



THE LAW SOCIETY
OF NEW SOUTH WALES

GOVERNMENT LAWYER

Newsletter of The Law Society of NSW's Government Solicitors Committee NO.45 / MAY 2010

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SAVE THE DATE
2010 GOVERNMENT
SOLICITORS CONFERENCE
AND DINNER
1 September 2010

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Chair's Message

By Doug Humphreys

Chair, Government Solicitors Committee

Dear Colleagues,

Planning is well underway for the 2010 Government Solicitors' conference and dinner which will be held on 1 September. This year's conference will be at the Hilton Hotel, due to space restrictions at our usual venue Parliament House. As such, we anticipate being able to meet all requests to attend. The conference will again have a general interest theme, with high quality speakers covering topics relevant to all fields of government law.

As many are aware, a working party has been formed to undertake the policy work associated with offering a new accredited specialty in Government and Administrative Law in 2010. Consisting of Commonwealth, NSW state and private lawyers, this has been meeting monthly since last December. The core competencies and curriculum are mostly settled, and the focus is now on the preferred methods of assessment, e.g. written examination, peer interview, resume of work or other. The group understands that there will most likely need to be some streaming in assessment between those who work in the Commonwealth area and those who are NSW state based. I will keep you informed as to further progress. The aim is to launch this new area of accredited specialisation at the Conference in September.

As a Councillor representing Government solicitors, I am taking a close interest in the national reform of the legal profession regulation project. I have been doing my best to ensure that the special role and practice of government legal practitioners is taken account of, and that no structural barriers are put in place that prevent them gaining full and unrestricted practising certificates. There is currently strong support for the concept that as part of the trade-offs for agreeing to any national scheme, all governments must agree that legal practitioners working in government will be supported to take out and maintain practising certificates. The situation varies considerably from state to state and with the Commonwealth. NSW appears to lead the way with solicitors working in NSW public sector almost always having P.C.s.

I am now in my second year as a member of the Professional Conduct Committee. One of the matters that has struck me is the almost complete absence of complaints against government solicitors. Of those few that have been made, I am yet to recall one that has resulted in proceedings in the ADT. That tells me that government solicitors have very high ethical and professional practice standards. As a group, that is something we can and should be very proud of.

A day in the life...

of Marianna Matevosian

Clerkship at Department of Justice and Attorney General

From the moment we step through the doors of our Law Schools to the moment we celebrate our much anticipated graduation, thoughts of clerkships and careers are familiar to every law student. Fourth year students become particularly exposed to the pressures of finding a suitable legal 'home' over the summer break and undoubtedly, it's a stressful time for all. Earlier this year I was fortunate enough to be able to work at the (newly named) Department of Justice and Attorney General (DJAG), in the Criminal Law Review and Legislative and Policy Division (CLR/LPD).

The first aspect of the clerkship that stood out to me was the incredibly busy vibe of the office and the uncanny ability of everyone to keep right on smiling regardless. My first few days at

CLR/LPD were admittedly rather daunting, having been thrown in the deep end of drafting Cabinet Minutes, advice to the Attorney General, researching law reform proposals and of course, dashing to and from Parliament (which was thankfully only a few streets away). The supervisors at DJAG are absolutely fantastic though and it was obvious that their priority was to give the clerk as many opportunities to enjoy as much of the public sector and legislation and policy world as possible. This included of course, all important trips to the rather theatrical question time at Parliament.

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Marianna Matevosian

I also realised from the start that I would be spending little, if any, time on administrative tasks like the infamous photocopying and stapling adventures from clerkships past. My supervisor made it very clear from the outset that the projects I would be involved in would mirror her own work. Three months on, her words ring very true and

I'm so grateful that I've been able to initiate, research, draft and ultimately forward proposals and advice to the Attorney, the NSW Legislative Council and other NSW Government agencies. The independence of the work at DJAG cannot be overstated: clerks really do feel like valued members of the team who contribute substance, rather than symbolism to current DJAG projects.

In terms of specific work, obligations of confidentiality prevent me from divulging too much. Suffice to say there were no dull moments during my two months at CLR/LPD. My projects included making a proposal for implementation of a new statutory declaration scheme in NSW, making submissions to the Legislative Council on its inquiry into spent convictions for juvenile offenders, researching and submitting upon the law regarding advocates' immunity, drafting a myriad of Cabinet Minutes for the Attorney and drafting the legislative review of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).

