



THE LAW SOCIETY
OF NEW SOUTH WALES

GOVERNMENT LAWYER

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

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Chair's Message

By Doug Humphreys

Chair, Government Solicitors Committee

Dear Colleagues,

Great progress has been made in ensuring the Society offers "value for money" membership to those working in the government sector. First is the new area of accredited specialisation in Government and Administrative Law. This new area of specialisation is a clear signal that government law is a discrete area of practice that is growing in importance. I extend my best wishes to all those attempting the accreditation process and hope they pass with flying colours.

Last month, the Society offered its first continuing education session specifically targeted at government solicitors. Close to 100 delegates attended the session. It was an outstanding success. The Government Solicitors Committee will continue to offer these CLE sessions into the future with the next planned to be held in July on writing reasons. I look forward to seeing you there.

The next Government Solicitors Conference will be held on 31 August at the Hilton Hotel in Sydney. The annual dinner will follow at the same location. Please keep your diary free for what has always been a good day and enjoyable dinner. I am pleased to advise that the NSW Attorney General will deliver a keynote address to the conference and present the excellence in government legal service award at the dinner. The after dinner speaker will be Commonwealth DPP, Mr Chris Craigie SC.

If any of you have suggestions for services the Law Society can provide to government solicitors, please feel free to contact a member of the committee and let us know your views. The worst that can happen is that we might just do it.

2011 Government Solicitors Conference and Dinner

Wednesday 31 August 2011 / Hilton Hotel

The Government Solicitors CLE Conference and Annual Dinner will this year be held at the **Hilton Hotel, 488 George Street, Sydney on Wednesday 31 August 2011.**

To register your interest in receiving a copy of the program and registration form when finalised, please send an email with your contact details (including agency/department) to events2011@lawsociety.com.au

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SAVE THE DATE

A day in the life...

of Kristine Nash

Principal Litigator with the Australian Taxation Office

I leave home at 6.40am. Why the early start? To ensure a car park close to my bus stop, a seat on the bus, less traffic and the ability to leave work at a reasonable hour to miss the peak hour traffic on the way home.

As I sit on the bus I take time to read a recent judgment on a matter I have been involved in. I have not had uninterrupted time at the office to read and digest the judgment in depth. It's a significant one for the organisation and I have to prepare a decision summary which outlines what it is about and the implications for the organisation so that it can be circulated to other legal officers throughout the office nationally. I intend to work on the decision summary as soon as I get to the office while it is still quiet. I am mindful of the internal 7-day turn-around requirement for preparing and distributing judgments from the date of their delivery; my time is running out.

I turn on my computer and check my inbox. The decision summary will have to wait—my manager has sent me an email alerting me to a new urgent referral that will be coming my way. We have been asked to advise on the prospects of an urgent freezing order application where there is evidence of asset dissipation of a taxpayer. I draft an email to the case officer outlining all the relevant information and documents that will be required to enable consideration of the matter.

Having dealt (well, initially anyway) with the new referral I check my emails again. Some written submissions I have been waiting on for a matter before the court has arrived; they need to be filed and served by the following day. I have been asked to review the submissions before they are sent up the line for sign-off. Whilst reading the submissions I recall a matter with similar issues being conducted from our Perth office and suspect part of the argument outlined in the submissions I am reviewing is not consistent with the arguments that were put before the court in Perth. I am unable to get through to the legal officer in Perth. Of course... Perth is two hours behind Sydney... so I leave an urgent message for my call to be returned.

Meanwhile a junior officer comes to me with a matter in court this morning to wind up a company for unpaid tax debts. The director of the company, now uncontactable, has said he is unable to attend court, and wants the matter adjourned. The matter has already been adjourned twice and I am asked to advise whether there is a problem with proceeding with the application. I spend time finding out more details about the case and provide advice mindful of our "model litigant" obligations.

I am thankful for a job which offers me such a diverse range of interesting and challenging work.

