



THE LAW SOCIETY  
OF NEW SOUTH WALES

**A Guide to Ethical Issues for Government Lawyers**  
**Second Edition 2010**



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# A GUIDE TO ETHICAL ISSUES FOR GOVERNMENT LAWYERS

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## **Disclaimer**

In issuing this Guide, the Law Society, its Government Lawyers' Committee and the consultant engaged to draft the Guides disclaim any intention to provide legal advice to readers. The Guides are intended to do no more than suggest what kind of legal issue may arise in some cases, and to give some legal references that may help. The attempt has been made to state the law as at August 2010, but readers will need to form their own opinions about the legal position at that and any other time.

## Preface

Ethics and professional responsibilities are an inherent part of practising law whether in public or private practice. With so many interests to serve, knowing the right path to take is not always clear cut. Whilst the underlying principles are fundamentally the same, the application may pose unique challenges for those lawyers who are in public practice.

Meeting ethical and professional responsibilities can provide public sector lawyers with arguably their most significant professional challenge. Public sector lawyers face issues in a complex and difficult context, and have significant additional factors to consider in respect of the public interest, greater public accountability and transparency.

The Government Solicitors' Committee of the Law Society of New South Wales published the first edition of the "Guidance on Ethical Issues for Government Solicitors" (the Guide) in 2003 to help government lawyers meet their ethical professional responsibilities. Since the release of the Guidelines this document has become a valuable resource for lawyers who are employed by all levels of government and also to private practitioners retained by a government agency.

The Government Solicitors' Committee, in 2010, undertook to review the Guide to ensure that it continues to be relevant and useful resource for the profession. I am pleased to present the second edition of the Guide and I am confident it will be an important and useful guide to lawyers working within government or local government and in some cases to private practitioners retained by a government agency. The Guide will continue to be updated as required and government lawyers are welcome to make suggestions on how to enhance the Guide.

The Guide is designed to assist by setting out guides to ethical issues for government lawyers where they are affected by law or public sector codes or circumstances of practice. The Guide may also be useful to private practitioners retained by a government agency.

The Guide is intended to be read in conjunction with the relevant practice rules and statements of ethics, and at the same time, address circumstances and situations which may be particular to government solicitors. I trust you will find this Guide relevant and useful in the circumstances of daily legal practice.

The Law Society of New South Wales recognises it is a valuable service to have a guide for members that is designed specifically for government solicitors that recognised the unique features of their work and work environment. I thank the members of the Government Solicitors' Committee for this publication. Particular thanks must go to Government Solicitors' Committee member Brad Row and Margaret White who worked as a special consultant on the project for their hard work on this edition.

**Mary Macken**

President

The Law Society of New South Wales

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## Introduction

Government lawyers are subject to the same ethical rules as private practitioners. There are, however, issues unique to government lawyers who are affected by laws, public sector codes and circumstances that don't arise in private practice.

The Government Solicitors' Committee of the Law Society of New South Wales has prepared this updated ethical guide for government lawyers ("legal officers") employed in Commonwealth and New South Wales state government agencies, including local government and statutory bodies set up for public purposes. It may also be useful to private practitioners retained by a government agency. The Guide is based on the original version published by the Committee in 2003.

Legal officers make up about one-tenth of legal practitioners in New South Wales and are employed in a broad range of agencies. "Inner budget" or "central" agencies carry out core government functions. Others, variously known as "government business enterprises" or "government trading agencies" do not have a regulatory or policy advice role. Some legal officers are involved in both legal and policy work.

The Guide should be read along with the *Legal Profession Act 2004* (NSW) and the *Legal Profession Regulation 2005*. Legal officers employed by the Commonwealth Attorney-General and the Australian Government Solicitor are subject to the *Judiciary Act 1903* (Cth) s.55E(3) and s.55Q(2) respectively. Commonwealth legal officers are also covered by the Commonwealth Attorney-General's Legal Services Directions. Codes of Conduct of the Commonwealth, such as s.13 of the *Public Service Act 1999* and State, such as s. 41 of the *Public Sector Employment and Management Act 2002*, are also relevant.

Since the Guide is not part of the solicitor's rules under the *Legal Profession Act 2004* its contents are not binding on the practice of legal officers.

## Commonwealth Government agencies

The Australian Government Solicitor (AGS) is a fully commercial legal firm in government ownership. It is subject to the *Commonwealth Authorities and Companies Act 1997*. More than 370 legal officers work in its head office in the ACT and in State and Territorial branches. The AGS provides legal and related services to the Commonwealth and to persons and bodies in areas for which the Commonwealth has power to make laws, and in relation to other functions referred to in the Act. Under the Legal Services Directions issued

by the Commonwealth Attorney-General and administered by the Office of Legal Service Coordination, constitutional legal issues, national security issues and Cabinet work are “tied work” that only the Attorney-General’s Department and the AGS may perform.

The AGS competes with private firms in other areas such as advising, litigation and commercial property work, mainly for the rest of government.

Numerous in-house legal officers are employed in other Commonwealth agencies, including the Commonwealth Attorney-General’s Department. Many specialise in legal issues relevant to their agency, while others provide more general legal advice on contractual, employment and administrative law issues.

## New South Wales Government agencies

The central legal office is the Crown Solicitor’s Office (“CSO”), which is part of the NSW Department of Justice and Attorney General (“the Department”). The Crown Solicitor is responsible to the Director-General of the Department. Government agencies must engage the CSO for “core” legal work in matters:

- which have implications beyond a Minister’s portfolio; or
- involve the constitutional powers and privileges of the State and/or the Commonwealth; or
- raise issues fundamental to the responsibilities of Government; or
- relate to matters for which the Attorney-General is responsible.

The CSO competes with the private legal profession for non-core legal work. The *Legal Profession Act 2004* specifies the bodies and persons for whom the Crown Solicitor may act.

The Department has other sections or offices carrying out specialist legal work, such as the Office of Trustee and Guardian and the Office of the Director for Public Prosecutions.

## Local Government legal officers

In-house legal officers in councils advise on the interpretation of local government and other legislation and represent the council in enforcing and defending the wide range of proceedings in which councils may be involved, and in transaction work.

## Summary

### 1. Who is the client?

- 1.1 Councils and statutory corporations may seek advice, take proceedings or be proceeded against, in their corporate name. Statutory office holders may also seek advice, take proceedings and be proceeded against in connection with the office.
- 1.2 Individuals may be clients. The relationship between such an individual and the legal officer is that of client and solicitor.
- 1.3 For government agencies, instructions are given by a minister or agency on behalf of the Crown (or the Attorney-General on behalf of the Crown). This affects the legal officer's duty to the "client" and gives rise to questions of legal privilege in communications. These issues are discussed in [Section 3](#).
- 1.4 A legal officer has a retainer for each matter for which the agency requires legal services.
- 1.5 A legal officer should treat agencies as separate from each other for the purpose of considering whether acting for more than one in the same matter would involve a conflict of duties owed to each.

### 2. Good, Independent Advice

- 2.1 Legal officers should accept instructions to advise or represent an agency, honestly, competently and diligently.
- 2.2 Legal officers should provide legal services even where it incurs the client's displeasure.
- 2.3 A legal officer must not publicly oppose government policy concerning any matter in which the officer is acting for an agency.

### 3. Confidentiality

- 3.1 Information given in confidence should be kept confidential, during and after the legal officer's employment, unless the agency authorises disclosure, there is an overriding legal obligation to disclose, or a legal immunity for doing so.
- 3.2 It is not unethical to make a protected disclosure under the *Protected Disclosures Act* 1994 (NSW).
- 3.3 It is not unethical to disclose the contents of legal advice to another government agency in accordance with law or government policy. A safeguard against waiver of client legal privilege would be to ensure disclosures are made confidentially.
- 3.4 The *Privacy and Personal Information Protection Act* 1998 (NSW) and the *Privacy Act* 1988 (Cth) restrict the communication of personal information between agencies, and to persons or other bodies.

