



THE LAW SOCIETY
OF NEW SOUTH WALES

GOVERNMENT LAWYER

Newsletter of The Law Society of NSW's Government Solicitors Committee NO.52 / NOVEMBER 2013

What's in this edition

- 1 Chair's Message
- 1 2013 Government Solicitors Conference and Dinner
- 2 2013 Excellence Award in Government Legal Service
- 3 A Day In the Life of ...
- 4 John Hennessy Research Scholarship
- 4 NCAT Update
- 4 The Commonwealth: What does it mean for Lawyers?
- 5 Report on 2012 John Hennessy Research Scholarship
- 7 Update on Advancement of Women Results

HAPPY HOLIDAYS

The Government Solicitors Committee wishes all government lawyers a safe and happy festive season and looks forward to another busy year in 2014.



Chair's Message

By Doug Humphreys

Chair, Government Solicitors Committee

Dear Colleagues,

2013 has proved to be another very successful year for the Government Solicitors Committee.

The annual Government Solicitors Conference and Dinner on 3 September was an outstanding success. I would like to thank all our conference speakers and offer my congratulations to the winners of the Excellence Award and Hennessy Scholarship. Of particular note was the wonderful vibe and energy at the dinner. The participants clearly enjoyed themselves and it was great to see such a large number of guests in the Law Society Dining Room.

I wish to congratulate Ms Elizabeth Espinosa on her election as a Councillor of the Law Society of NSW for a three year term and look forward to her continued and valuable contribution in the years to come.

In the new year the Committee will review the format of the annual conference and continuing legal education offered to government solicitors. The Law Society aims to provide a selection of high-value opportunities to enable government solicitors to attain their continuing legal education. This is particularly important given current demands on resources and the need to seek value for money in continuing education.

Lastly, I would like to thank the Committee members and Law Society staff for their valuable contributions throughout the year. ■

2013 Government Solicitors Conference and Dinner

By Erin Gough, Government Solicitors Committee member



Questions of constitutional interpretation kicked off the Law Society's annual conference for government solicitors held on 3 September at the Hilton Hotel Sydney, which attracted 164 delegates.

Thanks to the Hon. Justice Margaret Beazley AO for her opening keynote address on the constitutional opinions given by Australia's first Attorney-General, the "Affable Alfred" Deakin.

(continued on page 2)

2013 Government Solicitors Conference and Dinner

continued from page 1

In light of recent cases relating to tobacco sales and immigration, it was interesting to learn that the same types of constitutional issues were faced by Deakin as our courts face today.

Scott Alden, partner at DLA Piper, gave an erudite presentation on the procurement framework in NSW. Phil Nunn, psychologist and educator, provided some useful pointers on how to maintain our mental health and wellbeing as lawyers, including tips on taming the “black dog”.

Dr Ashley Tsacalos, partner at Norton Rose Fulbright Australia, gave some practical insights on the scope of the obligation to act as a model litigant. Natascha Rohr from the NSW

Department of Attorney General and Justice and winner of the 2012 John Hennessy Research Scholarship shared what she learned about the Ontario Mandatory Mediation Program during her visit to Canada.

Dr Juliet Lucy, barrister-at-law, Fifth Floor Selbourne Chambers, discussed the operation of access to information legislation. Bruce Whittaker, partner at Ashurst presented on the pros and cons of the *Personal Property Securities Act 2009* and its application.

Finally Steven Mark, former NSW Legal Services Commissioner and Tahlia Gordon, former Research and Projects Manager of the Legal Services Commissioner, presented some frankly

frightening ethical dilemmas, leaving us in terror about the sneaky things people will do with metadata, but better equipped to face such dilemmas should they arise.

The annual dinner, which attracted a sensational 95 delegates, was held at the Law Society Dining Room following the conference, with an entertaining and inspiring after-dinner speech delivered by the Hon. Robert McClelland MP, partner at Turner Freeman and former Attorney-General of Australia. Congratulations also to the winners of the Law Society’s Excellence Award in Government Legal Service and John Hennessy Research Scholarship, who were announced at the dinner. ■

2013 Excellence in Government Legal Service Award

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”.

Law Society members 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, or
- contributes to good government.

The Law Society received two nominations for the Excellence Award which were judged by the Government Solicitors Committee as deserving of recognition this year.