Before returning to the case decision summary, I decide to look at my "to do" list. It includes:

- Preparation of an office minute to the Attorney-General's Department; I need their sign off for an argument on legislative interpretation the Commissioner seeks to argue for one of my matters listed for hearing.
- Finishing off a brief to counsel seeking advice on the merits of pursuing recovery action against a taxpayer under a section in the tax legislation which remains untested.

- One of my matters is in court tomorrow and I will have to get someone else to appear for me as I suspect the freezing order application will have to take priority.
- As a member of a selection panel for a recruitment process for new legal officers, I need to review the fifty applications before meeting with my fellow panel members soon to finalise those being short-listed for interviews.
- I have been asked to assist in the presentation of an internal training session in respect of some recent advice received which has the potential to impact on certain audit activity conducted by the Tax Office.
- I need to finish off another office minute. This one to Treasury identifying the possible need for legislative amendment.

In my inbox are several emails providing information and a number of attachments in respect of the new referral. I spend the next three hours, interspersed by phone calls and requests for assistance from junior staff, going through all the information and documents with further emails passing between myself and my case officer requesting further information and clarification. My preliminary view is that the application for freezing order should be made. I inform my manager and contact several counsel before finding one who has capacity to take a brief on an urgent basis. I prepare the brief for counsel, hoping that the one paralegal in the team will be available to get the brief ready for urgent delivery.

The Perth officer returns my call. We talk briefly about her case and I ask her to email me the submissions used. After finishing off the brief for counsel I find time to read the written submissions and my suspicions are confirmed. The two submissions are not consistent and propose different arguments on a particular issue. I email the stakeholders identifying the issue and I am asked to organise an urgent phone hook-up to discuss the matter. *Continued page 3*

A day in the life... *Continued from page 2*

Although our submissions are due tomorrow, it is late in the day so I organise the three-state hook-up for the morning.

Before drafting the affidavit in support of the application for freezing orders, I review some draft letters which have been sitting on my desk since morning and respond to some further email requests.

I look at the time; it's 6.15pm and the affidavit will have to wait till tomorrow. I am about to log off when I receive an email informing me that one of the cases I worked on has been the subject of a FOI request from the taxpayer and I am required to provide a copy of all relevant emails, file notes, court documents and correspondence. The matter can wait till tomorrow, but as I pack up all my files

and place them all in security cabinets to comply with the office "clear desk policy" (a task to be completed at the end of each day), I recall the particular demands of the case and wonder if there will be anything amongst my file that I have written which may be cause for concern when produced to the taxpayer.

As I leave the office at 6.30pm, looking forward to the one hour commute home, I remember the decision summary I intended starting on my arrival at the office which remains uncompleted. On the other hand, there's plenty I have achieved through the day and I am thankful for a job which offers me such a diverse range of interesting and challenging work. As I take my seat on the bus, though, I do wonder where the idea of leaving early got left by the wayside. ■

2011 Government Solicitors Committee

Chair:

Mr Doug Humphreys	Veterans' Review Board	doug.humphreys@vrb.gov.au
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Co-Chair:

Ms Margaret Bateman	Crown Solicitor's Office	margaret_bateman@agd.nsw.gov.au
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Committee Members:

Mr Harold Bear	Roads and Traffic Authority of NSW	harold_bear@rta.nsw.gov.au
Mr Susai Benjamin	Office of State Revenue	susai@bigpond.com
Mr Roderick Best	Community Services Department	rod.best@community.nsw.gov.au
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Mr Adam Johnston	NSW Ombudsman	adamdj1@optusnet.com.au
Mr Paul Martin	WorkCover Authority of NSW	paul.martin@workcover.nsw.gov.au
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Excellence in Government Legal Service Award 2011

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 New South Wales by Commonwealth, New South Wales or Local Governments are eligible for nomination for the 2011 Excellence in Government Legal Service Award 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, 31 August 2011.

Nominations are now open for the 2011 Excellence Award. You can nominate your own work or that of a colleague or staff member.

The Excellence Award rules and conditions and nomination forms are available on the Government Solicitors page of the Law Society website at www.lawsociety.com.au/resources/areasoflaw/Government/index.htm.

