GOVERNMENT LAWYER

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CHAIR'S MESSAGE

CLE Convention

The Government Solicitors' Committee is organising the Annual Government Lawyers CLE Convention & Dinner to be held on Tuesday 9th September, 2003 at NSW Parliament House.

The program and registration form together with the Excellence Award nomination form is enclosed with this newsletter.

"Thriving in a Changing World" is the theme for this year's Convention to be opened by Mr Michael Sexton SC, NSW Solicitor General.

Here is a short biography of three of the guest speakers who will be addressing the Convention.

Steven Freeland, will be speaking on the following aspects of the International Criminal Court in his session: background; jurisdiction; US position; Australian Position; and the court's relevance and future. Stephen is a Lecturer in International Law at the University of Western Sydney. He has recently completed his LLM in International Law at UNSW and the University of Utrecht, The Netherlands, and is currently completing a PhD in International Law. His teaching and research interests include International Criminal Law, International Environmental Law, Human Rights Law, Public International Law and Space Law.

Two "hands on" sessions follow to be addressed by Christopher Blamford, Cleardocs Pty Ltd and Alan Limbury, Strategic Resolution.

Christopher is an internationally recognised expert in making legal and related documents clear, accurate, and easy to use. His clients include the United Nations and the European Central Bank. Through the innovative technology of his company Cleardocs (www.cleardocs.com), he provides plain language standard legal documents such as trusts and companies (including electronic ASIC registration) to accountants and other users.

Alan has been a litigation lawyer for over 39 years, specializing in trade practices and intellectual property. In 1996 he left his law firm, Minter Ellison, to focus full-time on mediation, through his ADR consultancy, Strategic Resolution. He has taught negotiation with Harvard Professor Roger Fisher (co-author of "Getting to Yes") and his session will show how the seven elements of "Principled Negotiation" can be used to help resolve disputes.

Send in the registration form for the CLE Convention to ensure your place as numbers are strictly limited.

Guidance on Ethical Issues for Government Solicitors

Following an extensive consultative process, the Committee is very pleased to launch the "Guidance on Ethical Issues for Government Solicitors" at the CLE Convention.

The project was completed with the expertise of Mr Hugh Roberts, former Crown Solicitor for 17 years who was engaged as a consultant to draft the Guidelines and Sue Bertram of the Law Society, who undertook focus groups and interviews with government solicitors. The project was steered by the Ethics Sub-Committee and I thank Brian Doyle, Patrick Duffy, Brad Row, Howard Bell, Rita Felton, Greg Williams, Virginia Shirvington, Donna Bain, Shanthini Govindasamy, Barbara Neil and Robyn Davies for their efforts.

The Guidance on Ethical Issues for Government Solicitors have been prepared for the benefit of solicitors employed in agencies of the Commonwealth and the State of NSW, and in local government bodies in NSW.

The purpose of the publication is to examine the application of existing principles of legal ethics to the circumstances of legal practice in the public sector of NSW. The Committee recognised it would be a valuable members service to produce a publication designed specifically for government solicitors that recognised the unique features of their work and work environment.

The publication will be available on the Law Society's website following the launch of the Guidelines at the CLE Convention. It is proposed to have a copy available for the attendees at the CLE Convention and for the solicitors who provided submissions in response to the draft document. A copy will be given to Government Legal Department Heads at their next meeting on 8th October.

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CAPSL

Greg Ross, Secretary of the Commonwealth Association of Public Sector Lawyers (CAPSL) has provided an article on the meeting held in Melbourne in April this year.

The Law Society is pleased to announce that it will be providing administrative support to CAPSL.

2003 Excellence in Government Legal Service Award

The Excellence Award has been administered by the Government Solicitors' Committee since 1992 and will be presented to the winner at the CLE Convention Dinner.

The aim of the award is to recognise the outstanding achievements of a Government legal solicitor or legal team. It's a fabulous way to reward the often unrecognised hard work and specialised legal skills of public sector solicitors.

Any individual or team that has performed 'above and beyond' the call of duty in the previous twelve months is eligible for nomination. All Government solicitors are encouraged to consider nominations for the Excellence Award. You can nominate your own work or that of a colleague or staff member.