WINNER –

2013 EXCELLENCE AWARD IN GOVERNMENT LEGAL SERVICE

Congratulations to **Margaret Baker**, the winner of the Excellence Award in Government Legal Service for 2013.

Ms Baker was nominated by her colleagues at the NSW Department of Education and Communities where she is a Senior Legal Officer. This Award recognises the contribution Ms Baker has made to government legal practice over a number of years. She has been in her current department for approximately 15 years and is a key member of the Legal Unit, working in a high pressure environment.

Ms Baker was nominated for this award for her continued efforts in going “above and beyond the call of duty” in her role.

HIGHLY COMMENDED –

2013 EXCELLENCE AWARD IN GOVERNMENT LEGAL SERVICE

Congratulations to the **Family Law Early Intervention Unit, Legal Aid NSW**, who received a Highly Commended citation. The Family Law Early Intervention Unit has been providing groundbreaking legal service, particularly in serving the needs of disadvantaged litigants. The staff members who comprise this Unit have shown an extraordinary level of commitment and contribution in the area of family law.

A day in the life...

of Ed Gomes

Senior Legal Counsel – Construction, NBN Co Ltd



My day as a Senior Legal Counsel at NBN Co Ltd invariably begins with a review of the day's media and overnight emails on the train to North Sydney. The National Broadband Network is obviously the subject of intense political jockeying and media scrutiny, and so there is almost always a wealth of coverage across both national and regional news outlets. Sometimes the reportage is surprisingly accurate – sometimes, completely inaccurate – but always interesting to read.

From the time I arrive at NBN Co Ltd's North Sydney offices, no day is the same.

Essentially the task for all lawyers at NBN Co Ltd is to juggle four sources of

demands on your time: requests from colleagues and more senior members of the NBN Co Ltd legal team; requests from senior management; requests from our day-to-day internal clients; and requests from our Board and Shareholder Ministers (the Minister for Communications and the Minister for Finance).

The learning never stops, and sometimes it seems the work doesn't either – but then, what lawyer would have it any other way?

The ability to prioritise each client's interests is crucial. Requests for advice, documents and contract drafting frequently (though unintentionally) collide and determining the order of precedence is vital. Given that the National Broadband Network is still well and truly in the construction phase, the work we do with construction partners is particularly in focus. There are now a great number of contractors performing a wide mix of roles for the National Broadband Network, and it is important to be across all the various issues in play at any one time and to pro-actively work to address emerging issues. This demands excellent internal communication within NBN Co Ltd but also with legal counsel and business representatives from the contractors themselves. One particular point of interest for me has been seeing the various negotiation and drafting styles of other lawyers on questions which are often highly complex and far from easy to solve.

And so as with many in-house roles, a substantial part of the day involves

attending various internal stakeholder and construction partner meetings. I might find myself beginning the day negotiating a construction contract with a new construction partner, before moving on to another meeting or call to attempt to resolve issues with an existing construction partner. Then there may be internal face-to-face discussions to consider what our next steps might be before going away and drafting letters, contracts or written advice so as to deal with the issues that have come up.

At some point food will be squeezed into the mix, which often gives those of us in the legal team a chance to chat informally and bounce ideas and problems off one another. The collegiality of the NBN Co Ltd legal team is excellent and it is often a vital resource to draw upon when things get busy or difficult.

In a sense I then move through two 'ends of the day'. The first is the end of my time in the office, during which I brief my immediate supervisor on what has been happening and what I have done, before we try to anticipate what the various next steps will be on the matters I am looking after.

As I support contract implementation in the western parts of Australia, the second end to my day comes when, at home and logged on, I manage to close out the various requests from the Perth, Darwin and Adelaide offices which lag up to two hours behind head office in Sydney. In this sense technology is an essential tool for me, particularly because I have a wife and toddler both of whom I like to see at night!

Working at NBN Co Ltd has been by far the most challenging but also the most rewarding legal experience I have had, particularly from the point of view of being a construction lawyer. I have the luxury of being able to work not just on a high-profile project but with some of the brightest minds I have encountered. The learning never stops, and sometimes it seems the work doesn't either – but then, what lawyer would have it any other way. ■

2013 John Hennessy Research Scholarship

The John Hennessy Research Scholarship was 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 (at the Commonwealth, State or local level)
- specialist accreditation
- specialist continuing legal education, or
- further postgraduate study (maximum 12 months).