### 4. Model Litigant

- 4.1 Legal officers should advise client agencies of their duty to behave as model litigants, should act as model litigants themselves, and assist agencies to do so.
- 4.2 "Model litigant" rules do not prevent governments and their agencies from acting firmly and properly to protect their interests. All legitimate steps may be taken to pursue, test or defend claims where there is a sound legal basis.

### 5. Conflict of Interest

- 5.1 The Revised Professional Conduct and Practice Rules (Solicitors Rules) about dealing fairly with clients, free of any interest that may conflict with a client's, apply to legal officers.
- 5.2 Public sector law prohibits conflicts of interest on the part of public sector employees.
- 5.3 Legal officers should not act for more than one agency in the same matter if they have conflicting interests. See also [Section 1: Who is the Client?](#)

## 6. Giving policy advice

- 6.1 A legal officer instructed to carry out or assist in a transaction, should not give unsought advice on its wisdom but might point out its the legal effect.
- 6.2 Advice may be sought on policy or management discretion. To prevent misunderstanding, a legal officer should separate legal from policy or management advice.
- 6.3 Issues of client or legal professional privilege require a legal officer to consider whether the dominant purpose of any opinion is to give legal or some other kind of advice.

## 7. External service providers

- 7.1 If the legal officer's agency must refer matters to some other Government legal agency, he or she is to ensure that it does so. If the agency is free to select its external advisers, the legal officer must:
  - try to ensure that the agency (and therefore the Government) is best served by the choice, and
  - avoid selection from habit, friendship or favour, or in return for some inducement.
- 7.2 Repeatedly briefing the same counsel or firm increases their experience in the affairs of an agency but the legal officer must still act diligently, brief and assist counsel or the firm properly, and point out any deficiencies in the advice. Briefing a number of barristers in one field, avoids the problem of one being unavailable.

## THE GUIDE

### 1. Who is the Client?

Does a legal officer have a client, or just a boss?

*“Sometimes I feel like a glorified secretary to my boss, who is the head of our agency. I’m the only legal officer in the agency and my primary responsibility is to provide legal advice in relation to applications for decision by [my boss]. It’s hard to keep up with this work because of his requests for other services (such as preparing speeches for him to deliver). Is my first responsibility to my boss, the agency, the applicants, the department or the government? What should I do if my primary responsibilities are suffering because my workload is too great? Can I decline to perform services requested by my boss?” See 1.4, and 2, below.*

**1.1 Councils and statutory corporations, whether or not they represent the Crown<sup>i</sup> have capacity to take proceedings and be proceeded against in their corporate name, and to seek legal advice. Statutory office holders not representing the Crown, may also take proceedings or be proceeded against in connection with the office, or take legal advice, subject to legislative provisions.<sup>ii</sup>**

1.1.1 A local government council is a body corporate under the *Local Government Act 1993* (NSW), as are statutory corporations defined in Part 8 of the *Interpretation Act 1987* (NSW). They are clearly capable of giving instructions on legal matters.

1.1.2 Under the *Director of Public Prosecutions Act 1986* (NSW), the Director may be represented by counsel and solicitor. It is the function of the Solicitor for Public Prosecutions (a) to act for the Director, and (b) to instruct the Crown Prosecutors and other counsel on behalf of the Director. The Director is then the client (though not the employer) of the Solicitor.

1.1.3. Where a legal officer is advising or representing an agency which has management of persons’ affairs (e.g. the NSW Trustee and Guardian), the client is the agency, not the person whose affairs are being managed.

## 1. Who is the Client?

### **1.2 Individuals can be clients where legislation or governmental practice allows.**

**Subject to legislation, their legal relationship with the legal officer is that of client and solicitor, with the confidentiality and loyalty inherent in that relationship.**

1.2.1. The *Legal Aid Commission Act 1979 (NSW)* declares that the relationship between a solicitor (the Chief Executive Officer, a member of staff or a private legal practitioner to whom work is assigned) and an applicant for, or recipient of, legal aid, is one of solicitor and client.<sup>iii</sup>

1.2.2 Ministers and statutory office holders are given advice and representation on matters arising from their statutory or common law functions, such as litigation to challenges the exercise of a power, or transactions to which they are a party. Ministers, public officials and Crown employees may also be defendants in proceedings such as tort or required to appear before investigative tribunals, where, due to their official duties, they have a substantial and direct interest. State policy on granting *ex gratia* legal assistance in these cases is set out in the guidelines to the Premier's Memorandum No. 99-11.

1.2.3 Legal assistance includes representation and an indemnity against legal costs and any verdict in civil proceedings awarded against the grantee, except fines or punitive or exemplary damages.

1.2.4 If it is decided that the grantee acted unreasonably, and/or failed to disclose all circumstances, *ex gratia* assistance may be withdrawn. The legal officer or private practitioner is still not free, however, to break any confidences of the client, or give advice to the government against the former client's interest. The Legal Services Guidelines address this issue in the Commonwealth.

1.2.5 The NSW Law Reform Commission has said (in report 86 of 1998) that:  
"The Attorney General, as the first law officer of the Crown, is primarily responsible for provision of legal advice to government. At common law, the Attorney General was, in formal terms, the sole source of legal advice to government. Other legal advisers act on the instructions (often implied) of the Attorney General who represents the Crown. This is so even when the advice is requested by, or delivered to, a department, agency, or official."

## 1. Who is the Client?

1.2.6 This seems to say that the Attorney General could intervene in any case in which advice on the Crown's legal position has been given, and instruct a legal adviser chosen by him or herself. This could include instructions contrary to those already given by a department, agency or official. In such a case, the client would no longer be the department, agency or official. It would be the Attorney General. In practice, the Attorney General would no doubt consult with the Minister.

### **1.3 Instructions to act are given by a Minister or an agency acting on behalf of the Crown (or perhaps on behalf of the Attorney-General, acting on behalf of the Crown).**

1.3.1 This affects the legal officer's duty of confidentiality to the "client." It also raises the question whether authorised disclosure of communications between the Minister or agency or the legal officer, to another Minister or agency may affect client professional privilege. Those matters are discussed, in the commentary on this Guide and in [Section 3](#).

### **1.4 A legal officer has a retainer for each matter for which the agency requires legal services.**

1.4.1 The NSW Professional Conduct and Practice Rules presume that the client-solicitor relationship arises from a contract of retainer. A legal officer employed by an agency does not receive a fee, but a salary. It is considered that this amounts to a retainer within the meaning of the Rules for each matter in which the legal officer receives instructions.

1.4.2 A legal officer doesn't have to accept a retainer. It isn't easy, however, to decline instructions from the employing agency. It is unethical, however, to accept a retainer if there is a conflict of duty and interest or the legal officer's workload is too great to allow him or her to serve the client competently and diligently.

1.4.3 The legal officer who does not want to accept a retainer should notify his or her manager so that the case can be referred to another legal officer, or briefed out. The situation is one of real difficulty for the many legal officers working in agencies where resources are limited and "briefing out" legal work may not be a welcome option for a (possibly non-lawyer) manager.

## 1. Who is the Client?

### **1.5 A legal officer should treat agencies of the Crown separately when he or she is considering whether acting for more than one in the same matter would involve a conflict of duties to each.**

1.5.1 Accepting instructions from two agencies in the same matter could involve a conflict of duty if they became irreconcilable. Legal theory and constitutional practice, however, supports the idea that in such cases there is only one client, the Crown (or the Attorney General as the Crown's representative). Conflict of interest is dealt with in [Section 5](#).