Most importantly, I will say that the best aspect of the work was arriving every morning and looking forward to seeing people who were always up for a chat, who were always quick with a joke and who always, always, found the time to have Wednesday Morning Teas, where the baking skills (and lack thereof) of DJAG's policy officers are put to proof. ■

SAVE THE DATE

2010 Government Solicitors Conference and Dinner

THE GOVERNMENT SOLICITORS CLE CONFERENCE

The Sydney Hilton
488 George Street, Sydney

Wednesday 1 September 2010

THE ANNUAL DINNER

Parliament House
Strangers Dining Room
Macquarie Street, Sydney

Wednesday 1 September 2010

To register your interest in receiving a copy of the programme and registration form when finalised, please send an email with your contact details (including agency/department) to louise.pronk@lawsociety.com.au

The 'professionalisation' of Government Lawyers

By **Mary Rebehy**

Manager, Ministerial and Executive Services Unit, NSW Office of State Revenue
(Formerly Director, Legal Management Services, Department of Justice and Attorney General)

I must confess I was surprised when I first read the term 'professionalised'. Although not certain of what this meant, I was a little miffed at the implication that government lawyers are somehow 'unprofessional'.

Nevertheless, the word has gained acceptance and has been given prominence in two recent reviews, the Commonwealth Report on the Review of Commonwealth Legal Services released early in 2010 and the Victorian 2009 Campbell and Lynch Report, Regulation of Government Lawyers-Report to the Attorney General. Perhaps coincidentally, the NSW Law

Although not all are employed as legal officers, lawyers in government practice face some unique issues.

Firstly, their client is usually also their employer; secondly, they may undertake a range of functions which may not be regarded as 'legal'; thirdly, they have a duty to assist the government in its functions of advancing the public interest and upholding the rule of law (Campbell & Lynch page 11) and they are generally exempt from a range of regulatory requirements imposed on legal practitioners such as practising certificates and professional indemnity insurance.

In-house legal practices within Commonwealth agencies (should be) 'professionalised'... to improve service delivery and also to improve their key role in the Commonwealth's procurement of externally sourced legal services.

(Recommendation 7, page 12, Blunn & Kreiger, Report on the Review of Commonwealth Legal Services Procurement, 2009)

Society is also developing a program for the Specialist Accreditation of Government Lawyers.

So what is this about?
What is this 'professionalisation'?

Who are government lawyers?

It seems lawyers have infiltrated the public sector. The number of lawyers employed in government agencies has increased significantly in the last decade. There was a 58 percent increase of lawyers employed in government from 1998 to 2001 and this seems to be an enduring trend, so that currently 11.9 percent of lawyers are employed in the government sector (Law Society of NSW, Profile of the Solicitors of NSW, 2001 and 2009).

It is not always simple to identify when an employee with legal qualifications is engaged as a lawyer in government. Sometimes they are given titles which do not reflect their legal functions or they may be employed in another capacity, say as a manager or policy officer. Nonetheless, they undertake legal services for the organisation. Campbell and Lynch narrowed this by proposing that a lawyer employed in government, and who undertakes legal work, is considered a government lawyer. This legal work includes:

- general legal advice
- advice on the interpretation of applicable legislation

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Excellence in Government Legal Service Award 2010

Since 1992 the Law Society of New South Wales' Government Solicitors Committee has been administering the Excellence Award in Government Legal Service, which recognises the outstanding achievements of public sector solicitors.

The award is given to a solicitor or legal team who has performed 'above and beyond the call of duty'.

Lawyers employed in NSW by Commonwealth, NSW or Local Governments are eligible for nomination if their legal work:

- makes a contribution to the community that is worthy of notice
- enhances the standing of the government legal service
- contributes to good government.

The Award is presented at the Annual Government Solicitors' Dinner which will be held this year on Wednesday, 1 September 2010.

Nominations are now open for the 2010 Excellence Award.

You can nominate your own work or that of a colleague or staff member.

Please contact Nelson de Sousa at the Law Society of New South Wales via email nelson.desousa@lawsociety.com.au for an Excellence Award package containing a nomination form, as well as the rules and conditions for the 2010 selection criteria.

The closing date for nominations is Friday 6 August 2010.

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The 'professionalisation' of Government Lawyers

- transactional work, including preparation of contracts and other commercial documents
- prosecutions and representation in tribunals such as the ADT
- drafting regulations and statutory instruments
- briefing of external counsel

What is professionalisation?

'Professionalisation' is the way in which government lawyers are 'organised, managed, supervised and trained' (Blunn & Kreiger, 2009 p 8). This involves lawyers clearly understanding their professional obligations of independence as well as the role of the Attorney General in upholding the law.

How do we achieve 'professionalisation'?

Campbell and Lynch make a range of recommendations for the structure and professionalisation of in house legal practices. The main recommendation is the removal of the exemption for government lawyers from holding practising certificates (recommendation 1). They could identify no compelling reason for this exemption.

Some of the arguments given for removing this exemption include:

- The holding of a practising certificate is seen 'as an important indicator of their commitment to professionalism' by providing membership to a profession with an ethical code and accountability. (Campbell & Lynch p.22).
- Practitioners in private practice are required to hold a practising certificate. Some suggest that the distinction for government lawyers creates distinction in status and a barrier to movement between the sectors. Certainly, a requirement of a current practising certificate is the obligation to maintain professional skills, competence and ethical standards through continuing legal education.
- Importantly, the holding of a practising certificate is a relevant factor to be taken into account for a claim of Legal Professional Privilege. The other factors which are

important are the lawyer's independence within the agency and the 'clear identification of their professional capacity as lawyers' (p 25).