The nomination form, rules and conditions for 2003 are contained in this issue of Government Lawyer.

John Edmund Hennessy Fellowship

The Government Solicitors' Committee are proud to once again call for applications for the John Edmund Hennessy Fellowship with this issue of the "Government Lawyer".

The Fellowship is offered up to the value of $5,000 to a solicitor employed in the New South Wales public sector currently holding a NSW practising certificate.

The application must demonstrate a benefit to the public sector by way of enhancing the applicant's skills and expertise in the practice of law relevant to their duties as a public sector lawyer.

A reminder that the applications must be lodged no later than 30th September. The winner of this prestigious award will be announced in the October issue of Government Lawyer. Information and criteria are contained in an article following.

I encourage you to consider your nomination for the Excellence Award and application for the John Edmund Hennessy Fellowship.

Kim Cull
Chair

2003 GOVERNMENT SOLICITORS COMMITTEE

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GOVERNMENT LEGAL DEPARTMENT HEADS

The Government Legal Department Heads meeting was held on Friday 2nd May, 2003 and the topic discussed was "Ethics for Government Lawyers".

The draft Ethical Guidelines for Government Lawyers had been circulated to all Government Legal Department Heads for review and comment and the meeting was held to conduct a panel discussion of the nine topics of the Guidelines.

The topics discussed were; Are the Ethical Guidelines Useful, Fiduciary Status, Who is the Client, Independence of Advice, Confidentiality, Model Litigant, Over-riding responsibility to Courts, Conflict of Interest, Legal Officer Giving Policy Advice and Legal Service Providers.

The panel, chaired by Donna Bain, Manager Research and Policy at The Law Society, included Virginia Shirvington, Senior Ethical Solicitor, Law Society, Greg Williams, Specialist Legal Officer, Child Protection, NSW Ombudsman deputising for Chris Wheeler, Deputy NSW Ombudsman and Hugh Roberts, former Crown Solicitor and consultant to the Sub-Committee.

The meeting was very well attended by the Government Legal Department Heads and/or their representatives and provided a spirited discussion and a valuable contribution to the consultation process.

The next meeting of the Government Legal Department Heads will be on Wednesday 8th October.

CAPSL

The Commonwealth Association of Public Sector Lawyers is an association formed by a group of lawyers with special interest in public sector legal issues.

CAPSL exists to support lawyers in providing an efficient and professional service to government, both national and local, and other public sector bodies throughout the Commonwealth for the benefit of the communities they serve. It is a satellite group of the Commonwealth Lawyers Association.

The primary aims of CAPSL are:

- To support public sector lawyers in the carrying out of their professional duties
- To promote interest within the Commonwealth in all aspects of public sector law
- To provide a focus and forum for the exchange of information and ideas
- To support public sector lawyers in the carrying out of their professional duties
- To promote interest within the Commonwealth in all aspects of public sector law
- To aid the Commonwealth Secretariat and Commonwealth Lawyers Association on all matters relating to public sector law and its practice

So far this year, over 50 individual and two institutional members have joined CAPSL, giving it a total of over 120 individual and 25 institutional members from over 25 Commonwealth countries.

CAPSL generally keeps in touch with its members by emailed newsletters and use of its website www.capsl.org. Meetings are held in conjunction with Commonwealth Law Conferences, every 3 or so years, with the most recent meeting in Melbourne in April this year.

Papers were presented on three topics - Outsourcing, Ethics and Public Private Partnerships.

Brief outlines of a number of the papers appear on the current CAPSL newsletter available at the CAPSL website (www.capsl.org). Details of other papers are intended to appear in the next edition and, in time, full text of papers may appear on the website.

The next Commonwealth Law Conference is to be held in London in 2005. CAPSL intends to be a contributor to the success of the Conference and to have public sector law issues the subject of discussion and debate.

Greg Ross
Secretary CAPSL

COMMONWEALTH LAW CONFERENCE

The 13th Commonwealth Law Conference was held from 14-17 April 2003 at the Melbourne Convention Centre. Thanks to the generous sponsorship of the NSW Law Society's Government Solicitors' Committee, I was able to attend both the conference and the meeting of the Commonwealth Association Public Sector Lawyers on 13 April 2003.