## 2. Good, Independent Advice

*“A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client, only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.” (Professional Conduct & Practice Rules, Rule 1.1)*

**2.1 In the service of their own or other agencies, legal officers should accept instructions to advise or represent and do so honestly, competently and diligently.**  
(Professional Conduct and Practice Rules, Rule 1)

2.1.1 Government, like anyone else, needs honest, competent legal advice and legal officers should give the best they can, according to their individual knowledge and experience.

2.1.2 “Competence” is usually inferred from the holding of a practicing certificate but that, obviously, is not conclusive.

**2.2 The legal officer should provide professional legal services, whether or not their advice is welcome.**

*“There are imperatives and I think that we are aware of them and we do our best to comply but the problems arise where the legal advice doesn’t accord with what they [the client agency] want, and my view is that we give the legal advice and they can accept or reject it.” (Government Lawyer)*

2.2.1 Being a legal officer employed by the state or federal government is not inconsistent with a professional relationship. If the government consults a legal officer, the officer is competent and there is no question of abuse of the relationship, then all the usual legal, ethical and policy rules will apply.

2.2.2 Legal professional privilege is one very strong incentive to legal officers to maintain a professional relationship with their clients.

2.2.3 In *Waterford*<sup>iv</sup>, Brennan J. said legal officers should be “competent, in order that the legal advice be sound and the conduct of the litigation be efficient;

## 2. Good, Independent Advice

independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of the litigation on behalf of his client.” Otherwise, “there is an unacceptable risk that the purpose for which privilege is granted will be subverted.”

2.2.4 The exercise of independent judgment is an ethical requirement, however:

*“Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.”<sup>v</sup>*

2.2.5 Under pressure to provide advice that their client employer wants to hear, a legal officer may be tempted to advise that the desired position is at least “arguable”.

This may not be helpful, however, and the client needs to know whether or not it would stand up in court and whether or not there are alternatives.

### Example

“I am employed in a NSW Department under the Public Sector Employment and Management Act to give legal advice when required. Part of my employment is preparing instructions to the Parliamentary Counsel for regulations to be made under the various Acts administered by the Department. A problem has been encountered with the administration of an Act, and the Department Head, obviously with the blessing of the Minister, thinks that it can be solved by making a regulation under the Act and directs me to proceed. I can see that the regulation in mind might fit some catch-all words in the regulation-making power literally interpreted, but it seems to me clear that in the context of the Act they would not support this regulation. Do I just pass on the instructions to the Parliamentary Counsel’s Office in the hope that it will either reject the instruction, or see nothing wrong? After all, I may be wrong.”

### Response

It can be embarrassing, or worse, to have to cool government (that is, your employer’s) enthusiasm for a course of action, but if the legal situation seems clear, the legal officer should say so. In the example, the decision as to whether the proposed regulation would be within power is not the legal officer’s, but the Parliamentary Counsel’s, but the legal officer should give his or her considered advice as requested by the client.

2.2.6 If a legal officer is confident that the law is clear, it can be confronting if your client wants another opinion. If the law is uncertain, a legal officer could suggest that they get external advice. If, however, a legal officer is told to get another opinion for what seems like opinion shopping, he or she should point out the

## 2. Good, Independent Advice

problems this might cause. If the second opinion is the more welcome, for example, the agency has no way of knowing whether it is right or wrong and liability can result from the consequences of following incorrect advice.

2.2.7 Legislation and codes of conduct support the independence of legal officers and reduce pressure to rubber stamp proposals.

2.2.8 The Local Government Act 1993, provides that:

“A member of staff of a council is not subject to direction by the council as to the content of any advice or recommendation made by the member.” (s. 352(1))

2.2.9 NSW Public Sector Legislation

The “public sector service” includes government departments, statutory bodies and services like the Police Service. It also covers some jobs in Parliament and bodies exercising public functions (such as State owned corporations).

2.2.10 An object of the *Public Sector Employment and Management Act 2002* is:

*“to ensure that the public interest is protected.”* (Part 2.7, Ch 2)

The public interest in expert, independent legal advice to government is well accepted.

2.2.11 The Premier’s Model Code of Conduct also supports the independence of legal officers:

*“Public employment requires standards of professional behaviour from staff that promote and maintain public confidence and trust in the work of government agencies... Employees are to promote confidence in the integrity of public administration and always act in the public interest and not in their private interest.”*

2.2.12 For ethical decision-making, the Premier’s Model Code of Conduct (8-4) suggests employees consider:

- a. Is the decision or conduct lawful?

## 2. Good, Independent Advice

- b. Is it consistent with government policy and the agency's objectives and code of conduct?
- c. What could its outcome be for the employee; work colleagues; the agency; and other parties?
- d. Does the outcome raise a conflict of interest or private gain at public expense?
- e. Can the decision or conduct be justified in terms of the public interest and would it withstand public scrutiny?

2.2.13 A legal officer who yielded to pressure from the client to act inappropriately would not be acting in the public interest.

### 2.2.14 Commonwealth

The *values* of the Australian Public Service ("APS") are set out in the *Public Service Act 1999*:

*"the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs."* (Section 10(1)(f))

2.2.15 The Act includes a Code of Conduct which states that APS employees:

*"must behave honestly and with integrity in the course of APS employment."*  
(Section 13(1))

### 2.2.15 Representation in court

Privilege, for representation in court, is governed by the Evidence Acts, 1995, of the Commonwealth and State. The "client" is defined as:

- a. an employer (not being a lawyer) of a lawyer"; and also
- b. an employer of a lawyer if the employer is:

## 2. Good, Independent Advice

- (i) the Commonwealth or a State or Territory, or
- (ii) a body established by a law of the Commonwealth or a State or Territory.” (Part 3.10 Division 1. S117(1))

2.2.16 The Acts do not cover every case.<sup>vi</sup> At least one High Court Justice, however, has said that communications within departments should be privileged<sup>vii</sup>. Other courts have held that communications between local government councils and other statutory authorities and their in-house lawyers are privileged.<sup>viii</sup>

### **2.3 A legal officer is not entitled to publicly oppose government policy concerning any matter in which they are or have been acting.**

2.3.1 A public statement of opposition to government policy will undermine public confidence and the client’s trust in the impartiality of the advice they receive.

2.3.2 Legal officers should be able to provide advice that is objectively based in law even if his or her personal interests are directly affected by government policy.

2.3.3 If a conflict of interest resulted in a legal officer’s giving partial advice, it would be considered. If a conflict of interest arises, or might arise, the legal officer should inform his or her client and arrange for the work to be done by someone else.

### 3. Confidentiality

*“Lawyers should ...keep the affairs of their clients confidential.” (Law Society Statement of Ethics).*

**3.1 Information given in confidence should be kept confidential, during and after employment, unless the agency authorises disclosure, there is an overriding legal duty to disclose, or a legal immunity for doing so.** (Professional Code of Conduct and Practice Rules).

3.1.1 Confidentiality is a fundamental and defining obligation for various professions, including law. Confidentiality is so important because it protects:

- a. The privacy and autonomy of individuals;
- b. The best interests of the client;
- c. Trust;
- d. The public interest.

3.1.2 The administration of justice is dependent on a client’s freedom to speak frankly to its legal advisor and so the content of their communications is privileged.