These aspects of professionalisation can be achieved as follows:

1. The legal unit should be set up to model a separate law firm.
2. Lawyers should be described as 'legal officers' or 'lawyers' rather than e.g. policy officers or managers. Position descriptions of government lawyers should require those engaged in legal practice to hold a practising certificate.
3. The lawyers employed in the Unit report to the Head of the Unit who should hold a practising certificate.
4. The Head of the Unit reports directly to the CEO, Department Secretary or Agency Head.
5. The Unit's legal files should be clearly labelled as 'confidential legal files' and stored separately from other departmental files.
6. Advice requested by a business unit should be provided directly to that unit.
7. The agency should clearly recognise and support the importance of an independent Legal Unit (Campbell and Lynch, 2009, p 25).

Should we professionalise government lawyers?

An examination of the public legal landscape suggests some emerging trends.

Australia is relatively unusual in having a decentralised model of legal service acquisition. The alternative such as that used in Canada is for all government legal services to be provided by the Department of Justice (the equivalent to our Attorney General's Department). Having a decentralised system means agencies are free to choose how they acquire their legal services. This choice comes at a cost financially and strategically. This is reflected in the findings of the Blunn and Kreiger Review on the difficulty for government in managing its legal expenditure and

exposure. As a result, governments will continue to scrutinise legal service acquisition to try to make the system more effective and efficient.

In this landscape, a government legal practice is competing in the legal market for work. If in-house units do not provide a quality service and value for money, these services will be sourced externally. Agencies have a financial and public obligation to ensure they purchase the best legal services possible for taxpayer money. This is becoming harder to achieve and requires agencies to give careful consideration to how they structure their legal teams.

There has been an increasing use of the 'informed purchaser' model in government agencies (Australian National Audit Office, Best Practice Guide to Legal Service Acquisition for Government Agencies, 2006). The informed purchaser, usually a senior lawyer, coordinates legal services for the agency. The purchaser reports to or belongs to the executive and closely manages the engagement and relationship with external service providers as well as expenditure on legal services including the in-house team. This model is used in Victoria.

A well structured and managed in-house practice improves efficiency and reduces the cost of legal services for the organisation and the government as a whole. An effective in-house legal practice adds value by minimising risk, assisting with compliance obligations and through the early identification of issues.

The debate has started. These are interesting times for government lawyers. The role of government lawyers may have been seen as second best to the private sector but this perception is changing. Their role within government is being examined, their position within organisations assessed and their impact on the procurement of legal services evaluated. It is in their interests, as well as those of the government, to be engaged in this movement towards 'professionalisation'. ■

John Hennessy Research Scholarship

The John Hennessy Research Scholarship has been established by the Government Solicitors Committee to support public sector solicitors to undertake a research project into legal systems in another jurisdiction and to make recommendations for the improvement of the legal system in NSW.

The scholarship is an 'occasional scholarship' that will be offered from time to time and covers travel and other approved expenses to the value of \$5,000.

Who Can Apply?

All NSW based Government and local Government solicitors holding a current NSW practising certificate who are members of the Law Society of New South Wales.

Applications

Applications should include a Curriculum Vitae, the names and contact details of two referees, a description of the research project (including a brief estimate on costing), to be funded in full or in part by the Scholarship. All applications must be typed.

Applications should include:

- the relevance and potential benefit of the project to the legal system in NSW
- the potential for the project to produce improvements in the operation of the legal system in NSW
- the budget outline/cost feasibility and timetable for the proposal
- experience and interest in the area which is the subject of the application
- the Project Sponsor's details
- a brief statement by the sponsor on the research project which should confirm support.

Referees

The applicant must include the names, addresses, telephone and facsimile numbers of two referees as well as the name and consent of the project sponsor (please refer to right column).

Project Report

The successful applicant is required to submit a final project report of around 1000 words to the GSC not later than six months after the grant of the scholarship with a view to publication in the Law Society Journal and/or the 'Government Lawyer' Newsletter.

The final report should make recommendations to improve the operations of the 'sponsor' Government legal department and/or the legal system in NSW.

Project Sponsor

Each applicant must have a project sponsor within the Government (including local Government) legal sector in NSW.

The role of the project sponsor is:

- to assess the usefulness of the project to the particular public sector department/s, and/or to the NSW legal system (to be attached to the application);
- to provide the applicant with assistance and support where necessary, in completing the project; and
- to document the assessment in a one page report which is to be attached to the final project report.

Lodgement of Application

Applications are to be lodged no later than close of business on Friday 6 August 2010. It is anticipated that any successful applicants will be announced in conjunction with the Government Solicitors Conference Dinner.

Please forward applications to:

Nelson de Sousa

Executive Officer

Government Solicitors Committee

Law Society of New South Wales

OR

to DX 362 SYDNEY

Sydney NSW 2000, 170 Phillip Street

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