The closing date for nominations is Friday 5 August 2011.

Update on National Legal Profession Reform

Since 2004, nearly all States and Territories have enacted their legal profession legislation on the basis of a national Model Bill.

However, variations between the jurisdictions meant that a single national framework for legal profession regulation was not achieved. It was in this context that the Council of Australian Governments (COAG) decided to bring regulation of the legal profession onto its microeconomic and regulatory reform agenda.

Following COAG's decision in February 2009, the National Legal Profession Reform Taskforce was appointed to make recommendations and propose draft legislation. In addition to achieving uniformity, the Taskforce agreed that the reform process provided an opportunity to enhance the clarity and accessibility of consumer protection. Consumer protection has since become one of the recurring themes of this process.

The Taskforce started its consultation process with the release of seven Discussion Papers in late 2009. The result was a proposed new framework for national regulation embodied in a draft National Law and National Rules. These were released for a three month public consultation exercise starting in May 2010.

In November 2010, the Taskforce released an interim report which addressed, at a high level, some of the key issues raised during the consultation, and made recommendations on funding. Just before Christmas 2010, amended draft legislation was released which reflected the Taskforce's revised views.

The proposed new structure for regulation includes the creation of two new bodies – a National Legal Services Board and a National Legal Services Commissioner (who would also be Chief Executive Officer of the Board). While most regulatory powers would reside in these national bodies, many of

the powers of the Board, and most of the powers of the Commissioner would actually be exercised locally by State and Territory regulators.

Each jurisdiction would need to consider how regulatory functions would be delivered at the local level, and by which regulatory bodies. It is expected that the Law Society will continue to be responsible for the administration of practising certificates and that we will continue to be a co-regulator for compliance and complaints-handling functions in NSW.

The National Legal Profession Reform Taskforce has estimated the start-up costs of the new system at \$1.7 million, to be provided by the Commonwealth Government. It is proposed that the ongoing operational costs of the National Legal Services Board and Commissioner would be funded by a standardised admissions fee of \$795. There is currently no proposal to increase practising certificate fees to fund national regulation.

The Law Society has consistently supported the objectives of national regulation and has worked with the Law Council of Australia and the NSW Government to make improvements to the proposals. Three main themes have been repeated in the Law Society's submissions:

- The Law Society supports regulation of the legal profession which is effective and affordable from the perspectives of those who consume, provide and regulate legal services. In particular, the Law Society agrees that there should be a national framework for regulation, with common standards applied consistently by State and Territory regulatory bodies operating locally, and a co-regulatory role for professional associations.

- However, regulation must respond proportionately to identified regulatory need and must impose requirements with which it is practicable to comply. Ineffective or unjustifiably burdensome regulation reduces productivity and increases the cost of regulation and the price of legal services.
- Finally, the cost of the new system should not exceed current funding levels and proposals must take into account the likely growth of the profession in future years.

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Young Lawyers Constitutional Law Essay Prize

The Government Solicitors Committee, with DLA Piper Australia, supports the NSW Young Lawyers Public Law and Government Committee in presenting the Sir Anthony Mason Constitutional Law Essay Prize.

Earlier in the year, law students were invited to submit an essay on a constitutional law issue of present national importance.

The winners were announced by Sir Anthony Mason AC KBE QC at an awards night on Wednesday 8 June.

FIRST PLACE: NAOMI KOPP

Abolish the States: Yea or Nay?

SECOND PLACE: ISABELLE WHITEHEAD

Human Rights and Constitutional 'Exceptionalism'

THIRD PLACE: BRAD MALLINSON

Combating Terror and a Dismantling of the Rule of Law

HIGHLY COMMENDED: THEO SOURIS

Rethinking Roach and a Right to Vote

THE LAW SOCIETY OF NEW SOUTH WALES
youngLAWYERS

Continued from page 4

Application of the proposals to government lawyers – as set out in the draft legislation published December 2010

The draft legislation prohibits unqualified entities from engaging in legal practice. However, there is a power for the National Legal Services Board, through National Rules, to declare an entity or class of entity exempt from that prohibition. A special provision has been added to ensure that government lawyers cannot be declared to be exempt as a class from the prohibition. However, government lawyers of a specified class may be declared to be exempt if the Board considers special circumstances warrant the exemption.