3.1.3 The ethical importance of confidentiality between lawyer and client is supported and regulated by legislation, case law and professional rules of conduct. A practitioner must not, for example, either during or after a retainer, disclose confidential information acquired during a retainer, unless:

- a. the client authorises disclosure;
- b. the practitioner is allowed or required by law to disclose (see External Investigative Authorities, below); or
- c. the practitioner discloses information for the sole purpose of preventing the probable commission or concealment of a felony. (Professional Code of Conduct and Practice Rules, Rule 2)

### 3. Confidentiality

3.1.4 The duty of confidentiality includes a request for advice and is inherent in the fiduciary relationship between lawyer and client. The Premier's Model Code of Conduct suggests:

- a. Clearly documented procedures for the storage, disclosure and distribution of information;
- b. Use of official information for work-related purposes only;
- c. Not disclosing or using confidential information without official approval;
- d. Ensuring that confidential information in any form cannot be accessed by unauthorised people; and
- e. Discussing sensitive information only with people authorised to access it.

3.1.5 Passing on privileged information could result in liability for damages.<sup>ix</sup> and/or an injunction to stop a third party from using it.<sup>x</sup>

#### 3.1.6 External Investigative Authorities

Rules relating to confidentiality don't always apply to external investigations. Under the *Legal Profession Act 2004 (NSW)*:

- a. A legal practitioner must, if required, answer questions or produce information or documents despite a duty of confidentiality to a client (s.152);
- b. A legal practitioner may disclose information to the Legal Services Commissioner, the Law Society Council or the Administrative Decisions Tribunal if the Commissioner, if it is necessary to defend a complaint against a solicitor.

3.1.7 Legal officers acting for an agency under investigation, or which has relevant information, must act on their client's instructions. Don't inform or assist an investigation unless legally obliged or instructed to do so, but advise the agency to assist the investigation to ensure a just outcome.

### 3. Confidentiality

3.1.8 Whether or not an agency must disclose information depends on its powers and the circumstances in which information is protected. For example:

#### 3.1.9 State

Complaints about legal officers acting for a public authority are excluded under the *Ombudsman Act 1974*. A legal officer, a client agency or local government council, is a “public authority”. The Act also excludes the conduct of a public authority involved in proceedings:

- a. before a court; or
- b. before another person or body which can compel witnesses to appear and give evidence. (Schedule 1, para.8)

3.1.10 Otherwise, the Ombudsman can insist that a public authority provides information and can enter premises to inspect documents. This does not include information subject to legal professional privilege, unless the authority agrees to provide it, or the investigation is about information affected by legal professional privilege.

3.1.11 The Independent Commission against Corruption (ICAC) conducts investigations and hearings under the *Independent Commission against Corruption Act 1988*. It can, in the course of an investigation, serve written notice on a public authority or official (defined in s.3), requiring them to produce information; or on anyone, to produce a document or something else (*Ombudsman Act, s.12 -21B*).

3.1.12 If ICAC serves a written notice a public authority or person must produce the information despite:

- a. any rule which, in a court, might justify an objection on grounds of public interest (s.22); or,
- b. any privilege which they could have claimed in a court (s.24); or,
- c. any other restriction (s.24).

### 3. Confidentiality

3.1.13 ICAC's power to enter the premises of a public authority or official, and to inspect and seize items shouldn't be exercised, however, if it appears that a person has a ground of privilege under which, in court, they might resist inspection or Production and that they haven't consented. (s.25)

3.1.14 Witnesses are not excused from answering questions or producing evidence except in the case of legal professional privilege. If:

- a. a person is required to answer a question or produce something at a hearing; and
- b. the answer or document contains privileged communications in relation to an appearance before the Commission,

they can refuse to comply unless the privilege is waived. (s.37).

3.1.15 The Government Information (Public Access) Act, 2009, has replaced the *Freedom of Information Act 1989*. , *Schedule 1 lists "exempt documents" - those containing information protected by legal professional privilege (Clause 10(1)), including an agency's policy document (defined in s.6.). The agency can refuse to produce an exempt document unless it can delete the exempt matter.*

### **3.2 It is not unethical to make a protected disclosure.**

3.2.1 Disclosures under the Protected Disclosures Act 1994 (NSW) of conduct are protected if there is evidence of:

- a. corruption, under the *Independent Commission Against Corruption Act*, or
- b. maladministration, being contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; or based on improper motives, or
- c. serious and substantial waste in the public sector. (Part 2 )

3.2.2 A legal officer should, in making a disclosure, act in the utmost good faith and care.

### 3. Confidentiality

3.2.3 The objects of the Act are to encourage and facilitate disclosures, in the public interest, by:

- a. improving procedures for making disclosures; and
- b. protecting persons from reprisals; and
- c. ensuring disclosures are properly investigated and dealt with.

3.2.4 No action may be taken against a person for making a disclosure, despite any duty of secrecy or confidentiality or other restriction (s.21). For example:

- a. a person who has a duty to maintain confidentiality under another Act has not committed an offence against that Act;
- b. a person is taken not to have breached an oath, law or practice in making a disclosure;
- c. a person is not liable to disciplinary action because of the disclosure (s.22).

3.2.5 If the protected disclosure is of communications between legal officer and a client, the communication would not lose legal professional privilege, which can only be waived by the client<sup>xi</sup>.

## Example

“I begin to suspect, on what seem reasonable grounds, that my immediate supervisor in the Department (who is not the Department Head) may be guilty of conduct about which a person with my knowledge of the circumstances could make a protected disclosure under the Protected Disclosures Act. I always think of myself as acting for the Department on the professional legal basis of confidentiality. I realise that even if I have misunderstood my supervisor’s conduct, that misunderstanding would not necessarily have the results, under the Act, that I would lose the protection it confers, and recriminatory action could be taken against me. But supposing I was wrong about the conduct, how could it ever be possible for a professional relationship to be re-established between us? What should I do?”

## Response

The issues are (1) what procedure should be followed if the legal officer made a disclosure under the Protected Disclosures Act; and (2) how would it affect the legal officer’s future relationship with her/his supervisor or the Department.

If there was no suspicion that the Department Head might support the legal officer’s supervisor, it would be easier to make the disclosure to the person appointed to receive it under the Department’s Code of Conduct for Protected Disclosures than to speak to investigative authorities; but the choice would be hers/his. If the supervisor was cleared of wrongdoing, the legal officer, though immune under the Act from reprisal, might need help from senior officers to re-establish a working relationship with her/his supervisor.

3.2.6 Disclosures may also be made to an external investigating body. Corrupt conduct should be disclosed to ICAC, maladministration to the Ombudsman and substantial waste of government property to the State Audit Office.

### 3.2.7 Public Service Act 1999 (Commonwealth)

There isn’t a Commonwealth equivalent to the NSW *Protected Disclosures Act*. The *Public Service Act 1999 (Cth)* provides, however, that a person performing functions in or for an agency must not victimize or discriminate against an Australian Public Service employee because they have reported breaches (or alleged breaches) of the Code of Conduct to specified Commonwealth authorities.<sup>xii</sup> (s 16 (Protection for whistleblowers))

### 3. Confidentiality

#### 3.3 It is not unethical to pass on legal advice to another agency in accordance with law or government policy.

##### Example

“I’m asked for legal advice by the Department Head in a memo that sets out the background facts. I find the legal question novel and difficult. I have a friend who is a legal officer in another Department, with experience on the issue, and would be able to help me. Is my duty of confidentiality owed to the Department (or Head), so that I would need approval to discuss the problem with the other legal officer? Or is it owed to the Government, so that, perhaps, I would not be breaking confidentiality anyway in speaking to another employee of the same Government.”