The Conference programme featured an impressive array of speakers from across the Commonwealth. The themes of the concurrent sessions - "Human Rights and the Rule of Law", "Criminal Law and Practice", "Litigation in the New Millennium", "Technology and the Law", "Commerce and Corporations Law" and

"The Legal Profession and Its Future" - give some idea of the wide range of legal ground that was covered.

A number of key themes emerged from the conference and, in particular, the "Human Rights and Rule of Law" stream which I attended. The first was the threat to the rule of law posed by purported anti-terrorist measures introduced in the wake of the destruction of the World Trade Centre in New York. A number of speakers noted their concern over the failure of the US Government to afford basic rights to those "enemy combatants" held without charge at Guantanamo Bay – including Australian citizens David Hicks and Mamdouh Habib.

President of the Special Court of Sierra Leone, Geoffrey Robertson QC, also criticised the measures proposed by the US Government to try those charged with crimes alleged in connection with the "war on terrorism" before military tribunals instead of civilian courts. Of this "victor's justice" he suggested: "Military courts are to justice what military bands are to music".

The ASIO Bill currently before the Australian Parliament, which provides for detention without charge of both adults and juveniles and limits rights such as access to legal representation, was also singled out as posing a threat to the rule of law by the President of the Law Council of Australia, Ron Heinrich, in his closing address.

Another key issue was the role in the promotion of the "common good" that can, or might, be played by of the development of, and commitment to, economic, social and cultural rights. While the focus of the human rights discourse in Australia, and elsewhere, has concerned itself largely with civil and political rights within an equality model, the limitations of such an approach was reflected upon by a number of speakers.

Justice Michael Kirby noted that economic, social and cultural rights are often not considered by lawyers in developed countries, while people living in developing countries place them at the forefront of their notions of "rights" – the right to housing, the right to adequate health care, the right to education being obvious examples.

Similarly, Judge Albie Sachs of the South African Constitutional Court suggested that the key human rights issue in developing countries is less that of direct inequality before the law than the nitty gritty of "how life is lived". He observed that it is of little comfort to a woman dying from starvation that with her last breath she will be free to curse the government. His reflections over a number of sessions on how the South African Constitutional Court has taken up the difficult challenge of making these rights (entrenched in the South African Constitution) meaningful and effectively justiciable were both thought-provoking and moving.

A number of speakers reflected on the need to maintain international scrutiny and pressure on countries where the rule of law is under threat, or as in the case of Zimbabwe, has been subverted. The cancellation of the 2001 Commonwealth Law Conference which was to take place in Harare was much lamented, while Malaysian defence advocate Karpal Singh strongly criticized political interference in the judiciary in Malaysia and the use of laws such as the Internal Security Act (which authorises detention without charge and was the basis upon which Mr Singh was detained during the trial of his client Anwar Ibrahim) to undermine political opposition and stifle the effectiveness of the legal profession in asserting the values of the common law.

Finally, in keeping with the theme of the Conference - "Common Law, Common Good, Common Wealth" - there was plenty of rumination on the state of the common law and its future. Perhaps unsurprisingly for a gathering of distinguished common law jurists, the common law came out of this looking robust and fit to meet the challenges ahead. Canadian Chief Justice Beverley McLachlin proposed the metaphor of the common law as a forest: "while even trees inevitably wither away, the forest never does, as long as no one interferes with its vital process of rebirth". Her Honour suggested:

> For the common lawyer, the world is not bent into shape and controlled at will by human beings – rather, the world and social life are sources of wisdom. This continued reliance on human experience, this ability to reinvent itself through a process that *always* ties together the past and the future – *that* is the principal of renewal of the common law. It cannot wither away as long as its roots and its aspirations are allowed to feed one another.

There was some evidence, too, of the manner in which wisdom drawn from "the world and social life" could be harnessed by the common law to meet modern challenges. In a session on "The Dilemma of the Transsexual" Justice Richard Chisholm discussed his judgment in the matter of *Re Kevin*, in which he had declared the validity of Kevin, a transgender person, to his wife Jennifer. While suggesting that the result of the case was a concordance between the law and a "sensible and humane outcome", his Honour also described the decision as an "orthodox application of the principles of the common law".

