



THE LAW SOCIETY
OF NEW SOUTH WALES

A GUIDE TO ETHICAL ISSUES FOR GOVERNMENT LAWYERS

THIRD EDITION 2015



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Disclaimer

This publication has been produced solely for government lawyers to provide general information of an introductory nature about ethical issues. It is a general guide only and is not exhaustive of issues which may be encountered. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors or the Law Society of New South Wales and any liability is hereby expressly disclaimed.

Preface

Ethics and professional responsibilities are an inherent part of practising law whether in public or private practice. With so many interests to serve, knowing the right path to take is not always clear cut. Whilst the underlying principles are fundamentally the same, the application may pose unique challenges for those lawyers who are in public practice.

Meeting ethical and professional responsibilities can provide public sector lawyers with arguably their most significant professional challenge. Public sector lawyers face issues in a complex and difficult context, and have significant additional factors to consider in respect of the public interest, greater public accountability and transparency.

The Government Solicitors' Committee of the Law Society of New South Wales published the first edition of the "Guidance on Ethical Issues for Government Solicitors" ("the Guide") in 2003 to help government lawyers meet their ethical professional responsibilities. Since the release of the Guide this document has become a valuable resource for lawyers who are employed by all levels of government and also to private practitioners retained by a government agency.

The Government Solicitors' Committee, in 2010, undertook to review the Guide to ensure that it continues to be a relevant and useful resource for the profession. I am pleased to present the third edition of the Guide which takes account of changes since 2010, including the introduction of the *Legal Profession Uniform Law (NSW)*. The Guide will continue to be updated as required and government lawyers are welcome to make suggestions on how to enhance the Guide.

The Guide is designed to assist by setting out guides to ethical issues for government lawyers where they are affected by law or public sector codes or circumstances of practice. It is intended to be read in conjunction with the relevant practice rules and statements of ethics, and at the same time, address circumstances and situations which may be particular to government lawyers. I trust you will find this Guide relevant and useful in the circumstances of daily legal practice.

The Law Society of New South Wales appreciates that it is a valuable service to have a guide for members that is designed specifically for government lawyers that recognises the unique features of their work and work environment. I thank the members of the Government Solicitors' Committee for this publication. Particular thanks must go to those members of the Government Solicitors' Ethics Sub-Committee (Doug Humphreys, Elizabeth Espinosa, Ryan Fletcher, Hayley Hummerston, Adam Johnston, Greg Ross and Jenny Stathis), for their hard work on this edition.

John F. Eades

President

The Law Society of New South Wales

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Introduction

Government lawyers are subject to the same ethical rules as private practitioners. There are, however, issues unique to government lawyers who are affected by laws, public sector codes and circumstances that don't arise in private practice.

The Government Solicitors' Committee of the Law Society of New South Wales, with the assistance of the Policy and Practice Department, has prepared this updated ethical guide for government lawyers employed in Commonwealth and New South Wales government agencies, local councils and statutory bodies set up for public purposes. It may also be useful to private practitioners retained by a government agency. The Guide is based on the original version published by the Committee in 2003.

Government lawyers make up 10.9%¹ of legal practitioners with practising certificates in New South Wales, and they are employed in a broad range of agencies. "Inner budget" or "central" agencies carry out core government functions. Others, variously known as "government business enterprises" or "government trading agencies" do not have a regulatory or policy advice role. Some government lawyers are involved in both legal and policy work. In-house lawyers in local councils are "corporate lawyers" for practising certificate purposes, but for the purposes of this Guide are intended to be included as government lawyers.

The Guide should be read along with the:

- *Legal Profession Uniform Law (NSW)*;
- *Legal Profession Uniform Law Application Act 2014 (NSW)*;
- *Legal Profession Uniform Law Application Regulation 2015 (NSW)*;
- *Legal Profession Uniform General Rules 2015*;
- *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*;
- *Legal Profession Uniform Law Legal Practice (Solicitors) Rules 2015*; and
- *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*.

¹ See 2014 Profile of the Solicitors of NSW: <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/942948.pdf>

Government lawyers employed by the Commonwealth Attorney-General and the Australian Government Solicitor are subject to the *Judiciary Act 1903* (Cth), s.55E(3) and s.55Q(2) respectively. Commonwealth government lawyers are also covered by the Commonwealth Attorney-General's Legal Services Directions. Codes of Conduct of the Commonwealth, such as s.13 of the *Public Service Act 1999* and the State, such as Part 2 of the *Government Sector Employment Act 2013* (NSW), are also relevant.

Since the Guide is not part of the solicitor's rules under the *Legal Profession Uniform Law* (NSW), its contents are not binding on the practice of government lawyers.

Commonwealth Government agencies

The Australian Government Solicitor ("AGS") employs more than 300 government lawyers. The AGS provides legal and related services to the Commonwealth and to persons and bodies in areas for which the Commonwealth has power to make laws, and in relation to other functions referred to in the Act. Under the Legal Services Directions issued by the Commonwealth Attorney-General and administered by the Office of Legal Service Coordination, constitutional law issues, national security issues and Cabinet work are "tied work" that only the Attorney-General's Department and the AGS may perform. The AGS competes with private firms in other areas such as advising, litigation and commercial property work, mainly for the rest of government. On 1 July 2015, the AGS was consolidated with the Commonwealth Attorney-General's Department.