##### Response

The circulation of legal advice by one agency to another, where the advice is relevant to the latter’s operations or powers, is not the same as passing on instructions for advice. The Law Reform Commission has said that “other legal advisers act on the instructions (often implied) of the Attorney General who represents the Crown”. That would support the conclusion that passing on the resulting advice was subject to the control of the Attorney General which could be achieved by a scheme stipulating the purposes for which advice could be passed on. However, it also supports a conclusion that the circulation of instructions for advice might be subject to the Attorney General’s control, though it is harder to see how control could be achieved.

The legal officer must get approval from the Department Head or delegate to show the memo to his or her friend or to discuss the instructions with the friend. It is possible that legal professional privilege might be jeopardised. It would seem best that:

- the discussions with the friend should be in very general terms, with no specifics being disclosed, and only in confidence; or
- the discussions should be held with another officer in the legal officer’s own agency; or external advice should be sought, e.g. from the Government legal office or counsel, instead of the friend.

3.3.1 The NSW Law Reform Commission has said that, where both agencies represent the Crown, there is no implied waiver of privilege. The Commission didn’t consider whether the same rule applies to instructions, so, to be safe, ensure all disclosures are made confidentially.

3.3.2 The Commission, in its report on Circulation of Legal Advice to Government considered it established, in *Western Australia v Watson*<sup>xiii</sup> that:

### 3. Confidentiality

- a. Ministers, and in many cases, senior officials of a government department or agency, constitute “the Crown”;
- b. Knowledge acquired by a Minister or senior official may, at least in some situations, be taken to be the knowledge of the Government as a whole;
- c. Every minister or senior official has a duty to communicate relevant knowledge to the Government as a whole (para. 3.9).

#### 3.3.3 The Commission went on to say that:

- a. Legal personality includes the ability of the Crown or government to receive advice, and therefore the indivisible nature of government remains important. (para 3.12);
- b. At common law the Crown enjoyed a range of privileges and immunities in relation to litigation which could be brought within the ‘shield of the Crown’ (para. 3.13);
- c. When a party is ‘the Crown’, it is also the client of the Attorney General, or the Attorney General as represented by the Solicitor General, Crown Advocate or Crown Solicitor. This is so, even when instructions are received from, and advice delivered to, particular office holders within the executive government (para 3.14);
- d. Legal advice to ‘the Crown’ or to any department, agency or official within the ‘shield of the Crown’ is the property of the Crown. The government as a whole, therefore, has property in the advice, and the right to disclose it. (para 3.15);
- e. The Attorney General, as the first law officer, is responsible for legal advice to government. Other legal advisers act on the instructions of the Attorney General, even when the advice is requested by, or delivered to, a department, agency, or official (para 3.17); It would be impossible for the Attorney General to know about all legal advice to government but the government receives advice from officials who may also be part of government. If advice is disclosed, the disclosure would be by the Attorney General (para.3.19).

### 3. Confidentiality

3.3.4 The Commission, said that: “If a government legal officer distributed amongst departments advice provided by a private legal practitioner... disclosure of a document by one Crown servant to another would not constitute a breach of copyright.” (para 3.23)<sup>xiv</sup>

3.3.5 The Commission advised that “since the client is notionally the Crown, the power of the Attorney General would to circulating includes advice provided to government by private practitioners.” (para 5.5)<sup>xv</sup>

3.3.6 The Department of Justice and Attorney General encourages agencies to share legal advice which affects their operations or powers. There should be procedures for sharing and a legal officer acting in accordance with those procedures would not breach the duty of confidentiality.

3.3.7 The duty of confidentiality doesn't apply if an agency is a corporation which does not represent the Crown, but may be subject to a Minister's direction<sup>xvi</sup>. Furthermore, the division of work within government, or a statute, may allow or require information to be shared between one agency and another<sup>xvii</sup>.

3.3.8 The following Ministers are always entitled to information about a legal matter in an agency:

- a. The Prime Minister or Premier, as the principal Minister of the Crown;
- b. The Attorney-General, as the first Law Officer of the Crown<sup>xviii</sup>;
- c. The Minister of the agency; and
- d. Ministers working together in Cabinet or a committee of Cabinet or by some other arrangement between them, on issues to which the legal matter is relevant.

3.3.9 The effect of sharing advice on legal professional privilege was considered in *Mann v Carnell*. The High Court<sup>xix</sup> agreed that the Chief Minister of the Australian Capital Territory was entitled to see legal advice provided to the Territory, without waiving the legal professional privilege which the Territory had in the advice.

## 4. Model Litigant

*“There’s nothing wrong with being tough, in fact it’s our obligation to be tough when our clients want us to be tough. It’s just that we shouldn’t be tricky, we shouldn’t be dishonest, we shouldn’t be immoral if you like, we shouldn’t be in a position where the government will be embarrassed by the conduct of its litigators or by the litigation that it runs”. (Government Lawyer)*

### **4.1 Legal officers should advise client agencies to conduct themselves as model litigants. They should act in accordance with model litigant rules and assist agencies to do so.**

4.1.1 The “Model litigant” acts in accordance with the court’s view of how a model litigant would behave. A legal officer should bring the requirements to the agency’s attention, because a failure to observe them could have an adverse effect on the agency’s position in court. (The Law Society’s Statement of Ethics).

4.1.2 The Model Litigation Policy for Civil Litigation in NSW states, as a matter of principle, that the state and it’s agencies must act honestly and fairly by:

- a. Dealing with claims promptly;
- b. Paying legitimate claims without litigation;
- c. Acting consistently in the handling of claims;
- d. Avoiding litigation wherever possible (see Premier’s Memorandum 94-25 on the use of alternative dispute resolution);
- e. Keeping costs to a minimum by not requiring proof of what the agency knows to be true and not contesting liability when a dispute a dispute is really about quantum;
- f. Not taking advantage of a claimant who lacks resources

#### 4. Model Litigant

- g. Not relying on technical defences unless the interests of the state or the agency would be compromised;
- h. Not lodging appeals unless there are reasonable prospects of success or an appeal is justified in the public interest;
- i. Apologising when the state or it's lawyers have acted wrongfully or improperly.

4.1.3 Procedures to minimise cost and delay will be adopted by a model litigant. A public sector employee claiming compensation for injury against the government, for example, would benefit by the early exchange of medical reports, clarifying the issues and helping to resolve them quickly.

4.1.4 Responsibility for wrong conduct towards members of the public should be readily accepted by agencies along with an enlightened attitude towards claiming legal professional privilege if disclosure may often actually assist the just resolution of disputes.<sup>xx</sup>

4.1.5 Legal officers themselves must act as “model litigants” and, in all their dealings with the courts, be frank and honest and diligent in observing undertakings given to the Court or their opponents:

“...Lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.” (The Law Society's Statement of Ethics).

4.1.6 The Commonwealth Attorney-General's Legal Services Directions require agencies briefing counsel in matters covered by the “model litigant” policy to enclose a copy of the relevant Directions and instruct counsel to comply with the policy. The Directions are legally binding under the Judiciary Act 1903.<sup>xxi</sup>

#### **4.2 Legal action should be instituted or defended only on a sound legal basis.<sup>xxii</sup>**

4.2.1 “Model litigant” requirements don't prevent governments and their agencies from acting firmly and properly to protect their interests. All legitimate steps may be

#### 4. Model Litigant

taken to pursue claims by agencies and testing or defending claims against agencies.<sup>xxiii</sup> (One government lawyer made the point that reporting by the media of claims, or the amassing of claims by a number of people, are not by themselves reasons for not firmly defending them.)

