LPCC Current Issues

Confidentiality of Settlement Conferences

Legal Profession Complaints Committee

Most, if not all, of the various courts and tribunals operating in Western Australia have procedures which require the parties to proceedings to attend conferences in an attempt to settle proceedings. These conferences include pre-trial conferences, mediation conferences and compulsory conferences (referred to generally in this article as settlement conferences). Each court and tribunal has different legislative provisions and practice directions governing the operation of these conferences. In some cases, the relevant legislation imposes a duty of confidence on the parties attending such conferences, for example, s71(1) *Supreme Court Act 1935*. In other cases, the relevant legislation may require the conference to be held in private, for example, s54(6) *State Administrative Tribunal Act 2004*. In the case of pre-trial conferences in the District Court, there are no such provisions, however, the *Procedure Guide for Unrepresented Litigants* refers to a pre-trial conference as a 'confidential meeting'.[1]

Irrespective of whether a specific duty of confidentiality is imposed, the relevant legislation invariably specifies that, subject to certain exceptions, evidence of anything said, or any admission made, in the course of the conference is not admissible in the proceedings.

This inadmissibility arises from the 'without prejudice' nature of the communications. The inadmissibility of without prejudice communications (which essentially operates as a constraint on the later production of material or information to the court), must be distinguished, however, from broader considerations of confidentiality, which may affect the divulging of information to persons outside of the court process.

Such wider obligations of confidence are likely to arise in relation to settlement conferences and practitioners should be aware of those wider obligations.

For example, in *C v M*,[2] Kenneth Martin J examined whether s71 of the Supreme Court Act imposes a duty of confidentiality or whether it is limited to specifying evidentiary inadmissibility. Kenneth Martin J found that:

> *A wider obligation of overarching confidentiality, applicable to all proposed participants in the mediation is imposed. The imposition of confidentiality rests beyond narrower inadmissibility*

constraints. Dual protections arising from confidentiality as well as inadmissibility deliver protections to the mediation process and participants going wider than simply imposing a constraint against subsequent use of information or a document in evidence at a trial.

In that case, a party to the proceeding who had distributed a report he had received from his lawyer on what had occurred at a mediation conference to five persons he considered had an interest in the subject matter, was held to have breached the confidentiality of the mediation.

In *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd,*[3] Emerton J considered whether the legislation under which the Victorian Civil and Administrative Tribunal (VCAT) operated imposed an obligation of confidentiality upon parties participating in compulsory conferences. As is the case with the State Administrative Tribunal (SAT), the legislation provided that such conferences (which may be used to promote settlement) are to be conducted in private and provided that evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the tribunal in the proceedings.

Despite finding that the fact that compulsory conferences are to be held in private does not, of itself, import obligations of confidentiality,[4] Emerton J found that the information which was imparted during the compulsory conference in question was imparted in circumstances that imported an obligation of confidence. Emerton J stated:

> *Accordingly, although the VCAT Act provides very limited statutory protection for confidential information divulged in the course of a compulsory conference, the circumstances in which that information is divulged and, in particular, the understanding of the persons to whom it was divulged that it be kept confidential, may give rise to an obligation of confidentiality. A compulsory conference held for the purposes of enabling the parties to 'lay bare their souls' in order to facilitate a conciliation and resolution of the dispute is most likely to import an understanding by the participants that anything said is said in confidence.*[5]

Accordingly, what is said and done in settlement conferences conducted in courts and tribunals where the operative legislation does not impose a duty of confidence is still likely to be found to have been divulged in circumstances giving rise to an obligation of confidence. This would be the case particularly when, as is often done at the outset of such conferences, the presiding officer specifically says that what is said and done during the conference is confidential.

Although a duty of confidentiality invariably arises, are there any limits on what is covered by that obligation? Can a participant in a settlement conference make any use of the factual information contained in statements, admissions or communications made during such a conference?

> "... the relevant legislation invariably specifies that, subject to certain exceptions, evidence of anything said, or any admission made, in the course of the conference is not admissible in the proceedings."

> "It goes without saying that a deliberate breach would in all likelihood result in prosecution."

In *C v M*, Kenneth Martin J briefly considered this issue although was not called upon to decide it. His Honour indicated that he found the reasoning of McDougall J in *789TEN v Westpac* (789),[6] compelling.[7] In *789*, McDougall J considered different observations which had been made in earlier cases on this issue but concluded that there is distinction to be drawn between communications (written or oral) made at mediation and the information contained in them. This means that parties who have been participants in a mediation may pursue lines of enquiry they learned about at mediation and seek to prove in the proceedings, by admissible evidence, the facts or information which gave rise to the line of enquiry. However, they cannot seek to prove the fact or information by reference to statements or material from the mediation.