Numerous in-house government lawyers are employed in other Commonwealth agencies. Many specialise in legal issues relevant to their agency, while others provide more general legal advice on contractual, employment and administrative law issues.

New South Wales Government agencies

The central legal office is the Crown Solicitor's Office ("CSO").

Premier's Memorandum 95-39 requires Government agencies to engage the CSO for "core" legal work in matters which:

- have implications beyond an individual Minister's portfolio; or
- involve the constitutional powers and privileges of the State and/or the Commonwealth; or
- raise issues fundamental to the responsibilities of Government; or
- arise from, or relate to, matters for which the Attorney General is responsible.

The CSO competes with the private legal profession for non-core legal work. *The Legal Profession Uniform Law Application Act 2014* (NSW) specifies the bodies and persons for whom the Crown Solicitor may act (s.44).

Local Government lawyers

Local councils in NSW are 'bodies politic' established by the *Local Government Act 1993* (NSW). Local councils have broad service, regulatory, revenue, administrative and enforcement functions.

In-house government lawyers in councils advise on the interpretation of local government and other legislation and represent the council in enforcing and defending the wide range of proceedings in which councils may be involved, and in transaction work.

Summary of key principles

The principles outlined below are expanded on in the remainder of the Guide.

1. Who is the client?

- 1.1. Councils and statutory corporations may seek advice, take proceedings or be proceeded against, in their corporate name. Statutory office holders may also seek advice, take proceedings and be proceeded against in connection with the office.
- 1.2. Individuals may be clients. The relationship between such an individual and the government lawyer is that of client and solicitor.
- 1.3. For government agencies, instructions are given by a minister or agency on behalf of the Crown (or the Attorney General on behalf of the Crown). This affects the government lawyer's duty to the "client" and gives rise to questions of legal professional privilege in communications. These issues are discussed in Section 3.
- 1.4. A government lawyer has a retainer for each matter for which the agency requires legal services.
- 1.5. A government lawyer should treat agencies as separate from each other for the purpose of considering whether acting for more than one in the same matter would involve a conflict of duties owed to each.

2. Good, Independent Advice

- 2.1. Government lawyers should accept instructions to advise or represent an agency, honestly, competently and diligently.
- 2.2. Government lawyers should provide legal services even where it incurs the client's displeasure.
- 2.3. A government lawyer must not publicly oppose government policy concerning any matter in which the officer is acting for an agency.

3. Confidentiality

- 3.1. Information given in confidence should be kept confidential, during and after the government lawyer's employment. Unless the agency authorises disclosure or there is a legal immunity for doing so, there is an overriding legal obligation not to disclose.
- 3.2. It is not unethical to make a protected disclosure under the *Public Interest Disclosures Act 1994* (NSW).²
- 3.3. It is not unethical to disclose the contents of legal advice to another government agency in accordance with law or government policy. A safeguard against waiver of legal professional privilege would be to ensure disclosures are made confidentially.
- 3.4. The *Privacy and Personal Information Protection Act 1998* (NSW) and the *Privacy Act 1988* (Cth) restrict the communication of personal information between agencies, and to persons or other bodies. There are thirteen Australian Privacy Principles³ that regulate the handling of personal information by most Commonwealth public or government agencies and some private sector organisations.

4. Model Litigant

- 4.1. Government lawyers should advise client agencies of their duty to behave as model litigants, should act as model litigants themselves, and assist agencies to do so.
- 4.2. "Model litigant" rules do not prevent governments and their agencies from acting firmly and properly to protect their interests. All legitimate steps may be taken to pursue, test or defend claims where there is a sound legal basis.

5. Conflict of Interest

- 5.1. The *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* apply to government lawyers, including in relation to dealing fairly with clients, free of any interest that may conflict with that of a client.

² For further information see: <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>

³ For further information see: <http://www.oaic.gov.au/privacy/privacy-act/australian-privacy-principles>

- 5.2. Public sector law prohibits conflicts of interest on the part of public sector employees.
- 5.3. Government lawyers should not act for more than one agency in the same matter if they have conflicting interests. See also Section 1: Who is the Client?

6. Giving policy advice

- 6.1. A government lawyer instructed to carry out or assist in a transaction, should not give unsought advice on its wisdom, but might point out its/the legal effect.
- 6.2. Advice may be sought on issues of policy or management discretion. To prevent misunderstanding, a government lawyer should separate legal from policy or management advice.
- 6.3. Issues of legal professional privilege require a government lawyer to consider whether the dominant purpose of any opinion is to give legal or some other kind of advice.