4.2.2 A “model litigant” would not engage in such conduct as the destruction of documents<sup>xxiv</sup>. In *British American Tobacco Australia Services Ltd v Cowell* (rep. McCabe estate)<sup>xxv</sup> the right of a litigant to manage its own documents, whether by retaining or destroying them, versus the right of the opposing party to access them, was discussed. The case concerned documents that had been destroyed before litigation was begun, the respondent claiming (ultimately unsuccessfully) that the destruction had been carried out to frustrate foreseeable litigation. The Court held that it would intervene, particularly if the sanction sought was the striking out of the destroying party’s pleading, only if “the conduct of (that) party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot.”<sup>xxvi</sup>

4.2.3 The destruction of documents by a client agency to prejudice a future claimant would be unethical conduct, but the above case also leaves open the possibility of the agency’s claim or defence being struck out.

4.2.4 To advise a client that a document should be destroyed, or made illegible, is professional misconduct. So too is advice to move it, if the practitioner is aware that:

- a. the document may be required in legal proceedings which are likely to be commenced, and
- b. following the advice will result in the document being unavailable or unusable in court.

4.2.5 Legal officers must not do any of these things (destroying or moving) themselves, nor aid or abet someone else to do them, even if there has been no indication that a specific person intends to commence proceedings in which the documents may be needed. It is not professional misconduct, however, to move a document in their possession or control at the request of someone who is lawfully entitled to it.

#### 4. Model Litigant

4.2.6 *The Legal Profession Amendment (Documents) Regulation 2002* inserted into the *Legal Profession Regulation 2002* a new clause 142A, on advice on and handling of documents. It prohibits a legal practitioner from advising a client to the effect that a document should be destroyed.

## 5. Conflict of Interest

*“...Lawyers should...avoid any conflict of interest” (Law Society’s Statement of Ethics)*

*“Well, its pretty standard procedure I guess that if you’ve got a court case on...you go to lunch with Counsel and invariably Counsel pays. That’s the practice...well, it just happens in litigation, and I’m not saying that on occasions I get embarrassed by it and insist on paying for myself...I just don’t want to feel that they’re obligated to buy me dinner or lunch or whatever.” (Government Lawyer)*

### **5.1 Legal officers must deal fairly with their clients, free of the influence of any interest that may conflict with their clients’.**

5.1.1 The Professional Conduct and Practice Rules, in the Statement of Principles for Rules 1-16, stress that practitioners must be acutely aware of their fiduciary relationship with their clients.

5.1.2 Rule 10 deals with avoiding a conflict between a client’s and a practitioner’s own interest. It states that a practitioner must not:

- a. allow the interests of an associate to conflict with those of the client;
- b. unduly influence a client to benefit the practitioner over and above fair remuneration for the legal services provided;
- c. accept instructions, or continue to act, in a property matter if they are, or become, aware that the client’s interest in the proceedings or transaction is in conflict with that of the practitioner or an associate.

5.1.3 The following Rules, dealing with taking benefits under a client’s will and borrowing from a client, deal with specialist agencies, such as the Trustee and Guardian. Such agencies have their own codes of conduct.

**5.2 Public sector law also prohibits conflicts of interest on the part of public sector employees.**

5.2.1 Public Sector Codes of Conduct have detailed rules against conflicts of interest.

The Premier's Memorandum on a Model Code of Conduct:

- a. requires potential conflicts of interest to be taken into account in decision-making;
- b. provides detailed guidance on the sorts of situations that give rise such conflicts;
- c. describes how they are to be resolved;
- d. include rules about accepting gifts or benefits; and
- e. outlines precautions in relation to post separation employment.

5.2.2 For Commonwealth agencies, the Code of Conduct in s. 10 of the *Public Sector Act 1999* provides that and APS employee:

- a. must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment; and
- b. must not make improper use of:
  - inside information; or
  - their duties, status, power or authority;

to gain, or seek to gain, a benefit or advantage for themselves or someone else.

5.2.3 The *Commonwealth Authorities and Companies Act 1997* applies to the Australian Government Solicitor (AGS). Part 3 Division 4 deals with the conduct of directors, other officers and employees of authorities, including:

## 5. Conflict of Interest

- a. An officer or employee must not improperly use his or her position to gain an advantage for him or herself or for someone else, or to cause detriment to the authority or to another person.
- b. A person who obtains information because of their position must not improperly use the information to gain an advantage for him or herself or someone else; or to cause detriment to the authority or to another person.
- c. An officer or employee commits an offence if he or she uses his or her position dishonestly or recklessly to gain advantage or cause detriment . (Ss. 24 – 26)

### **5.3 Legal officers should not act for more than one agency, for an individual and an agency, in the same matter if they have conflicting interests. This is so, even where the conflict was not apparent at the beginning but becomes evident later.**

See further under Section 3, Who is the Client?

#### **Example**

“The solicitors acting for the private sector party to a projected agreement with the Government tell me that they have been so impressed by my work on behalf of the Government that at the conclusion of the deal they will gladly give me a job at a much higher salary than I get now, and with substantial prospects of future partnership. What do I say, and should I tell the Department Head about the offer?”

#### **Response**

If the legal officer has reason to suspect the projected offer of future employment is an inducement not to advise the Government of any problems the officer sees with the agreement, he or she should report it immediately to a senior officer. Otherwise, it would be best to say that taking up the offered job is something the officer could not consider until the present task was completed. It would be advisable even so to tell a senior officer what the firm has said, and the response the officer has made.

5.3.1 Rule 9 of the Professional Conduct and Practice Rules deals with acting for parties with opposing interests. It applies to legal officers employed in most government agencies. There are, however, statutory rules applying to the Attorney-General's lawyers and the AGS, and the NSW Crown Solicitor.

## 5. Conflict of Interest

5.3.2 The *Judiciary Act 1903*, s.55F and s. 55R, provides that an Attorney-General's lawyer or the AGS may act for 2 or more parties who have conflicting interests with the approval of the Attorney-General:

- a. in relation to the particular matter; or
- b. under written arrangements covering the circumstances in which they may so act.

5.3.3 *The Legal Profession Act 1987*, s.48A (3), provides that the Crown Solicitor may act for a party in a matter that is not the subject of litigation, even if also acting for another party.

### Example

The NSW Ombudsman has noted cases where clear conflicts between the interests of agencies have not even been realised by legal officers acting for both agencies. (The Ombudsman's Annual Report for 2001 – 2002).

The problem can arise if agencies arrange to share legal services or to use lawyers employed by another agency.

In the Legal Advice section of his "Good Conduct and Administrative Practice", the Ombudsman suggests that both agencies should ensure that the arrangements explicitly state what to do if a potential conflict is identified.

The Deputy Ombudsman as pointed out the extreme case where the same lawyers are retained for an agency and an individual; if a conflict of interest arises, the ongoing relationship between the agency and its lawyers is likely to induce the latter to favour the agency's interest over the individual's, making it imperative that the individual then have proper independent representation.

## 6. Giving Policy Advice

**6.1 A legal officer who is instructed to help the agency to carry out a transaction, does not have to offer unsought advice on the wisdom of the transaction.<sup>xxvii</sup> It is, however, appropriate to point out the legal effect of provisions being drafted to carry out the transaction.**

**6.2 Advice may be sought from legal officers about a matter of policy or management discretion. It is not unethical to provide such advice, but it is desirable, to prevent misunderstanding, to separate clearly the legal advice from the policy or management advice.**

**6.3 The legal officer should consider whether this type of mixed advice<sup>xxviii</sup> may later raise questions about whether, for the purposes of legal professional privilege, the dominant purpose of the advice was legal or something else.<sup>xxix</sup>**

### Example 1

“I do my Department’s commercial agreements work. I have been working hard on a very complex agreement proposed with a major company for a project of obvious political importance to the Government. Through all the complexity I have begun to think that under the agreement the Government will be carrying all the risk involved in the project. What do I do, bearing in mind that the Government thinks that all that remains to be done is to settle the formalities? Policy-making is not in my job description”.

