to mitigating the imminent risk of irreparable prejudice created by seizure of the material to Timor-Leste's rights, but did not eliminate this risk entirely. There remained a risk of disclosure because Australia envisaged the possibility of using this confidential and sensitive information in circumstances involving national security. Any breach of confidentiality might be incapable of remedy or reparation. Furthermore, the confidentiality of Timor-Leste's communications with its lawyers was left unaddressed.

Australia was ordered to keep the seized material under seal, ensure that it was not used to Timor-Leste's disadvantage and not to interfere in communications between Timor-Leste and its legal advisers. These orders are binding upon Australia.

Only Judge ad hoc Callinan explicitly considered Australia's submissions in relation to exceptions to the privilege, considering it unlikely that any state would treat national security as inferior, or subject to, legal professional privilege.[16] Judge ad hoc Callinan also considered the undertakings proffered by Australia to be sufficient for the circumstances of the case.[17]

Conclusions

The ICJ accepted, on a provisional basis, that a state has a right to conduct arbitration or negotiations without external interference, including the right of confidentiality when communicating with its lawyers. It is probable that, like the position under Australian common law, national security is a lawful reason for abrogating legal professional privilege under international law. However, as Judge ad hoc Callinan cautioned, the extent to which there is a settled principle of legal professional privilege under international law, and moreover immunity to any limitation in an international or national interest, requires further analysis. Assuming the ICJ will find it has jurisdiction, it is hoped clarification will occur at the merits phase of these proceedings.

Endnotes

1. *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475, 487 (Mason and Brennan JJ).
2. *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141.
3. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500.
4. *Commissioner Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501.
5. *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, (2006) 155 FCR 30 [210]-[212] & [229].
6. E.g., s 25, *Australian Security and Intelligence Organisation Act 1979* (Cth).
7. Legal professional privilege is not abrogated by statute without a clear indication that was intended: *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.
8. E.g., Cohn M, 'The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001' (2003) 71(4) Fordham L Rev 3.
9. Letter from J Silkenat, President, American Bar Association (ABA) to General K Alexander, Director, and R De, General Counsel, National Security Agency (NSA), 20 February 2014.
10. Letter from General K Alexander, Director, NSA to J Silkenat, President, ABA, 10 March 2014.
11. Australian Law Reform Commission (ALRC), Discussion Paper 73: *Client Legal Privilege and Federal Investigatory Bodies*, 2007, Proposal 6.1 & [6.151].
12. ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* [2007] ALRC 107, [6.136], [6.142]-[6.143].
13. *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 157 (Toohey J).
14. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500, 53 (Dawson J).
15. International Court of Justice, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), Order on Request for the Indication of Provisional Measures, 3 March 2014, [26] & [28].
16. Dissenting opinion of Judge ad hoc Callinan, [26].
17. Dissenting opinion of Judge ad hoc Callinan, [21], [31].