7. External legal service providers

- 7.1. If a government lawyer's agency must refer matters to some other government legal agency, the government lawyer should ensure that he or she does so. If the agency is free to select its external advisers, the government lawyer must:
 - use informed purchaser models to engage external legal services and manage external legal services providers, including operating within the government procurement policy framework;
 - try to ensure that the agency (and therefore the government) is best served by the choice; and
 - avoid selection from habit, friendship or favour, or in return for some inducement.
- 7.2. Repeatedly briefing the same counsel or firm increases their experience in the affairs of an agency but the government lawyer must still act diligently, brief and assist counsel or the firm properly, and point out any deficiencies in the advice. Briefing a number of barristers in one field avoids the problem of one being unavailable.

THE GUIDE

1. Who is the Client?

Does a government lawyer have a client, or just a boss?

“Sometimes I feel like a glorified secretary to my boss, who is the head of our agency. I’m the only government lawyer in the agency and my primary responsibility is to provide legal advice in relation to applications for decision by my boss. It’s hard to keep up with this work because of his requests for other services (such as preparing speeches for him to deliver). Is my first responsibility to my boss, the agency, the applicants, the department or the government? What should I do if my primary responsibilities are suffering because my workload is too great? Can I decline to perform services requested by my boss?” See 1.4 and 2 below.

1.1. Local councils and statutory corporations, whether or not they represent the Crown have capacity to take proceedings and be proceeded against in their corporate name, and to seek legal advice. Statutory office holders not representing the Crown may also take proceedings or be proceeded against in connection with the office, or take legal advice, subject to legislative provisions.⁴

1.1.1. A local council is a body politic under Chapter 9 of the *Local Government Act 1993* (NSW), as are statutory corporations defined in Part 8 of the *Interpretation Act 1987* (NSW). They are clearly capable of giving instructions on legal matters.

1.1.2. Under the *Director of Public Prosecutions Act 1986* (NSW), the Director may be represented by counsel and solicitor.⁵ It is the function of the Solicitor for Public Prosecutions (a) to act for the Director, and (b) to instruct the Crown Prosecutors and other counsel on behalf of the Director.⁶ The Director is then the client (though not the employer) of the Solicitor.

1.1.3. Where a government lawyer is advising or representing an agency which has management of persons’ affairs (e.g. the NSW Trustee and Guardian), the client is the agency, not the person whose affairs are being managed.

⁴ See, for example, the *Ombudsman Act 1974* (NSW), ss.35A and 35B (amongst others) imposing restraints on proceedings that may be taken against the Ombudsman, and proceedings that the Ombudsman may take; and the *Public Finance and Audit Act 1983* (NSW), s.33, as to the entitlement of the Auditor-General to seek advice from the Attorney General or the Crown Solicitor.

⁵ *Director of Public Prosecutions Act 1986* (NSW), s.21.

⁶ *Director of Public Prosecutions Act 1986* (NSW), s.23.

- 1.2. Individuals can be clients where legislation or governmental practice allows. Subject to legislation, their legal relationship with the government lawyer is that of client and solicitor, with the confidentiality and loyalty inherent in that relationship.
- 1.2.1. The *Legal Aid Commission Act 1979* (NSW) declares that the relationship between a solicitor (the Chief Executive Officer, a member of staff or a private legal practitioner to whom work is assigned) and an applicant for, or recipient of, legal aid, is one of solicitor and client.⁷
- 1.2.2. Ministers and statutory office holders are given advice and representation on matters arising from their statutory or common law functions, such as litigation to challenge the exercise of a power, or transactions to which they are a party. Ministers, public officials and Crown employees may also be defendants in proceedings such as an action in tort or required to appear before investigative tribunals where, due to their official duties, they have a substantial and direct interest. State policy on granting *ex gratia* legal assistance in these cases is set out in the guidelines to the Premier's Memorandum No. 99-11.⁸
- 1.2.3. Legal assistance includes representation and an indemnity against legal costs and any verdict in civil proceedings awarded against the grantee, except fines or punitive or exemplary damages.
- 1.2.4. If it is decided that the grantee acted unreasonably, and/or failed to disclose all circumstances, *ex gratia* assistance may be withdrawn. The government lawyer or private practitioner is still not free, however, to break any confidences of the client, or give advice to the government against the former client's interest. The Legal Services Directions address this issue in the Commonwealth.

⁷ Section 25(1). The relationship arises only in the context of functions performed by the solicitor in the course of acting as a solicitor (s.25(1A)). An applicant for legal aid includes a person who only seeks legal advice. A person to whom legal aid is granted includes a person to whom that advice is given; and an application for legal aid includes a request for that advice: s.25(6). See also s.24, on the respective functions of the CEO and a member of staff in practising as a solicitor under the Act, and the rules, standards and duties of a solicitor that apply to both. See also s.25, and s.26, prohibiting the passing on information.

