

Government Lawyer

Newsletter of the Law Society of NSW's Government Solicitors' Committee



The Law Society
of New South Wales

Chair's Message

By Kim Cull
Chair, Government Solicitors
Committee



As 2004 draws to a close it is worth reflecting on the momentous changes it has brought to the NSW Law Society.

The shift to a voluntary membership organisation is one of the most significant developments in the Society's 120 year history. At an organisational level it has provided a clearer delineation between the regulatory and representational roles of the Society. And at an individual level it has provided a focus on the service and benefits that Society membership provides to member solicitors and their employers in both the public and private sectors.

The fact that more than 92% of solicitors across the state elected to take up membership reflects the desire for a strong professional association. The challenge for the Society in 2005 and the years ahead is to maintain that strength.

In 2005 the Society will be advocating on behalf of government solicitor members the value to their employers of Law Society membership. That value includes access to specialist accreditation and

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CLE at discounted prices, participation in Law Society committees and on the Council, and influence with the broader legal profession.

The Society intends to host a number of events in 2005 that were successful this year, including the Government Legal Department Heads seminars and the Government Solicitors CLE.

Moreover, the Society is continuing to work with the State and Federal Governments to seek greater clarity for its members on issues such as the potential liability and indemnity arrangements for government solicitors involved in legal action.

I look forward to working with the members of the Government Solicitors Committee in 2005 as they continue to make a most valuable contribution to the profession.

The LEAPS! (Lawyers Encouraging and Assisting Promising Students) Mentoring Program

The LEAPS! (Lawyers Encouraging and Assisting Promising Students) Mentoring Program establishes a structured, appropriate relationship or partnership between mentor and student whereby each volunteer mentor encourages and guides the school student, offers support, advice, friendship, positive reinforcement and sets a constructive example for the student. This program has been running as a partnership between the Sydney legal profession and the NSW Department of Education for almost three years. The program has been shown to make a real difference in the lives of vulnerable young people.

LEAPS was planned over several years and has been constantly monitored through feedback from mentors and students and behaviour and attendance records to ensure that it provides maximum benefit

to the students in the safest manner and in a way which is rewarding for volunteer mentors. It is a highly structured program with clear boundaries.

Mentors spend one lunchtime per fortnight (during school term) with their allocated Year 9 student. During this time they share their life experiences, and using the lesson materials assist in the development of the student's self confidence, skills for learning and working, and vision for their future. It is hoped that this will open new understandings and dimensions for the students as they are encouraged and assisted to develop personally and academically and reach their fullest potential.

Under this program, the students spend a morning "shadowing" their mentor, go on a team-building excursion and then make fortnightly trips to the Law Society or city law firms for lunch and

interactive group mentoring sessions for the remainder of the school year.

The emphasis of the LEAPS! Program is on sharing skills, and encouraging the students to set career and life goals, and empowering them to deal effectively with challenges and opportunities they will encounter in their future lives.

The LEAPS! Program has a series of clear aims which are:

- to increase student engagement in learning;
- to increase motivation to complete high school and undertake some form of further education;
- to provide the students with access to expanded vocational and career options, and insight into corporate and professional environments;
- to enhance students' performance in a range of skills including goal setting, decision making, negotiating and constructing a coherent argument;
- to break down stereotypes; and
- to broaden students' experience.

Mentors commonly find the process personally enriching. A supportive relationship with a young person struggling with the pressures of growing up can challenge preconceived ideas and yet be very rewarding. To see a young person's eyes open to the possibilities of life because of the wisdom that you have been able to impart is a wonderful experience.

This program was piloted with NSW Young Lawyers in 2002 assisting Chifley College Mt Druitt. It has been a model for groups of lawyers in law firms and government departments to adopt a school and make a positive difference in the life of promising school students.

A number of Sydney law firms and government legal departments have signed up for 2005, or have

expressed interest in participating, and more schools will be included in the program in 2005.

For further information contact Alison Soutter (Alison.soutter@det.nsw.edu.au).

Legal professional privilege

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Requirements for an in-house counsel to attract privilege

The conditions necessary to enable legal professional privilege to be attached to in-house counsel's communications have been considered in an important decision of the Australian Capital Territory Supreme Court. In *Vance v McCormack* [2004] ACTSC 78 (Vance), Crispin J held that communications with lawyers in the Australian Defence Force were not privileged because the lawyers:

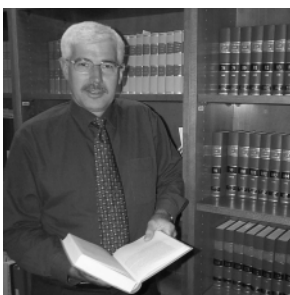
- did not have a current practising certificate, and
- were employed under rules and in a culture where they were not sufficiently independent in their professional role.