The scholarship is an 'occasional scholarship' which is offered from time to time and covers travel, study and other approved expenses up to a maximum value of \$10,000.

The Scholarship is open to all NSW based government and local government solicitors holding a current NSW practising certificate who are members of the Law Society.

The successful applicant is required to submit a final project report around six months after the grant of the scholarship with a view to publication in the *Law Society Journal* and/or *The Government Lawyer* newsletter. Where a research

project has been undertaken, the final report should make recommendations to improve the operations of the "sponsor" government legal department and/or the legal system in NSW.

2013 Winner of the John Hennessy Research Scholarship

Congratulations to **Rebecca Barrington** from the Office of the Director of Public Prosecutions, Dubbo who is the 2013 Winner of the John Hennessy Research Scholarship.

Ms Barrington will be using the funding to research the measures which exist in other jurisdictions to address the unique issues in domestic violence cases.

Ms Barrington will look at the Specialist Domestic Violence Courts in the United Kingdom and assess their suitability in the NSW criminal justice system. The objective of Ms Barrington's research will be to look into the cost of implementing similar systems in NSW, relative to the benefit to victims and the estimated impact on domestic violence reporting and case outcomes.

Ms Barrington has an ongoing interest in the needs of victims and witnesses and the necessity of addressing victim needs in the interests of efficiency of the justice system. ■

The Commonwealth: What does it mean for lawyers?

An article based on a presentation by Dr Peter Slinn at the 18th Commonwealth Law Conference, Cape Town South Africa in April 2013, was published in *The Commonwealth Lawyer*, the journal of the Commonwealth Lawyers Association. Dr Slinn is General Editor of the Law Reports of the Commonwealth and a member of the Executive Committee of the Commonwealth Lawyers Association.

In his enlightening article, Dr Slinn examines the relevance and value of the Commonwealth to lawyers.

A copy of Dr Slinn's article can be accessed [here](#).

NCAT UPDATE

The *Civil and Administrative Tribunal Act 2013* received assent on 4 March 2013. It sets out NCAT's governance framework and contains provisions that are needed to transition more than 20 existing tribunals to NCAT, including the Administrative Decisions Tribunal, the Consumer, Trader and Tenancy Tribunal and the Guardianship Tribunal.

The *Civil and Administrative Tribunal Amendment Act 2013*, which adds detail to the initial Act, and *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* have now been passed and received assent on 20 November 2013.

NCAT will commence operations as planned on 1 January 2014. Mr Robertson Wright SC has been appointed as the inaugural President of NCAT. Mr Wright was also sworn in as a Judge of the Supreme Court of NSW on 25 October 2013. Justice Wright has been practising as a barrister for 30 years and has been a Judicial Member of the Administrative Decisions Tribunal since 2007.

A Steering Committee was established to guide the implementation of NCAT with input provided by a broader Reference Group. The Law Society is a member of the NCAT Reference Group and has addressed a number of key issues in its submissions including legal representation, costs and constitutional requirements. Minutes of the Reference Group's meetings and discussion papers are published on the NCAT website at: www.tribunals.lawlink.nsw.gov.au

Report on 2012 John Hennessy Research Scholarship

This article was first published in the *Law Society Journal*, November 2013, and is reproduced with permission.

Talking it out: mandatory mediation in Ontario

One of the oldest and best-known mandatory mediation schemes in the common law world could hold valuable lessons for those in NSW according to a recent study.

Meredith Tucker reports.

“Policy makers often get caught up in making rules,” says Natascha Rohr, winner of the 2012 Hennessy Scholarship and acting head of the Alternative Dispute Resolution Directorate with the NSW Department of Attorney General and Justice. “But in Ontario it’s striking how well mandatory mediation works with minimal regulation.”

Parties in Ontario involved in civil suits over \$25,000 must attempt mediation before a hearing, but how, when and where is up to them.

They can also choose whether to engage a low-cost panel mediator or another private mediator of their preference. “Lawyers and their clients are sophisticated enough to benefit from that flexibility, while the basic framework is there to ensure access to mediators for self-represented or otherwise disadvantaged litigants,” Rohr says.

The success of this approach – allowing the system the flexibility to grow organically and better reflect the needs of those engaged with it – is one of the key findings of Rohr’s study trip to investigate the Ontario program awarded by the Hennessy Scholarship. The study included interviews with lawyers, mediators, ministry and court staff and a judge.