⁸ For further information see:

http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0014/15062/Guidelines_for_the_Provision_of_Ex_Gratia_Assistance_for_Legal_Representation_for_Ministers_of_the_Crown,_Public_Officials_and_Crown_Employees_v2.pdf

- 1.2.5. The NSW Law Reform Commission has said (in Report 86 in 1998) that:

“The Attorney General, as the first law officer of the Crown, is primarily responsible for the provision of legal advice to government. At common law, the Attorney General was, in formal terms, the sole source of legal advice to government. Other legal advisers act on the instructions (often implied) of the Attorney General who represents the Crown. This is so even when the advice is requested by, or delivered to, a department, agency, or official.”
- 1.2.6. This seems to say that the Attorney General could intervene in any case in which advice on the Crown’s legal position has been given, and instruct a legal adviser chosen by him or herself. This could include instructions contrary to those already given by a department, agency or official. In such a case, the client would no longer be the department, agency or official. It would be the Attorney General. In practice, the Attorney General would no doubt consult with the Minister.
- 1.3. Instructions to act are given by a Minister or an agency acting on behalf of the Crown (or perhaps on behalf of the Attorney General, acting on behalf of the Crown).
 - 1.3.1. This affects the government lawyer’s duty of confidentiality to the “client”. It also raises the question whether authorised disclosure of communications between the Minister or agency or the government lawyer, to another Minister or agency may affect legal professional privilege. Those matters are discussed in Section 3.
- 1.4. A government lawyer has a retainer for each matter for which the agency requires legal services.
 - 1.4.1. The *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* presume the existence of a client-solicitor relationship. A government lawyer employed by an agency does not receive a fee, but a salary. It is considered that this amounts to a client-solicitor relationship within the meaning of the Rules for each matter in which the government lawyer receives instructions.

- 1.4.2. A government lawyer doesn't have to accept a retainer. It isn't easy, however, to decline instructions from the employing agency. It is unethical, however, to accept a retainer if there is a conflict of duty and interest or the government lawyer's workload is too great to allow him or her to serve the client competently and diligently.
 - 1.4.3. The government lawyer who does not want to accept a retainer should notify his or her manager so that the case can be referred to another government lawyer, or briefed out. The situation is one of real difficulty for the many government lawyers working in agencies where resources are limited and "briefing out" legal work may not be a welcome option for a (possibly non-lawyer) manager.
 - 1.5. A government lawyer should treat agencies of the Crown separately when he or she is considering whether acting for more than one in the same matter would involve a conflict of duties to each.
 - 1.5.1. Accepting instructions from two agencies in the same matter could involve a conflict of duty if they became irreconcilable. Legal theory and constitutional practice, however, supports the idea that in such cases there is only one client, the Crown (or the Attorney General as the Crown's representative). Conflict of interest is dealt with in Section 5.

2. Good, Independent Advice

2.1. Rule 4 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* provides that a solicitor must:

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
- 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
- 4.1.4 avoid any compromise to their integrity and professional independence; and
- 4.1.5 comply with these Rules and the law.

2.2. In addition, rule 7 provides:

“7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation.”

2.3. In the service of their own or other agencies, government lawyers should accept instructions to advise or represent and do so honestly, competently, diligently and as promptly as reasonably possible. (*Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*, rule 4.1.2 and 4.1.3)

2.3.1. Government, like anyone else, needs honest, competent legal advice and government lawyers should give the best they can, according to their individual knowledge and experience.

2.3.2. “Competence” is usually inferred from the holding of a practising certificate but that, obviously, is not conclusive.

- 2.4. The government lawyer should provide professional legal services, whether or not their advice is welcome. They must avoid any compromise to their integrity and professional independence. (*Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*, rule 4.1.4)

“There are imperatives and I think that we are aware of them and we do our best to comply but the problems arise where the legal advice doesn’t accord with what they [the client agency] want, and my view is that we give the legal advice and they can accept or reject it.” (Government Lawyer)

- 2.4.1. Being a government lawyer employed by the state or federal government is not inconsistent with professional independence. If the government consults a government lawyer, and there is no question of abuse of the relationship, then all the usual legal, ethical and policy rules will apply.
- 2.4.2. The importance of maintaining legal professional privilege is one very strong incentive to government lawyers to maintain professional independence with their client(s).
- 2.4.3. In *Waterford*,⁹ Brennan J said government lawyers should be “competent, in order that the legal advice be sound and the conduct of the litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of the litigation on behalf of his client.” Otherwise, “there is an unacceptable risk that the purpose for which privilege is granted will be subverted.”
- 2.4.4. The exercise of independent judgment is an ethical requirement, however: *“Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.”*¹⁰

⁹ *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.

¹⁰ Per Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (No 2) (1972) 2 QB 102.

- 2.4.5. Under pressure to provide advice that their client employer wants to hear, a government lawyer may be tempted to advise that the desired position is at least “arguable”. This may not be helpful, however, and the client needs to know whether or not it would stand up in court and whether or not there are alternatives.

Example

“I am employed in a NSW Department to give legal advice when required. Part of my employment is preparing instructions to the Parliamentary Counsel for regulations to be made under the various Acts administered by the Department. A problem has been encountered with the administration of an Act, and the Department Head, obviously with the blessing of the Minister, thinks that it can be solved by making a regulation under the Act and directs me to proceed. I can see that the regulation in mind might fit some catch-all words in the regulation-making power literally interpreted, but it seems to me clear that in the context of the Act they would not support this regulation. Do I just pass on the instructions to the Parliamentary Counsel’s Office in the hope that it will either reject the instruction, or see nothing wrong? After all, I may be wrong.”