In a matter which came to the LPCC's attention, a practitioner attended a pre-trial conference in the District Court with his client who was a plaintiff in a personal injuries matter. During the pre-trial conference, the defendant's counsel raised an issue concerning the reliability of the plaintiff's treating doctor's report on the plaintiff's symptoms and whether the doctor was supporting a long term patient, rather than providing an honest and independent opinion. The matter did not settle at the pre-trial conference. Subsequently, the practitioner informed the defendant's solicitor that he had informed the doctor of the position taken by the defendant at the pre-trial conference regarding his report.

The defendant's view of the doctor's report was conveyed during an attempt to settle the matter at a pre-trial conference. Although there is no statutory provision importing a duty of confidentiality in pre-trial conferences, it is more likely than not that the circumstances in which the defendant's position was conveyed imposed an obligation of confidentiality on the practitioner. Accordingly, the practitioner should not have informed the doctor of the position taken by the defendant. However, the practitioner could have used the information to have asked further questions of the doctor going to the issue of the reliability of his report and whether any of his opinions were swayed by his long term relationship with the plaintiff. To do so would not have breached the obligation of confidentiality.

Practitioners are asked to take care to preserve the confidentiality of what is said and done at settlement conferences and to ensure that their clients are also made aware of these obligations. Divulging confidential information from settlement conferences may amount to unsatisfactory professional conduct or professional misconduct and result in disciplinary proceedings.

PRISON VISITS - KNOW THE RULES

From time to time the committee is required to investigate the conduct of a practitioner arising out of the practitioner's visit to a prison or other correctional facility.

The right of a legal practitioner to visit a prisoner held in a Western Australian correctional facility is contained in section

62 of the *Prisons Act 1980*.

Broadly, that section provides that a legal practitioner may visit:

(a) a prisoner who is a client, for the purposes of pending court proceedings;

(b) with the approval of the Superintendent of the facility, any other prisoner for a bona fide purpose.

All prison visitors must comply with rules relating to prison visits.

As well as the *Prisons Act* and the *Prison Regulations 1982*, practitioners intending to visit a correctional facility should make themselves aware of the Adult Custodial Rules,[8] in particular Operational Instruction 18, and any standing orders issued by the Superintendent of the facility they are intending to visit.

CONTRABAND

A recent investigation into a practitioner's conduct involved an allegation that the practitioner had taken, albeit inadvertently, a prohibited item (a mobile telephone) into a prison.

Practitioners intending to visit a prisoner should make themselves aware of items which are not permitted to be taken into the facility. Generally, as well as the more obvious items such as weapons and substances, the following types of items are prohibited in prisons:

- film;
- computer games;
- cameras and other photographic devices;
- mobile telephones;
- portable digital media players;
- USB storage devices;
- any other item that may threaten the safety or security of the prison.

Operational Instruction 18 of the Adult Custodial Rules provides that a legal practitioner visiting a prisoner in an official capacity may take in a dictaphone and relevant papers. However, laptops and mobile phones are not permitted. Operational Rule 18 does not apply circumstances where the visit is not official (refer to section 62 of the Act), accordingly it will have no operation if a practitioner is visiting a prisoner in the capacity of a family member or friend.

HANDING OVER ITEMS TO A PRISONER

Another investigation undertaken by the committee involved an allegation that a practitioner had provided a prisoner with a prohibited item (a music CD). The practitioner had believed that disc contained police evidence, but in any event the practitioner had not followed prison procedure which required the approval of prison staff before a disc containing police evidence was handed over to a prisoner.

SUMMARY

The Superintendent of a prison has wide powers to ensure the security and good governance of the facility. Depending upon the seriousness of a contravention of the rules and regulations relating to prison visits a practitioner could be banned from visiting any Western Australian correctional facility for a specified period. It goes without saying that a deliberate breach would in all likelihood result in prosecution. Furthermore, a practitioner's contravention may constitute unsatisfactory professional conduct or professional misconduct under the provisions of Part 13 of the *Legal Profession Act 2008* including where a practitioner uses their practitioner status to take advantage of lawyer/client privileges when the visit is not client related.

Practitioners intending to visit a prison are encouraged to make themselves aware of the legislative and other provisions relating to the types of items and material that may not be taken into the facility. Given how easily a prohibited item could be carried into a prison inadvertently (a mobile phone in a jacket pocket, a USB on a key ring or in the bottom of a brief case or handbag), it is suggested that practitioners carefully check to ensure that they do not take any prohibited item into a correctional facility.

Further, practitioners should check with a prison officer before handing anything over to a prisoner and make and maintain a contemporaneous note for their file of any item handed over.

NOTES

1. *District Court of Western Australia Procedure Guide for Unrepresented Litigants,* at para 11.1.
2. [2011] WASC 175.
3. [2011] VSC 287.
4. *ibid.,* para 22.
5. *ibid.,* para 26.
6. [2004] NSWSC 594.
7. *ibid.,* at para 94.
8. Available online at www.correctiveservices.wa.gov.au.