Whether the common law can provide more of such "sensible and humane" outcomes in the face of these interesting times might be reflected upon at the next Commonwealth Law Conference, to be held in London in 2006.

Jonathon Hunyor

IDENTIFYING THE CLIENT : AN UNREMARKABLE TASK OR A REAL CHALLENGE FACING THE GOVERNMENT LEGAL PRACTITIONER?

*"**Client** / n.* **1**. a person using the services of a lawyer, architect, social worker or other professional person. **2**. a customer. **3**. *Rom. Hist*. a plebeian under the protection of a patrician. **4**. *archaic*. a dependant or hanger-on." [i]

Introduction

One of several doctrinal issues flowing from the drafting of the recently *Guidance on Ethical Issues for Government Solicitors* has been the identity of the client serviced by the government lawyer. The debate surrounding this particular issue [ii] has certainly raised awareness of the importance of correct customer identification. That there is a statement, describing the government legal service client for ethical purposes, highlights the value of having a properly fitting concept of the government legal client for the purposes of measuring customer satisfaction and other key performance indicators necessary for the continuous improvement of government legal service delivery.

The New Government Business Environment

A decade or less ago, a casual enquiry to a school, TAFE college, police station, public hospital or other government agency as to its client base would have provoked amusement, confusion or a belief that the enquirer was trifling with the agency. Nowadays, government educational organisations tend to have clients or customers as distinct from students or pupils. Similarly, the public hospital system increasingly thinks of patients as members of a clientele. Again, policing agencies tend to think of the community which they police, together with suspects and offenders, as belonging to their clientele. This new public sector thinking has been instrumental in wide-ranging changes to the way in which Crown employees and public officials approach their day-to-day duties and acquit tasks falling within their area of responsibility.

Any government legal agency which has been through a quality accreditation process, or even a project intended as a precursor to such accreditation, will have experienced the alteration in business consciousness which flows from focusing on process, product and identification of the wants and needs of clients, be they individuals within the organisation, external stakeholders within the broader community or other agencies or organisations in the business community.

Nevertheless, there continues to be extensive discussion, and sometimes disagreement, about the most suitable approach to be taken in identifying the real customer or beneficiary of services being provided particularly where, as in the case of government legal service delivery, the product is one that is not tangible.

A government legal agency approached by an individual member of that organisation seeking legal advice or representation in a particular administrative or judicial forum, is a good example of a person likely to be identified as a client. Less so however, is a person or agency approaching its legal services unit requesting comment on draft documents, training packages or policy instruments. The legal service provider will frequently argue that such people, or groups, are internal clients. This will certainly promote good management of the client's expectations and needs. However it may be, in one sense, casting the net too narrowly to marginalise or eliminate from the business approach of the unit, the external beneficiaries of the policy.

By way of practical example, an educational institution providing public education may require guidance from its legal service providers on a proposed educational policy addressing the needs of a particular group within the community such as disadvantaged learners, mature age students or students for whom English is not their first language. The industrious adviser commenting from a legal perspective will be careful to restrict his or her advice to the legal, as distinct from policy, ramifications likely to flow from the proposed policy or practice of the agency. However, in providing advice on a policy issue for the client, one will sometimes experience difficulties in disentangling the purely legal elements of the business scenario from the broader outcomes of implementing the proposed policy for the community stakeholders such as the physically handicapped or intellectually challenged learners. These types of situations illustrate that the government legal practitioner, like other legal advisers, does not operate in vacuo. Rather, the practicality and pragmatism of the legal advice can have direct benefits on those who may be thought of as being very distantly connected with the internal client or beneficiary of the legal advice within a particular agency.

Considerations of this kind produce a range of responses that will sometimes encourage legal advisory groups within a government agency to re-think the identity of the client.