Response

It can be embarrassing, or worse, to have to cool government (that is, your employer’s) enthusiasm for a course of action, but if the legal situation seems clear, the government lawyer should say so. In the example, the decision as to whether the proposed regulation would be within power is not the government lawyer’s, but the Parliamentary Counsel’s, but the government lawyer should give his or her considered advice as requested by the client.

- 2.4.6. If a government lawyer is confident that the law is clear, it can be confronting if your client wants another opinion. If the law is uncertain, a government lawyer could suggest that they get external advice. If, however, a government lawyer is told to get another opinion for what seems like opinion shopping, he or she should point out the problems this might cause. If the second opinion is the more welcome, for example, the agency has no way of knowing whether it is right or wrong and liability can result from the consequences of following incorrect advice.
- 2.4.7. Legislation and codes of conduct support the independence of government lawyers and reduce pressure to rubber stamp proposals.

- 2.4.8. The *Local Government Act 1993* (NSW) provides that:
“A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.” (s.352(1))
- 2.4.9. NSW Public Sector Legislation
The “government sector” includes government departments, statutory bodies and services like the Police Service. It also covers some jobs in Parliament and bodies exercising public functions (such as State owned corporations).
- 2.4.10. The *Government Sector Employment Act 2013* (NSW):
- recognises the role of the government sector in preserving the public interest, defending public value and adding professional quality and value to the commitments of the Government of the day; and
 - establishes an ethical framework for a merit-based, apolitical and professional government sector that implements the decisions of the Government of the day (s.6).
- 2.4.11. The public interest in expert, independent legal advice to government is well accepted.
- 2.4.12. *Behaving Ethically: A Guide for NSW government sector employees*¹¹ has also been prepared to provide practical guidance for government sector employees on ethical decision-making.
- 2.4.13. A government lawyer who yielded to pressure from the client to act inappropriately would not be acting in the public interest.

¹¹ Published by NSW Public Service Commission, October 2014.

2.4.14. Commonwealth

The values of the Australian Public Service (“APS”) are set out in the *Public Service Act 1999 (Cth)*:

“the APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.” (s.10(5))

2.4.15. The Act includes a Code of Conduct. (s.13).

2.4.16. Representation in court

Privilege, for representation in court, is governed by the Evidence Acts of the Commonwealth and NSW. The definition of “client” includes an employer of a lawyer if the employer is:

- (i) the Commonwealth or a State or Territory; or
- (ii) a body established by a law of the Commonwealth or a State or Territory.” (s.117(1))

2.4.17. The Acts do not cover every case.¹² At least one High Court Justice, however, has said that communications within departments should be privileged.¹³ Other courts have held that communications between local government councils and other statutory authorities, and their in-house lawyers, are privileged.¹⁴

2.5. A government lawyer is not entitled to publicly oppose government policy concerning any matter in which they are or have been acting.

2.5.1. A public statement of opposition to government policy will undermine public confidence and the client’s trust in the impartiality of the advice they receive.

¹² See *Mann v Carnell* (1999) HCA 66 (preliminary discovery), and *Esso Australia Resources Limited v The Commissioner of Taxation* [1991] HCA 6 (discovery).

¹³ Per Deane J in *Waterford*: “...legal professional privilege applies in relation to the seeking and giving of professional legal advice within and between the various branches of the Executive Government.” Where the solicitor has been the Australian Government Solicitor, or the Government Solicitor in a state or territory, it has been suggested that officers, though employed by the client, have a professional relationship with it. They can expect the protection of the Attorney-General from any threat to their independence. Brennan J in *Waterford* considered that a professional relationship can arise only where the Government has been advised or represented by the Crown Solicitor (or the Australian Government Solicitor, as it was then). Other Justices have spoken generally of the Government’s legal advisers being in a professional relationship to the Government.

¹⁴ Santow J. in *Kang v Kwan & 2 Ors* [2001] NSWSC 698.

- 2.5.2. Government lawyers should be able to provide advice that is objectively based in law even if his or her personal views are directly affected by government policy.

- 2.5.3. If a conflict of interest could result in a government lawyer giving partial advice, the government lawyer should inform his or her client and arrange for the work to be done by someone else.

3. Confidentiality

Lawyers should "...act confidentially and in the protection of all client information."¹⁵

3.1. Rule 9 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* provides that a solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

- a. a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
- b. a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2, which provides that a solicitor may disclose confidential client information if:

- a. the client expressly or impliedly authorises disclosure;
- b. the solicitor is permitted or is compelled by law to disclose;
- c. the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
- d. the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
- e. the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
- f. the information is disclosed to the insurer of the solicitor, law practice or associate entity.