The decision is significant for both government and corporate employers of in-house lawyers. It is relevant to both the lawyers' terms of employment and the working practices of the organisation.

Background

Mr Vance was a squadron leader in the Royal Australian Air Force, and brought proceedings against the Commonwealth for unlawful termination of his employment. The Commonwealth claimed privilege over communications with the following lawyers:

- legal officers employed by the defence force who



Biography of Damian Bugg

Damian Bugg QC has been the Commonwealth Director of Public Prosecutions since 1999.

Damian was born in Tasmania and attended

school and university in Hobart. He was admitted to the Bar of the Supreme Court of Tasmania in 1969.

Damian was Senior Litigation Partner in the Hobart law firm Dobson Mitchell and Allport when he was appointed the first Director of Public Prosecutions for Tasmania in July 1986. He took silk in 1994.

Damian has been President of the Bar Association of Tasmania, Chairman of the Legal Assistance Scheme and a Member of the Council of the Law Society of

Tasmania. He was a Member of the Council of the Australian Institute of Judicial Administration for nine years, and is currently the President and a Board Member of the Canadian based International Society for the Reform of Criminal Law. In addition, he is a member of the Council of the University of Tasmania.

Damian chaired the Electronic Recording Committee, which implemented the programme of video recorded Police interviews in Tasmania in 1987. He established and chaired the Forensic Science Services Committee in 1988, and has written and spoken about victims' rights, pretrial disclosure, committals and procedural reform. Damian was made a Fellow of the University of Tasmania in 1998, and was appointed as the Commonwealth Director of Public Prosecutions in August 1999.

- held military commissions (military DLOs)
- a civilian legal officer employed by the defence force (civilian DLO), and
- reserve legal officers who were also in private practice at the New South Wales Bar (reserve DLOs).

All were admitted to practise, but only the reserve DLOs held current practising certificates. All were subject to rules or practices which required obedience to directions of superior officers.

A right to practise: the need for a practising certificate

Crispin J held that, before privilege could attach, it was necessary for the lawyer to have a right to practise. The privilege facilitates communications with independent lawyers, not with anyone who may have advice to give in relation to legal issues. His Honour said "it is difficult to see how privilege could be justified on public policy grounds when the legal advisers consulted have no right to practise": at [37].

This means that the lawyer must hold a current practising certificate, or rely on a statutory right to practise (a limited kind of which is currently available to government lawyers generally in Queensland and Western Australia, and lawyers of specific government agencies in other jurisdictions).¹

In Vance, since only the reserve DLOs held a current practising certificate, the claims for privilege in relation to communications with all other DLOs failed.

Professional independence: ethical standards not being influenced by employer.

Crispin J also held that it was necessary for the in-house lawyer to be professionally independent. The in-house counsel should not be constrained (either by terms of employment or the organisational culture) from acting with the ethical and professional standards of an independent lawyer.

A current practising certificate will assist in establishing independence. It demonstrates the lawyer's continuing adherence to current ethical and professional standards, and attracts a liability to professional discipline.

In Vance, his Honour found that the military and civilian DLOs were subject to an authoritarian structure in which obedience was enforced by penal sanctions and there was a culture of requiring officers to obey directions of superior officers. The judge was satisfied that the reserve DLOs were adequately independent. Although subject to the same penal sanctions as military DLOs, they were in separate practice, presumably with practising certificates, and only involved in the defence force culture on a part-time basis.

Issues of independence also face in-house lawyers

in non-military organisations. There is authority that, if the lawyer also has a significant business or administrative role, the demands of that role may not permit a sufficient degree of independence from the organisation.²

Important considerations

The in-house counsel must hold a current practising certificate in an Australian jurisdiction or a statutory right to practise.

The lawyer's job description should make clear that the lawyer is professionally independent of the employer and that his or her professional ethical duties override his or her duties as an employee.

Indicia of absence of independence, such as reporting to a non-legal manager who must approve or co-sign any advice given by the lawyer to senior officers, should be removed.

An application for leave to appeal has been made by the Commonwealth. If successful, it is likely that the appeal will not be heard before February 2005.

- 1 Crispin J noted that Queensland and Western Australian legislation provide positive rights of practise for government lawyers without the need for a practising certificate: s 47, Legal Profession Act 2004 (Qld); s 35, Legal Practice Act 2003 (WA).
- 2 Southern Equities Corp Ltd (in liq) v Arthur Andersen & Co (No 6) [2001] SASC 398.