Three such exemptions have been proposed in the draft National Rules. The first is for an officer or employee of a government authority drawing instruments in the course of his or her duty, otherwise than as parliamentary counsel, legislative counsel or legislative drafter (however described). The second is for an officer or employee of a government authority undertaking appearance work in courts or tribunals under the authority of a law of a jurisdiction or of the Commonwealth.

This second category of exemption was not in the original draft legislation and was presumably added in response to submissions made during the consultation. For example, the Australian Taxation Office pointed out that ATO officers may be authorised by the Commissioner to appear in any action, prosecution or other proceeding under or arising out of a taxation law on behalf of the Commissioner¹. The relevant provision of the taxation administration legislation was introduced in recognition of the specialised knowledge required for tax matters and does not require officers to be legally qualified².

The third category of exemption applies to certain activities of a public trustee (or a company performing

trustee work on behalf of the government).

The revised draft National Law deals with different categories of practice by way of conditions on practising certificates. Except where a solicitor is doing pro bono work only, a practising certificate will be subject to the condition that the holder is authorised to engage in legal practice in one or more of four categories, the last of which is “as a government legal practitioner”.

There are a number of definitions which are relevant to the “government legal practitioner” category:

government legal practitioner means a government lawyer who is an Australian legal practitioner.

government lawyer means a person who engages in legal practice only:

- (a) as an officer or employee of a government authority; or
- (b) as the holder of a statutory office of the Commonwealth or of a jurisdiction; or
- (c) in another category specified in the National Rules.

government authority includes a Minister, government department or public authority of the Commonwealth or of a jurisdiction, and includes a body or organisation (or a class of bodies or organisations) declared in the National Rules to be within this definition.

engage in legal practice includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy).

You would therefore need a practising certificate if:

- You work for a Minister, government department or public authority or you are a statutory office holder

AND

- You practise law or provide legal services in that capacity

AND

- There is no exemption in the National Rules for your class of practice

Legally qualified people who engage only in legal policy work, including developing and commenting on legal policy, would not need a practising certificate.

A common requirement to hold a practising certificate when engaging in government legal practice would standardise the rules for government lawyers across Australia. The current position varies from State to State so that government lawyers are exempted from the requirement to hold PCs in some jurisdictions but not in others. The Government Solicitors Committee has long held the view that solicitors in government legal practice should be both entitled and required to hold a PC.

Under the proposed legislation, government practitioners would be exempted from both the requirement to have professional indemnity insurance coverage and the requirement to pay contributions to the fidelity fund. Government lawyers who are involved in the procurement of legal services from private firms should also be aware that the majority of the proposed legal costs provisions would not apply when the client is a government authority. This is similar to the current costs disclosure exemption for sophisticated clients.

Current status

A key step in constructing the national framework would be for the proposed legislation to be enacted by the Parliament of a host jurisdiction. It would then be adopted in identical terms in each of the other States and Territories.

At its last meeting on 13 February, COAG “agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)”. We therefore expect the final revisions to the draft legislation to be made available soon. ■

1. Section 15, *Taxation Administration Act 1953*.

2. Submission viewed online at: [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(9A5D88DBA63D32A661E6369859739356\)-233+ATO.PDF/\\$file/233+ATO.PDF](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)-233+ATO.PDF/$file/233+ATO.PDF).

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 NSW can apply.

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 (2) referees as well as the name and consent of the project sponsor (please see below).

Project Report

The successful applicant is required to submit a final project report (of around 1000 words) to the Committee 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.

Lodgment of Application

Applications are to be lodged no later than close of business on Friday 5 August 2011. It is anticipated that any successful applicants will be announced in conjunction with the Government Solicitors Conference Dinner.