¹⁵ *Statement of Ethics* Proclaimed by the Council of the Law Society of New South Wales 28 May 2009

3.2. Confidentiality is not the same as legal professional privilege. Privileged communications will be confidential, but some confidential information communicated to solicitors may not be privileged. Legal professional privilege is a substantive right that clients may rely on to resist the disclosure of confidential information that is brought into existence for the dominant purpose of giving or obtaining legal advice or for the use in existing or anticipated litigation: *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49. This has the following consequences:

- a. being a substantive rule of law, the privilege may be relied upon to resist all forms of compulsory disclosure, including in judicial, quasi-judicial or non-judicial proceedings (*Baker v Campbell* (1983) 153 CLR 52 at 132); and
- b. the privilege cannot be overridden by statute unless the statute does so by clear and unambiguous words or by necessary implication.¹⁶

3.3. Confidentiality is a fundamental and defining obligation for many professions, including the legal profession. Confidentiality is so important because it:

- a. protects the privacy and autonomy of individuals;
- b. promotes the best interests of the client by enabling open and frank communications with their legal advisers. Clients will be more likely to engage in open and honest communications, and disclose all relevant information regarding a matter if they are assured that their communications will remain confidential;¹⁷
- c. promotes the public interest in the administration of justice by facilitating freedom of consultation between the client and the legal adviser;¹⁸ and
- d. underpins the rule of law by enabling people to conduct their affairs with the benefit of legal advice.¹⁹

¹⁶ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (*Daniels*) at 552-553.

¹⁷ See *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

¹⁸ *Waterford v Commonwealth* (1986) 163 CLR 54 at 62.

¹⁹ *Kennedy v Wallace* (2004) 142 FCR 185 201.

- 3.4. In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47, Megarry J specified the conditions for the existence of an action for breach of an equitable obligation of confidence arising independent of contract: “First, the information itself...must ‘have the necessary quality of confidence about it.’ Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”
- 3.5. In *Marshall v Prescott* [2015] NSWCA 110, Beazley P noted the following legal principles:
- a. It is a well-established principle that a person who “*receives information in confidence shall not take unfair advantage of it*”: *Seager v Copydex Ltd* [1967] 2 All ER 415 at 417 per Lord Denning MR. The prohibition is on disclosure, because that would destroy the information’s confidentiality, as well as on use of the confidential information. As Lord Denning MR added, at 417, ‘use’ must not be made of information “*to the prejudice of him who gave it without obtaining his consent*”.
 - b. A party to whom the duty of confidence is owed may authorise disclosure for a particular purpose without waiving the obligation of confidentiality for all purposes. This was explained in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 22 FCR 73, where Gummow J observed, at 94, that:

“In many situations, where a plaintiff establishes a case of disclosure of confidential information for a sole purpose, then any use of it for any other purpose including disclosure to any other party will be a breach of confidence...”
 - c. In *Coco v A N Clark (Engineers) Ltd* [1969] 65 RPC 41, Megarry J listed three requirements for an action in breach of confidence: the information had to have the necessary quality of confidence about it; the information must have been imparted in circumstances importing an obligation of confidence; and there must be an unauthorised use of the information. This formulation was cited in *Commonwealth v John Fairfax* [1980] HCA 44; 147 CLR 39 at 51 and *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 per Gleeson CJ at [30].

- d. In *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2, at [158] ff, Barrett JA noted that implicit in the *Coco* formulation were requirements of specificity and confidentiality, as follows:

“158 Implicit in the statement of principle are two propositions of particular relevance to this appeal: first, that particular information is specifically identified; and, second, that the confidential nature of the identified information is established.

159 The need for specificity in the identification of the information said to be confidential in respect of which relief is sought comes from the fact that the court must make an assessment of the quality of that information, that is, whether it is in truth of a confidential nature. An aspect of that inquiry may turn on whether the whole or some part has become the subject of general disclosure or notoriety. Precise delineation of the subject matter is accordingly essential. The task of a plaintiff, in this respect, is, in the words of Gummow J in *Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health* ... at 87, ‘to identify with specificity, and not merely in global terms, that which is said to be the information in question’.

160 The confidential quality of information does not depend on its being in the nature of a trade secret. As Campbell JA pointed out in *Del Casale v Artedomus (Aust) Pty Ltd* at [103], referring to what was said by Megarry J in *Coco v A N Clark (Engineers) Ltd* ... at 47:

‘On Megarry J’s account, the information is ‘of a confidential nature’ if it is not ‘public property and public knowledge’, or if it is ‘constructed solely from materials in the public domain’, to which ‘the skill and ingenuity of the human brain’ has been applied (47). This is a fairly undemanding test.’”

- e. Barrett JA also observed, at [162], that confidentiality may be lost if the information enters the public domain:

“The fact that information that was confidential when obtained has later entered the public domain means that its confidential quality is lost. In *Attorney-General v Guardian Newspapers Ltd (No 2)*, Lord Goff explained (at 282) that ‘public domain’, for these purposes, means ‘no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential’.”

- f. In the area of breach of fiduciary duty it is established that a fiduciary who acts for two principals whose interests potentially conflict “*without the informed consent of each is in breach of the fiduciary’s obligation of undivided loyalty [and this] automatically constitutes a breach of fiduciary duty*”: *Bristol and West Building Society v Mothew* [1998] Ch 1 per Millet LJ at 18-19, cited in *Beach Petroleum NL v Kennedy* [1999] NSWCA 408; 48 NSWLR 1 at [466]. However, where the person to whom the obligation is owed knows all the relevant facts, a decision to engage the fiduciary is a fully informed decision: *Bristol and West Building Society v Mothew* at 19; *Beach Petroleum NL v Kennedy* at [467]. In other words, “*the existence of an informed consent ... negate[s] what otherwise [would be] a breach of duty*”: *Maguire v Makaronis* at 467.
- g. It would seem that the same principle applies to breach of confidence: see *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*, 5th ed, at [42-070].