The other is how readily mandatory mediation has become a wholly accepted part of the legal topography of the province. This is in sharp contrast to the NSW situation where the idea of

mandatory mediation is viewed with scepticism by some, according to Rohr.

“Lawyers quite rightly consider themselves experts in dispute resolution,” she says. “They’ve trained and honed their skills, and though most can see the benefit of mediation at least some of the time, there are those who remain concerned about the idea of it becoming mandatory.”

It’s a perspective Rohr herself appreciates. With a background in family law, she remembers her own reaction when compulsory mediation was introduced to help resolve disputes before they went to court. “I had some serious doubts. I was worried about my clients, particularly those whom I felt were vulnerable, but over time I developed a different perspective,” she says.

“I remember I was surprised by how often it worked and how satisfied many clients were with the process, mainly because it met their non-legal needs in ways litigation couldn’t.

“In Ontario, I heard the same thing from those involved in civil claims. People tend to feel more satisfied by mediation than by settlement negotiations between lawyers,” she says.

Rohr found that Ontario lawyers had experienced a similar transition in their thoughts about mandatory mediation over the 14 years the program has been in place. However, the process played out quite differently in the two major cities involved, Ottawa and Toronto.

To an extent, the difference reflects the larger social differences and litigation cultures of the two cities, Rohr found. Ottawa, Canada’s capital, is smaller than big-city Toronto, it’s much slower-paced and home to a closely-knit bar who were involved heavily in an earlier mediation pilot.

“It’s a collegial place. People know and trust each other. There was this real sense

Policy makers often get caught up in making rules, but in Ontario it’s striking how well mandatory mediation works with minimal regulation.

Natascha Rohr, winner of the 2012 Hennessy Scholarship and acting head of the Alternative Dispute Resolution Directorate with the NSW Department of Attorney General and Justice

of ‘give and take’ in the way the program was set up there.”

In consequence, Rohr believes Ottawa embraced the mediation program more readily than Toronto, a larger commercial city with a less integrated legal fraternity, at least initially.

The battle for acceptance was therefore much harder in Toronto than Ottawa. “Many I spoke with felt that the culture in Toronto only really shifted because the mandatory nature of the program required lawyers to become familiar with mediation and its benefits,” she says.

Obviously, this has implications for any mediation program set up in NSW, with Rohr believing it is vital that any similar project take into account the prevailing litigation culture.

A flexible approach

From the beginning, the Ontario approach has been to encourage simplification and flexibility – a roster of mediators work for a scheduled fee and are required to do up to 12 hours pro bono a year for parties meeting a means test. Complaints are handled by local mediation committees and administration is managed by mediation coordinators.

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Report on 2012 John Hennessy Research Scholarship

continued from page 5

Parties are free to select either a mediator from the rostered list or to use off-roster mediators who can charge higher fees. Coordinators are able to assign mediators from the roster where necessary.

Similarly, the model for mediation to be used is not prescribed, even though it was initially intended that an interest-based facilitative model be adopted.

“Over time, it appears that there has been a shift in favour of rights-based negotiation and ‘evaluative’ or advisory mediation practices, where the mediator may provide some expert opinion about the substance of the dispute, though not advise or direct the parties.”

On the one hand, this shows how flexible the process is. On the other, Rohr spoke to at least one attorney who thought lawyers should be better educated in the benefits of interest-based mediation so they can assist their clients to get the most out of the process.

Measuring success

As part of her study trip, Rohr attended two mandatory mediation sessions.

While the cases couldn’t have been more different – one a wrongful death suit involving a boy who drowned, the other a claim for damages resulting from an elevator malfunction – they are instructive about what mediation can and cannot achieve.

The elevator case was resolved quickly, the wrongful death suit was not.

Predicting which matters will resolve at mediation is very difficult. What is known is that the vast majority of civil claims cases will settle before the hearing.

However, there will always be a role for the courts. As Robert Beaudoin, a judge with the Superior Court of Justice at Ottawa and interview subject for Rohr’s study said: “If the case is about fact, it should settle at mediation. Cases about law may require a hearing.”

When it comes to measuring mediation success participants in Rohr’s study stressed that the key point is not, as many assume, what proportion of matters settle – after all, only a small proportion end up in court regardless of whether or not mediation is used.

“Rather, the issue is how quickly they settle, whether it is early on in the process or shortly before the hearing,” says Rohr.