### Response 1

If it is clear from the legal officer’s instructions that the agency understands that the Government will be carrying the risk involved in the project, then it is not the legal officer’s duty to query those instructions. The legal officer should, however, in advising on documentation for the transaction, point out the legal effect of its provisions, including those that impose the risk of the transaction on the Government.

**6.3.1 Policy issues are often woven into requests for legal advice. It is not unusual for legal officers to advise on matters that are concerned solely with policy or management.**

**6.3.2 Agencies benefit from having legal officers who are willing to give advice from a legal perspective on policy and management issues. There is usually no difficulty,**

## 6. Giving Policy Advice

from an ethical or any other point of view. The important thing is to be very clear about the distinction.

6.3.3. Decision makers can be misled about the choices available, however, and can feel they have to take a particular course. If a client asked a legal officer whether a particular course of action was possible, for example, the legal officer might reply that it was not, because they thought it would be bad policy, not because it was not legally permissible. The legal officer might be unaware of other policy considerations and the client needs know the legal position.

6.3.4 When a question involves mixed issues of law and policy, it may be best to clearly separate them. Separate documents could be used, or clear headings where the advice is given in one document. If verbal advice is given, double-check that the recipient understands which part of it is legal and which part is policy.

### Example 2

I have been asked to advise a government client about whether there are procedures by which existing legislation can be used to achieve certain objectives and, if it cannot, the kind of legislative amendments which will be needed to achieve those objectives. However, in my view, those objectives, if realised, may yield some very undesirable outcomes. Is it my place to express such an opinion when I provide my advice?

### Response 2

This may depend. If it is possible to envisage alternative procedures or legislative amendments which achieve these objectives but in the opinion of the legal officer either do not produce these undesirable outcomes, or, if they do produce them, to a much smaller degree, then these are available options which can be brought to the client's attention. Not only is the legal officer perfectly entitled to raise them for consideration; he or she may well be remiss if they omit to do so. The client is entitled to expect that a competent legal officer will canvass all the available alternatives.

If, however, these undesirable outcomes will follow irrespective of the way in which the objectives are realised the legal officer needs to consider carefully whether his or her opinion to this effect should be expressed in the advice; especially when the opinion has not been sought. Assessing the likely outcomes of a particular policy can involve a variety of disciplines including economics, social science and psychology. The legal officer should retain enough modesty to appreciate that when it comes to such disciplines they will be outside their area of professional expertise and no more qualified to comment than any member of the general public. Further, if the policy is capable of producing benefits the question of whether those benefits are worth the anticipated drawbacks is one for the client to decide.

## 7. External Legal Service Providers

**7.1 If an agency is bound to refer particular types of matter to the Government legal agency, the legal officer should ensure that it does so. If the agency is free to select its external advisers, the legal officer must:**

- **try to ensure that the agency (and therefore the Government) is best served by the choice, and**
- **avoid selection from habit, friendship or favour, or, of course, in return for some inducement.**

7.1.1 The choice of law firms should depend on the outcome of a tendering process, in which the capacity of the firm, its willingness to use experienced practitioners and the costs involved will all be relevant. The experience of a legal officer who has seen counsel in action will often be a very good means for choosing an appropriate barrister.

7.1.2 The Equitable Briefing Policy of the NSW Government is also relevant here in that it states that all reasonable efforts should be made to identify and genuinely consider briefing female counsel. It also provides a format for monitoring, reviewing and reporting on the engagement of women barristers.

7.1.3 Commonwealth agencies and legal service providers are also encouraged to brief a broad range of counsel and, in particular, women. (Legal Services Directions, Appendix D)

7.1.4 In New South Wales the Crown Solicitor must be retained in particular classes of matter. Senior Counsel cannot be retained without the Attorney-General's approval.

7.1.5 The NSW Attorney General's Department's Guidelines for Outsourcing Government Legal Work can help agencies to decide:

- a. When legal work should be contracted out;

## 7. External Legal Service Providers

- b. The tendering process to be followed; and
- c. The management of the relationship with the selected external legal provider(s).

7.1.6 If there is doubt about whether or not the Crown Solicitor's Office should be engaged, the Crown Solicitor's Office should be consulted. If it is still unclear, the Director General of the Attorney General's Department will decide whether or not a matter is core legal work.

7.1.7 In the Commonwealth, the Australian Government Solicitor must be retained for what is known as “tied work”. For more information about this, see the Attorney-General’s Legal Services Directions, Appendix A.

### Example 1

“I am acting for the Department to get the advice of a major private firm on how a proposal to alter certain rights over the use of water flowing through properties might be implemented. The firm has done a lot of government work. I am happy to work closely with them, but I can’t be present at all of the discussions they have amongst themselves as they develop the advice. When the advice arrives I think the firm’s scheme is far too complicated, and, indeed, that it would be far simpler and practical to introduce legislation to bring about the change. What do I do?”

### Response 1

The legal officer should raise with the firm the deficiencies she sees in the advice obtained, in an attempt, in the agency’s interest, to resolve the issue. The legal officer’s experience may be very valuable to the firm in reviewing its advice. If the firm maintains its advice, and the legal officer still thinks it is deficient, the agency should be told.

**7.2 A legal officer must act diligently in every case: to brief and assist external legal service providers and raise any problems with their advice.**

### Example 2

“The specialised work of the Department is remote from the experience of many barristers, so I like to brief a small number of counsel, to build up their experience in that work, and their acquaintance with officers in the Department. It saves me a lot of time, not having to explain things to a new barrister. Yet it worries me that some of the barristers are beginning to move into a price range that is bringing in some large bills to the Department.”

### Response 2

The legal officer should always try to control the cost of external legal services, and so should always be on the lookout for new talent to gradually replace barristers whose fees are beginning to stretch the budget. There are always talented junior barristers available, and the experience of the legal officer should be fully used to give them the necessary knowledge of the specialised work.

7.2.1 Repeatedly briefing the same counsel or firm improves their experience in the agency’s work. Having a number of barristers doing advocacy work in the one field, however, could be useful in case a single barrister is unavailable. In country areas of course, there may be only one legal firm in town, and using that firm may be a substantial saving.

7.2.3 Commonwealth agencies and legal service providers are also encouraged to brief a broad range of counsel and, in particular, women. Under the Commonwealth Attorney-General’s, which is binding, the selection of counsel by Commonwealth agencies needs to take into account the interests of the Commonwealth in securing suitable and expert counsel but this shouldn’t result in a narrow pool of barristers who regularly do Commonwealth work. (Legal Services Directions, Appendix D)

## Example 1

“I am acting for the Department to get the advice of a major private firm on how a proposal to alter certain rights over the use of water flowing through properties might be implemented. The firm has done a lot of government work. I am happy to work closely with them, but I can’t be present at all of the discussions they have amongst themselves as they develop the advice. When the advice arrives I think the firm’s scheme is far too complicated, and, indeed, that it would be far simpler and practical to introduce legislation to bring about the change. What do I do?”

## Response 1

The legal officer should preferably raise with the firm the deficiencies she sees in the advice obtained, in an attempt, in the agency’s interest, to resolve the issue. The legal officer’s experience may be very valuable for the firm in reviewing its advice. If the firm maintains its advice, and the legal officer still thinks the advice deficient, the agency should be told.

7.2.4 Agreeing on clear performance indicators at the outset, and talking early and frankly about any concerns, will help avoid serious problems with legal firms and barristers. Regular meetings between agency representatives and external service providers should be scheduled to discuss the work being performed. Future problems can also be provided if the tender team regularly reviews and records progress.