3.6. Examples of advice to Government which may be privileged include:

- a. advice concerning the exercise of a statutory power or the performance of a statutory duty or function (*Waterford* at 63-64, 74-75; *Webb v Commissioner of Taxation* (1993) 44 FCR 312 at 317);
- b. advice concerning proposed laws and their drafting (*WorkCover* at [74], [94]; *Three Rivers (No. 6)* at 652); and
- c. ‘commercial’ or probity advice (*National Tertiary Education Industry Union v Commonwealth and D.A. Kemp* [2002] FCA 441).

- 3.7. Part 2 of the *Government Sector Employment Act 2013* (NSW) establishes an ethical framework for the NSW government sector, including preserving the public interest. The Act also establishes NSW government sector core values including integrity, trust, service and accountability. The *Code of Ethics and Conduct for NSW Government Sector Employees* (the NSW Code) implements the ethical framework and provides guidance on the mandatory requirements and best practice conduct for all government sector employees. The Code indicates that a principle of the Ethical Framework is to uphold the law, including:
- a. *Government Sector Employment Act 2013* (NSW): sections 25 and 30 (regarding the general conduct and management of organisations in accordance with the core values) and section 63 (regarding workforce diversity and the integration of workforce diversity into agency workforce planning);
 - b. *Public Finance and Audit Act 1983* (NSW): sections 11 and 45C (regarding the system of internal control over the financial and related operations of agencies);
 - c. *Anti-Discrimination Act 1977* (NSW): (regarding equal employment opportunity and equal access to services);
 - d. *Government Information (Public Access) Act 2009* (NSW) (which mandates the proactive release of open access information and requires that this information be available to members of the public free of charge or at the lowest reasonable cost. Section 5 of the Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of legal professional privilege, unless the person in whose favour the privilege exists has waived the privilege);
 - e. *Public Interest Disclosures Act 1994* (NSW) (regarding receiving, assessing and dealing with public interest disclosures);
 - f. *Independent Commission Against Corruption Act 1988* (NSW) (regarding reporting of any matter suspected on reasonable grounds to involve corrupt conduct and to comply with any requirement or direction of the Independent Commission Against Corruption (ICAC) in relation to a referral of matters by the ICAC);

- g. *Privacy and Personal Information Protection Act 1998* (NSW) (regarding the protection of personal information, and the protection of the privacy of individuals generally);
- h. *Public Works and Procurement Act 1912* (NSW) (regarding the procurement of goods and services by government agencies);
- i. *Health Records and Information Privacy Act 2002* (NSW) (regarding the fair and responsible handling of health information);
- j. *Work Health and Safety Act 2011* (NSW) (regarding the health and safety of employees and the maintenance of healthy and safe workplaces);
- k. *Government Advertising Act 2011* (NSW) (regarding requirements to issue advertising compliance certificates);
- l. *Ombudsman Act 1974* (NSW) (regarding obligations to cooperate with investigations by the Ombudsman and obligations relating to reportable conduct concerning child protection matters);
- m. *State Records Act 1998* (NSW) (regarding the creation, management and protection of agency records and public access to those records);
- n. *Children and Young Persons (Care and Protection) Act 1998* (NSW) (regarding obligations relating to the care and protection of, and provision of services to, children and young persons, including obligations relating to exchange of information and co-ordination of services between agencies);
- o. *Child Protection (Working with Children) Act 2012* (NSW) (regarding obligations to obtain checks and clearances for employees engaged in child-related work);
- p. *Crimes Act 1900* (NSW) (regarding criminal offences).

3.8. Agencies can supplement the NSW Code but not alter or detract from it. Although published before the NSW Code, the NSW Department of Premier and Cabinet's *Code of Conduct* (January 2014) provides some additional guidance concerning the release of confidential information:

- a. employees must maintain the confidentiality of all official information and documents which are not published or normally made available to the public;

- b. employees may only disclose information not normally provided to the public:
 - i. if it is required as part of their duties
 - ii. if proper authority has been given to them to do so
 - iii. when required, or authorised, to do so by law, or
 - iv. when called to give evidence in court or to a parliamentary committee;
 - c. employees must not make private use of official information. Misuse of official information, whether or not for monetary gain, may be corrupt conduct and subject to disciplinary action;
 - d. employees are to ensure that any information in any form (eg printed or electronic) cannot be accessed by unauthorised persons and that sensitive information is only discussed with persons (inside or outside of the Department) who are authorised to have access to it; and
 - e. employees are not to access information unless it is immediately relevant to the work they are performing.
- 3.9. Passing on privileged information could result in liability for damages, and/or an injunction to stop a third party from using it.²⁰
- 3.10. Rules relating to confidentiality don't always apply to external investigations. Under the *Legal Profession Uniform Law (NSW)*:
- a. A legal practitioner must, if required, answer questions or produce information or documents despite a duty of confidentiality to a client (s.370);
 - b. A legal practitioner may disclose information to the Legal Services Commissioner, the Law Society Council, the NSW Civil and Administrative Tribunal or the Supreme Court of NSW if it is necessary to defend a complaint against a solicitor (s.321).