The Ontario experience suggests that mediation can help bring the timing of settlement forward, before the parties have expended a lot of time and money on the dispute.

Rohr’s experiences in Ontario have led her to believe that NSW could benefit from further integrating ADR into some aspects of its civil litigation program. She notes that an independent evaluation conducted 23 months after the program began found that around 40 per cent of

Over time, it appears that there has been a shift in favour of rights-based negotiation and ‘evaluative’ or advisory mediation practices, where the mediator may provide some expert opinion about the substance of the dispute, though not advise or direct the parties.

cases settled at an earlier point in the litigation process. It also found significant reductions in time to disposition, decreased costs to litigants and considerable satisfaction expressed by both litigants and lawyers.

“I heard that many Ontario lawyers were initially cynical about mandatory mediation, but 14 years later there seems to be overwhelming support.”

The Hennessy Research Scholarship was established by the Law Society’s NSW Government Solicitors Committee to support public sector solicitors to undertake a research project into legal systems in another jurisdiction, specialist accreditation, continuing education or further postgraduate study. The 2013 Scholarship was awarded to Rebecca Barrington from the Office of the Director of Public Prosecutions at the Government Solicitors Conference in September 2013.

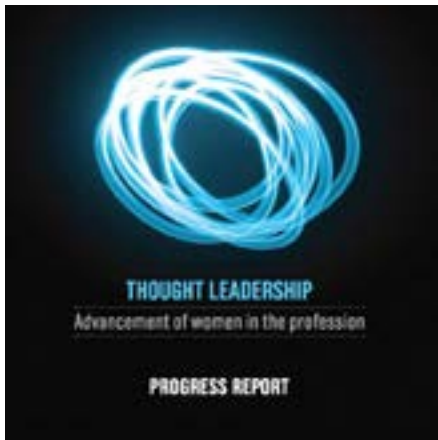


Rule 42 Seminar for government lawyers Wednesday 26 March 2014, 9am - 12.30pm

Join us to hear updates on compliance, costs and ethics from our team of experts from the Law Society’s Professional Support Unit.

REGISTER HERE

Advancement of Women Results



In July 2013, the Law Society published a second report as part of The Advancement of Women in the Legal Profession Project. This second report sets out progress against the recommendations in the first report published in 2011 as well as updated statistics and new research on women solicitors in leadership, including new research on the gender balance of heads of corporate and government legal teams.

To increase our understanding of the gender balance in senior in-house roles, the Law Society commissioned independent research company Urbis to conduct a survey of all corporate and government members employed in a legal capacity. The core objectives of the

research were to examine the gender breakdown of senior solicitors in corporate and government practice and determine trends in the gender profile of new senior appointments over time. As the terminology for a “senior position” in in-house practice is less standard than the equivalent partner/principal role in private practice, two different types of senior role were included in the survey:

1. Most senior lawyer working in a legal capacity in the organisation, and
2. Head of legal team.

In total, 347 government solicitors completed the survey, with 59% female respondents and 41% male. This is comparable with the Law Society’s data for the government segment overall which shows that women comprised 63% of NSW government lawyers in 2012.

Most senior lawyer

Respondents were asked to indicate whether they were the most senior lawyer working in a legal capacity in their organisation. Of the 347 government solicitors completing the survey, 43 (12%) specified that they were the most senior lawyer. Of those 43, 40% were female and 60% were male. Consistent with anecdotal feedback, these figures suggest

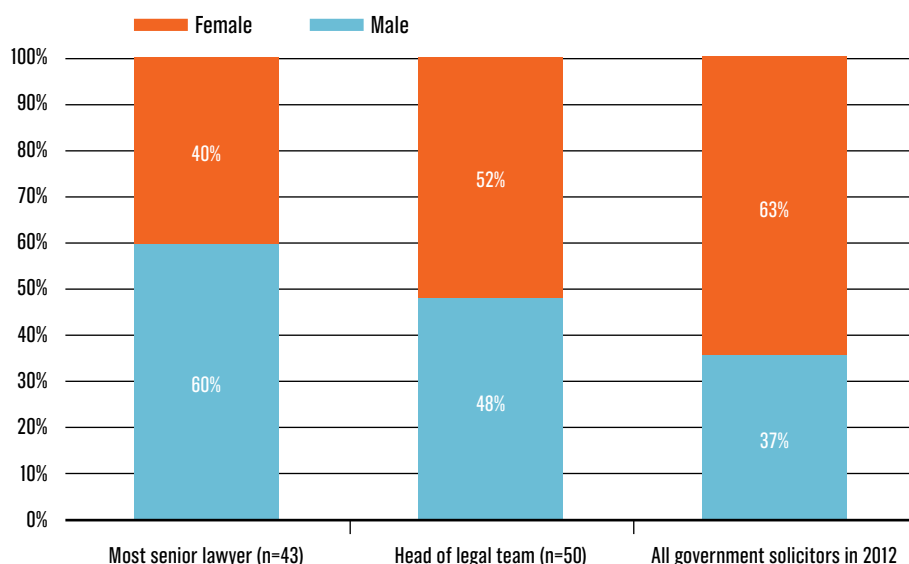
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that there are more women represented at the highest level in government practice than in private practice.