Please forward applications to:

Government Solicitors Committee

The Law Society of New South Wales
170 Phillip Street, Sydney NSW 2000
or DX 362 Sydney

Update on Specialist Accreditation

The 2011 Accreditation program across 8 areas of law is well underway. This year 186 practitioners are seeking accreditation in their chosen area, with 15 candidates for the newest area of accreditation, Government and Administrative Law.

Visit www.lawsociety.com.au/specialists for more information.



www.lawsociety.com.au/specialists

Senate Committee Inquiry into the Role of the Australian Law Reform Commission

On 8 April 2011, the Senate Legal and Constitutional Affairs References Committee released its report on the inquiry into the role of the Australian Law Reform Commission (ALRC).

The inquiry was initiated in November 2010 by Senate reference following scrutiny of ALRC funding cuts during Supplementary Budget Estimates hearings. The ALRC gave evidence that its budget would be reduced by \$242,000 in 2010-11, and then by \$495,000 per year in forward years (to 2013-14), equating to a reduction of 20% on 2009-10 levels.

During the consultation period, the Law Society of NSW joined with the Law Council of Australia in calling for the reversal of the cuts to the ALRC budget. The Government Solicitors Committee expressed the view that the capacity of the ALRC to provide independent and considered advice is of utmost importance to the functioning of government. The Government Solicitors Committee noted that inadequate funding and cost cutting can only be absorbed by cutting staff and that such cuts would have a significant impact on the ALRC's core functions and ability to perform its vital role.

The full impact of the budget cuts was revealed during the inquiry, with the ALRC reduced to one permanent full-time Commissioner, forced to discontinue its educational outreach program including the journal *Reform* and to make restrictions on travel expenditure including for consultation. The ALRC has also reduced its staffing levels from 25 to 16.2 full-time equivalents over 10 years. In its submissions, the ALRC reiterated that there is no further capacity to reduce staff while discharging its current workload. During the Committee hearings, ALRC President Professor Rosalind Croucher illustrated the

impact of the budget cuts by referring to the Black Knight in *Monty Python and the Holy Grail*³:

"After he lost one arm defending his turf he said, 'Tis but a scratch'. After the other one was lopped off, 'Just a flesh wound'. After both his legs departed similarly, he still managed to say, defiantly, 'The Black Knight always triumphs'. It is ridiculous, but somehow fitting. The real reduction in the budget – not just the efficiency dividend, I am talking about the significant 20 per cent reduction in recent years – makes us feel like that poor knight."

After he lost one arm defending his turf he said, "Tis but a scratch". After the other one was lopped off, 'Just a flesh wound'. After both his legs departed similarly, he still managed to say, defiantly, 'The Black Knight always triumphs'.

The Committee also considered the impact of governance and financial management changes to the ALRC to take effect from 1 July 2011 as a result of the *Financial Framework Legislation Amendment Act 2010*. These changes would see the existing Board of Management structure replaced by an executive management model, with the President as the Chief Executive Officer. The Attorney-General would also have more control over the ALRC, including a power to appoint part-time

Commissioners and provision to establish or dissolve a management advisory committee to advise the President. The position of Deputy President of the ALRC would also be abolished. The change in governance arrangements was criticised during the inquiry, with issues raised about the appropriateness of the executive management model and the need for independence.

The Committee recommended that:

- the ALRC's budget be restored as a matter of urgency
- the legislation provide for a minimum of two standing, fixed-term, full-time commissioners
- an additional full-time commissioner be appointed for each inquiry when the ALRC has two or more ongoing inquiries
- the ALRC's public information and education services program be resumed immediately, and
- all necessary resources be provided to enable the ALRC to continue to travel to undertake face-to-face consultations.

The Committee also noted that it would use the Senate Estimates process to scrutinise the retention of independence by the ALRC under the new governance structures.

A dissenting report was provided by Government Senators on the Committee, maintaining that the ALRC is adequately resourced and that the structural changes will improve its flexibility and ability to undertake expert analysis. ■

3. Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission*, April 2011, paragraph 4.3.