How Good Was The Government Lawyers Conference?

Greg Williams

Member of the Government Solicitors Committee

One of the best seminars we've had yet*

*This entirely unsolicited comment was made by one participant. Thank you, MD. (You know who you are, and so do we – expect a nice present for Xmas!)

Once again we have carefully considered the evaluations returned by those who attended the Government lawyers conference on 7 September 2004. I was deputed by the committee to prepare this report on those evaluations because my absence overseas makes me a reviewer of unimpeachable impartiality.

Like last year, several evaluations contained frank and forcefully expressed comments about the quality and value of different speakers. These comments will not be quoted in this report to avoid defamation actions, but their makers can rest assured that they were read, considered and appreciated.

1. Effectiveness of the speakers:

Excellent 15, Good 16, Satisfactory 1, Poor Nil

Comments: Well paced and kept mostly to time; although the timing of some of the talks meant that some of the other talks were limited, which was unfortunate.

2. Standard of the seminar papers:

Excellent 6, Good 21, Satisfactory 4, Poor Nil

Comments: On the whole very good; informative and considered; some were missing; good as usual; varied considerably;

3. Relevance of topic:

Excellent 5, Good 18, Satisfactory 9, Poor Nil

Comments: ICAC was excellent esp. Mr Temby but not value based billing; national legal profession – relevance was an issue for me; ICAC – great; terrorism – very interesting a pity about civil liberties reduced presentation because of time constraints; very interesting & a birds eye view of relevant topics.

4. Standard of catering:

Excellent 14, Good 14; Satisfactory 3; Poor Nil

Comments: Very good; getting better & better; a bit crowded as ever but very tasty; great as to quality and quantity.

5. Your choice of topics & speakers for future seminars

Comments: Mandatory mediation – dispute resolution program; need more focus on state issues; privacy developments, ADT issues – developments; changes to corrective services e.g., High Risk Unit in Goulburn & relationship between conditions of incarceration & eligibility for sentence length reduction; delegation & sub-delegation powers & not of procedural fairness & natural justice; conflict of interest; status of Government Lawyers with in the profession; civil liberties, ADT, ICAC etc.; perhaps a session on policy formulation/analysis; prohibited employment; crown representation for employees of Government depts..

6. Other comments

Comments: Otherwise good if not great!! Some of the papers/topics were not all that relevant to NSW government practitioners; however the majority were quite relevant; I felt the standard of speakers and papers this year exceeded last year by far; time management could be improved significantly, if there were no papers then should at least provide copies of overheads; An enjoyable and informative program; an excellent venue. Next time list 3 speakers per 2-hour period OR be VERY stringent on time allocation & silence speakers at exceeding 30 minutes. Well Done! Hard to put much substance in a 30 minute talk H/E panel discussions really rounded up points & added much value to what had been presented; well done, especially the panel discussion; I was most disappointed to see that there were no women presenters, given that over half the audience were women; please continue these annual seminars – I find them consistently to be interesting and relevant and I so enjoy catching up with colleagues from different departments; hypothetical at conclusion of convention was excellent.

8. Member of the Law Society: Yes 32, No Nil

(Either government lawyers strongly believe in Society membership, or only members were interested enough to respond.)

Overall impressions conveyed to this 'absent reviewer'

There were plenty of comments about absence of papers or even printouts of overheads/ powerpoint slides. We agree about the desirability of papers being included in the handout of the proceedings, but our presenters give their time free so we have a limited ability to obtain papers from them in time, if at all. The executive officer of the committee used all the legitimate means at her disposal including, but not limited to, asking, requesting, persuading, begging, pleading, cajoling and grovelling (these were resorted to in an ascending order as the day of the conference drew nigh).

In terms of time management, some speakers did go over time and infringed on the time allotted to others. We will ensure that the committee members chairing sessions next year undergo assertiveness training as a preliminary to the conference.

However, they will have to treat our gracious and generous speakers with respect and will therefore not be equipped with management tools such as whips, chairs, cattle prods or revolvers loaded with blanks.

There were several comments that speakers could be given more time. If we follow this suggestion next year, it might ease the problem of time management. The committee will keep this in mind.

There was no criticism of the venue this year. This is pleasing as Parliament House is a convenient and economical venue that facilitates the drinks and dinner that follow the conference.

There were no complaints about food this year or the availability of drinks (including water) at lunch. One comment about absence of plates (even paper plates). The committee will consider this when arranging next year's conference.

See you next year!!!



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