Head of legal team

Respondents who indicated they were not the most senior lawyer in their organisation were then asked to specify whether they were the head of their legal team (noting there may be more than one legal team within an organisation). Of the 347 government solicitors completing the survey, 50 (14%) specified they were the head of their legal team. Of those 50, 52% were female and 48% were male. Compared to the findings for the most senior lawyer above, this shows that women are more evenly represented amongst heads of government legal teams in a ratio which is closer to their representation in the general government lawyer population. Consistent with anecdotal feedback, this is also a much higher rate than for principals in private practice.

Figure 1: Gender breakdown of senior positions in government legal teams



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Advancement of Women Report

continued from page 7

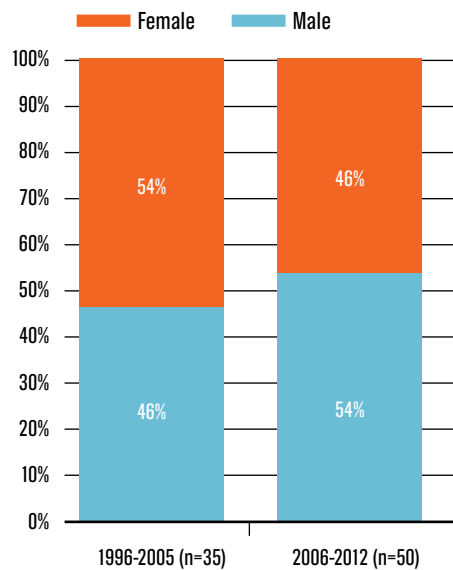
New senior appointments

Government most senior lawyer respondents were asked to specify how long they had held their current position so that we could determine the year they were appointed to that role. The results show that women comprised 37% of the 27 appointments reported since 2006.

All most senior lawyer and head of legal team respondents were also asked to indicate how long it was since they were first appointed to a senior legal position (head of legal team). This allows us to examine the gender balance for new appointments to senior government positions over time. As shown in figure 13, female respondents were more strongly represented in new appointments between 1996 and 2005 (54% female, 46% male), and less strongly represented in new appointments since 2006 (46% female, 54% male).

More information about The Advancement of Women in the Legal Profession Project and a copy of the 2013 Progress Report can be found on the [Law Society website](#).

Figure 2: Year first appointed head of government legal team by gender



2013 Government Solicitors Committee

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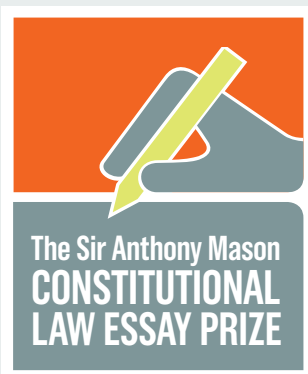
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2013 Sir Anthony Mason Constitutional Law Essay Prize Competition

The Law Society's Government Solicitors Committee was pleased to sponsor the 2013 Sir Anthony Mason Constitutional Law Essay Prize Competition. Sir Anthony Mason AC KBE QC announced the three best essays at an Awards Night on 20 June 2013 at the Law Society, organised by the NSW Young Lawyers Public Law and Government Committee.

Congratulations to the award winners:

Ms Marie Iskander –
First Prize (\$250 and a copy of *The Constitution of Australia* by Cheryl Saunders)

Ms Alice Wharldall –
Second Prize (\$150 and a copy of *The Constitution of Australia* by Cheryl Saunders)

Mr Jackson Wherrett – Third Prize (\$100)