The Crown As The Client

One solid and robust school of thought is that any government legal practitioner ultimately provides advice for one client and that is the Crown. Such an approach can address a myriad of otherwise unsolved problems as to customer identity in the government

legal arena. However, critics of this school have argued that the autonomy of many government agencies, together with the direct operational connection between some legal advice and the operational or business activity of the agency concerned, renders the Crown too vague an entity to be thought of as being the client for the purposes of service delivery and the measure of key performance business indicators.

One legally rigorous justification for not seeing the Crown as being a mere band-aid solution to the problem of client identity is that ultimately, actions taken by government officials, be they educators, health providers, police or others, will ultimately have the benefit of vicarious liability in the event that they are sued for actions taken as a consequence of legal advice provided to them.

A criminal investigator, in a state or federal policing agency might, for example, approach a government legal advisor seeking advice on how to proceed at a particular point in his or her investigation. That advice may be decisive in determining the direction taken thereafter by the investigator. Whilst it is trite law that an investigator does not owe a duty of care in relation to the conduct of an investigation [iii], a legal advisor or legal advisory agency providing specific recommendations to a public official such as an investigator does not necessarily enjoy the same specific vicarious liability protection. Nor should a legal advisor do so. Legal advisers have their own professional duties to the courts, their clients and the community. These are couched in terms not dissimilar to those found in other duties of care applicable to professionals providing advice that accurately reflects the law applicable to the situation at hand.

There can, of course, be a considerable gulf between client satisfaction, or dissatisfaction, with the actions of a public official relying on legal advice by a government lawyer and the extent to which the government lawyer has, or has not, breached his or her professional obligation to provide accurate, comprehensive and timely legal advice to the public official. At first blush, this scope for variance between client satisfaction and a public official's actions impacting on an external stakeholder within the community may appear to provide justification for not linking client identity with the quality of advice received by lawyers advising public agencies.

However as with many management systems, containing client focused performance appraisal tools, one can see that any measure of quality within public life must ultimately not just have a discernable connection with, but rather should find its roots in, the needs of those who benefit most fully from the work of a government agency.

A Template For Client Identification

The above discussion is too brief to allow one to prescribe a precise formula for ascertaining the client in a given business environment within government legal services. It does, however, enable one to postulate a template for identifying the client in a particular government legal service agency. It will be seen that the template also allows for the fact that government legal agencies will usually have a multiple, or indeed a sub-culture, of clients.

My proposed template for the accurate determination of client identity is simply as follows: -

1. Who are the stakeholders (key or otherwise) in the advice that I provide to the agency employing me?
2. Who is likely to be affected (directly or indirectly) as a result of the natural consequences of the advice I provide to the public agency that employs me?
3. To whom can it reasonably be said that I have an obligation to ensure that all reasonable care is taken to avoid loss, damage, injury or prejudice in the course of providing advice to my government client?

Conclusion

I advance the above draft template for consideration amongst my government legal professional colleagues. I would welcome your views as to the workability of this simple three point template. In particular I would ask whether its scope of application covers the field in terms of government agencies and the many and varied public officials who are the direct recipients of legal advice and whether the template rightly incorporates the external stakeholders within the community who can be affected as a result of advice tendered by the government lawyer working at his or her desk or speaking across the conference table to their many and varied clients.

The resolution of this issue will certainly benefit from discussion and debate within the government legal community and should assist in determining client identity as well as the new duty of care owed by government and non-government lawyers as we approach national regulation of the legal profession.

Howard Bell
Government Lawyer, NSW

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[i] The Australian Concise Oxford Dictionary, 3rd Edition, Edited by Bruce Moore at the Australian National Dictionary Centre, Oxford University Press, Melbourne, Australia 2002 at page 240.

[ii] Appearing as Chapter 2 of the *Guidance on Ethical Issues for Government Solicitors*.

[iii] See for example Hill v. Chief Constable of South Yorkshire [1989] AC 53, and see also Quintano v. The State of NSW (unreported Supreme Court of NSW August 2002 per Levine J) and the High Court Judgment in Sullivan v. Moody & Ors (2001) 207CLR 562. Both the English House of Lords case and the Australian cases show that courts are reluctant to impose a specific duty of care on police investigators.

The contents of this article represents the author's own views, which are not necessarily those of the Law Society of NSW, its Government Solicitors' Committee, the Ethics Subcommittee of that Committee or the members of those bodies.