## Example 2

“The specialised work of the Department is remote from the experience of many barristers, so I like to brief a small number of counsel, to build up their experience in that work, and their acquaintance with officers in the Department. It saves me a lot of time, not having to explain things to a new barrister. Yet it worries me that some of the barristers are beginning to move into a price range that is bringing in some large bills to the Department.”

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The legal officer should always try to control the cost of external legal services, and so should always be on the lookout for new talent to gradually replace barristers whose fees are beginning to stretch the budget. There are always talented junior barristers available, and the experience of the legal officer should be fully used to give them the necessary knowledge of the specialised work.

## End notes

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<sup>i</sup> Statutory corporations, although established for public purposes, will not readily be treated as representing the Crown. See *Babcock International Limited v Babcock Australia Limited & Eraring Energy*; *Babcock Australia Limited v Eraring Energy & Babcock International Limited* [2003] NSWCA 6.

<sup>ii</sup> See, for example, the *Ombudsman Act* 1974 (NSW), ss.35A and 35B (amongst others) imposing restraints on proceedings that may be taken against the Ombudsman, and proceedings that the Ombudsman may take; and the *Public Finance and Audit Act* 1983 (NSW), s.33, as to the entitlement of the Auditor-General to seek advice from the Attorney General or the Crown Solicitor.

<sup>iii</sup> Section 25(1). The relationship arises only in the context of functions performed by the solicitor in the course of acting as a solicitor (s.25(1A)). An applicant for legal aid includes a person who only seeks legal advice. A person to whom legal aid is granted includes a person to whom that advice is given; and an application for legal aid includes a request for that advice: s.25(6). See also s.24, on the respective functions of the CEO and a member of staff in practising as a solicitor under the Act, and the rules, standards and duties of a solicitor that apply to both. See also s.25, and s.26, prohibiting the passing on information.

<sup>iv</sup> *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.

<sup>v</sup> Per Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (N0 2) (1972) 2 QB 102.

<sup>vi</sup> See *Mann v Carnell* (1999) HCA 66 (preliminary discovery), and *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 6 (discovery).

<sup>vii</sup> Per Deane J in *Waterford*: "...legal professional privilege applies in relation to the seeking and giving of professional legal advice within and between the various branches of the Executive Government." Where the solicitor has been the Australian Government Solicitor, or the Government Solicitor in a state or territory, it has been suggested that officers, though employed by the client, have a professional relationship with it. They can expect the protection of the Attorney-General from any threat to their independence. Brennan J in *Waterford* considered that a professional relationship can arise only where the Government has been advised or represented by the Crown Solicitor (or the Australian Government Solicitor, as it was then). Other Justices have spoken generally of the Government's legal advisers being in a professional relationship to the Government.

<sup>viii</sup> Santow J. in *Kang v Kwan & 2 Ors* [2001] NSWSC 698.

<sup>ix</sup> S.3, and s.126, which makes that Council "the appropriate Council", and s171S.

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<sup>xi</sup> See, for example, per Gibbs CJ (para. 5 of his judgment), and per Mason and Brennan JJ (paras. 10-11 of their joint judgment in *Attorney-General (N.T) v Maurice* (1986) 161 CLR 475. Of course, if

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the client agency explicitly authorized the legal officer to make the disclosure, the question of waiver might need closer examination.

<sup>xii</sup> The specified authorities are the Public Service Commissioner appointed under the Act; the Merit Protection Commissioner so appointed; an Agency Head; or, in any of those cases, the authority's delegate for that purpose. For the action these respective authorities may take see s.41, s.50 and s.20.

<sup>xiii</sup> Report 86 (1998).

<sup>xiv</sup> Report, para. 3.11. By "the indivisible nature of government" it meant the doctrine by which "at one time, the symbolic Crown was represented as being one and indivisible". For passing reference to the doctrine in a different setting, see the decision of the NSW Court of Appeal in *Haines v. Tempesta* (1995) 37 NSWLR 24.

<sup>xv</sup> The proposed scheme included the deletion of material identifying individuals where publication might embarrass them. The then Attorney General's Department in NSW commented that "there is now a practice whereby NSW public sector agencies are encouraged to share their legal advice with another agency if that advice has an impact on the latter agency's operation or powers. In instances where agencies disagree about the sharing of advice, the proper course is for the Crown Solicitor to refer the matter to the Attorney General for determination as First Law Officer of NSW."

<sup>xvi</sup> See, for example, para. 10 (Advice on legislation administered by other agencies) of the Commonwealth Attorney-General's Legal Services Directions issued pursuant to the Judiciary Act 1903, s. 55ZF.

<sup>xvii</sup> ((1999) HCA 66, Gleeson CJ, Gaudron, Gummow and Callinan JJ in their joint judgment at para. 16.

<sup>xix</sup> *Mann v Carnell* (1999) HCA 66. The Court did not consider whether sharing advice between Ministers or agencies representing the Crown could never amount to waiver of client legal privilege, as appears to have been the view of the NSW Law Reform Commission. Sharing of advice, therefore, should to be done confidentially.

<sup>xx</sup> The "Legal Advice" section of the Ombudsman's 2<sup>nd</sup> Edition of Good Conduct and Administrative Practice Guidelines

<sup>xxi</sup> See Judiciary Act 1903, ss 55ZF and 555ZG. *Scott v Handley* (1999) FCA 404 also contains a valuable reference to recent authority.

<sup>xxii</sup> Rule 17.2 A of the Professional Conduct and Practice Rules, which provides that a practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:

17.2.1 The facts already available provides a proper basis for the allegation;

17.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and

17.2.3 the client wishes the allegation to be made after having been advised of its seriousness.

<sup>xxiii</sup> Commonwealth Attorney-General's Legal Service Directions: see the requirement that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation by complying with the requirements set out in paras (a)-(i).

<sup>xxiv</sup> Commonwealth and state documents are also protected under state archives legislation.

<sup>xxv</sup> *British American Tobacco Australia Services Ltd v Cowell (rep. McCabe estate)* (December 2002, Victorian Court of Appeal).

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<sup>xxvi</sup> See paras. 173-176 of the joint judgment. The Court left open the question whether it is possible to hold conduct to be contempt, even criminal contempt, if it takes place before any proceeding has been instituted. It pointed out that it would be impossible to classify conduct as civil contempt i.e. disobedience to an order, in such circumstances.

<sup>xxvii</sup> Privy Council in *Clark Boyce v Mouat* (1994) 1 AC 428 at 437, cited by Young J in *Marcolongo v Mattiussi* (2000) NSWSC 834. Those cases did not involve legal officers, but the rule would seem to apply to them, unless, at any rate, an officer's duties included giving policy advice.

<sup>xxviii</sup> In *Waterford v The Commonwealth of Australia* (see references Section 3 above) In response to the appellant's argument that advice on the exercise of "administrative functions" could not be privileged, because the officer just had to be told how to do something, Brennan J said, at para. 9 of his judgment: "...the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimising that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration." Advice that went further than the nature or extent of a power, or the legal restraints on its exercise, and expressed an opinion on what decision should be reached on the merits, would be policy advice, and not protected by legal professional privilege. See also per Mason and Wilson JJ at paras. 5-7 of their joint judgment. Dawson J dissented and Dean J reserved his opinion.

<sup>xxix</sup> On the dominant purpose test, see the Evidence Acts 1995 of the Commonwealth and New South Wales, Part 3.10, and *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67

## References

Premier's Memorandum to Ministers M95-39, relating to work for which the Crown Solicitor's Office must be engaged.

NSW Attorney General's Department's Guidelines on Outsourcing Government Legal Work.

Commonwealth Attorney-General's Legal Services Directions, .Appendix D.

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