JOHN EDMUND HENNESSY FELLOWSHIP 1999

John Edmund Hennessy was born in 1940 and commenced his career in the Crown Solicitor's Office in 1957. John was extremely well known and respected in the Government legal sector after practising as a litigation lawyer at the Crown Solicitor's Office for almost 38 years, and as Assistant Crown Solicitor from 1980 till his appointment to the bench in 1997. Motor Neurone Disease brought John's life to an untimely end at age 58.

The Fellowship will be offered from time to time up to the value of $5,000. The Fellowship can be used to cover the expenses of attending legal conferences, travel, research and associated expenses.

It is expected that within one month of completion of the project, the successful applicant will submit a final project report to the Government Solicitors' Committee (GSC). The report must be in a format suitable for submission by the GSC for publication in the Law Society Journal, Government Lawyer Newsletter or other publication as determined by the GSC.

Selection Criteria

The following selection criteria will apply:

- The applicant must be a solicitor employed in the New South Wales public sector currently holding a New South Wales practising certificate;
- The application must demonstrate a benefit to the public sector by way of enhancing the applicant's skills and expertise in the practice of law relevant to their duties as a public sector lawyer, or improvements in the operation of the applicant's employer, or improvements in the operation of the New South Wales legal system;
- The project must be costed and come within the budget of the Fellowship;
- The project must have a letter of support from the applicant's project sponsor;
- The project sponsor must agree to evaluate the project on its completion and provide a written evaluation report to the GSC within a reasonable completion of the project;
- The application must specify how any funds provided under the Fellowship will be expended and how such expenditure will be accounted for;
- The project must be capable of completion within a period of six (6) months from the date of approval by the GSC or such other time by mutual agreement; and
- If the project involves overseas study/research, the application must demonstrate that the relevant authority to study overseas will be granted.
- If the project involves leave from the applicant's place of employ the applicant must demonstrate that the leave will be granted.

Each application will be assessed on the criteria outlined above. The decision of the GSC will be final.

Applications:

Applications must address the selection criteria set out above, include a curriculum vitae, a description of the proposed project, a timetable for completion and be typed.

Project Sponsor:

Each applicant must have a project sponsor within the New South Wales Government legal sector. Generally, the sponsor will be the applicant's employer unless the nature of the proposed project indicates otherwise. The GSC reserves the right to reject any proposed sponsor.

The role of the project sponsor is:

(a) To assess the usefulness of the project to the applicant's employer or, where applicable, the New South Wales public sector;
(b) To provide the applicant with assistance where necessary, in completing the project; and
(c) To document the value of the project on its completion. The evaluation is to be attached to the final project report for submission to the GSC.

Time Table and Lodgement of Application:

Applications for the John Edmund Hennessy Fellowship <u>close on 30th September, 2003</u>. It is anticipated the successful applicant will be announced in "Government Lawyer" Volume 29.

Please forward applications to

Robyn Davies
Liaison Officer
Government Solicitors' Committee
The Law Society of New South Wales
170 Phillip Street, Sydney or
DX 362 Sydney NSW 2000

For further information please contact:
Robyn Davies on Telephone: 02 9926 0276 Facsimile: 02 9223 1496 or Email: rad@lawsocnsw.asn.au

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Excellence Award in Government Legal Services

Applications are open for the 2003 Excellence Award in Government Legal Service. The Award is sponsored by Thomson Legal & Regulatory Limited (formerly Law Book Company) and nominations close on 15th August 2003. Awards will be presented on Tuesday 9th September 2003 at the Annual Government Lawyers' Dinner at Parliament House.

John Edmund Hennessey Fellowship 1999

Application for the John Edmund Hennessey Fellowship is advertised in this issue of 'Government Lawyer' with a closing date of 30th September 2003. It is anticipated that the successful applicant will be announced in "Government Lawyer" Volume 29.

Government Lawyers' CLE Convention and Annual Dinner

This popular annual event for government lawyers will be held on Tuesday 9th September 2003 at Parliament House. Details of the agenda, speakers and a registration form have been included as an insert in this issue of "Government Lawyer".