²⁰ See, for example, per Gibbs CJ (para. 5 of his judgment), and per Mason and Brennan JJ (paras. 10-11 of their joint judgment in *Attorney-General (N.T) v Maurice* (1986) 161 CLR 475. Of course, if the client agency explicitly authorised the government lawyer to make the disclosure, the question of waiver might need closer examination.

3.11. Government lawyers acting for an agency under investigation, or which has relevant information, must act on their client's instructions. They should not inform or assist an investigation unless legally obliged or instructed to do so, but should advise the agency to assist the investigation to ensure a just outcome.

3.12. Whether or not an agency must disclose information depends on its powers and the circumstances in which information is protected. For example:

3.12.1. State

Complaints about government lawyers acting for a public authority are excluded under Schedule 1 of the *Ombudsman Act 1974* (NSW). A government lawyer, a client agency or local government council, is a "public authority". The Act also excludes the conduct of a public authority involved in proceedings:

- a. before a court; or
- b. before another person or body which can compel witnesses to appear and give evidence. (Schedule 1, para.8)

3.12.2. Otherwise, the Ombudsman can insist that a public authority provides information and can enter premises to inspect documents. This includes information subject to legal professional privilege, unless the authority agrees to provide it, or the investigation is about information affected by such privilege.

3.12.3. The Independent Commission Against Corruption (ICAC) conducts investigations and hearings under the *Independent Commission Against Corruption Act 1988* (NSW). It can, in the course of an investigation, serve written notice on a public authority or official (defined in s.3), requiring them to produce information; or on anyone, to produce a document or something else (s.21 and s.22).

3.12.4. If ICAC serves a written notice a public authority or person must produce the information despite:

- a. any rule which, in a court, might justify an objection on grounds of public interest (s.24(3)(a)); or

- b. any privilege which they could have claimed in a court (s.24(3)(b)); or
 - c. any other restriction (s.24(3)(c)).
- 3.12.5. ICAC’s power to enter the premises of a public authority or official, and to inspect and seize items shouldn’t be exercised, however, if it appears that a person has a ground of privilege under which, in court, they might resist inspection or production and that they haven’t consented (s.25).
- 3.12.6. Witnesses are not excused from answering questions or producing evidence except in the case of legal professional privilege. If:
- a. a lawyer is required to answer a question or produce something at a hearing; and
 - b. the answer or document contains privileged communications in relation to an appearance before the Commission,
- they can refuse to comply unless the privilege is waived (s.37(5)).
- 3.12.7. Schedule 1 to the *Government Information (Public Access) Act 2009* (NSW) lists “exempt documents” - those containing information protected by legal professional privilege (clause 5), including an agency’s policy document (defined in s.23). The agency can refuse to produce an exempt document unless it can delete the exempt matter.
- 3.13. It is not unethical to make a protected disclosure.
- 3.13.1. Disclosures under the *Public Interest Disclosures Act 1994* (NSW) of conduct are protected if there is evidence of:
- a. corruption, under the *Independent Commission Against Corruption Act 1988* (NSW) (s.10); or
 - b. maladministration, being contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; or based on improper motives (s.11); or
 - c. serious and substantial waste in the public sector (s.12).

- 3.13.2. A government lawyer should, in making a disclosure, act in the utmost good faith and care.
- 3.13.3. The objects of the Act are to encourage and facilitate disclosures, in the public interest, by:
- a. improving procedures for making disclosures; and
 - b. protecting persons from reprisals; and
 - c. ensuring disclosures are properly investigated and dealt with (s.3).
- 3.13.4. No action may be taken against a person for making a disclosure, despite any duty of secrecy or confidentiality or other restriction (s.21). For example:
- a. a person who has a duty to maintain confidentiality under another Act has not committed an offence against that Act;
 - b. a person is taken not to have breached an oath, law or practice in making a disclosure;
 - c. a person is not liable to disciplinary action because of the disclosure (s.21).
- 3.13.5. If the protected disclosure is of communications between a government lawyer and a client, the communication would not lose legal professional privilege, which can only be waived by the client.²¹

²¹ See, for example, per Gibbs CJ (para. 5 of his judgment), and per Mason and Brennan JJ (paras. 10-11 of their joint judgment in *Attorney-General (N.T) v Maurice* (1986) 161 CLR 475. Of course, if the client agency explicitly authorised the government lawyer to make the disclosure, the question of waiver might need closer examination.

Example

"I begin to suspect, on what seem reasonable grounds, that my immediate supervisor in the Department (who is not the Department Head) may be guilty of conduct about which a person with my knowledge of the circumstances could make a protected disclosure under the *Public Interest Disclosures Act*. I always think of myself as acting for the Department on the professional legal basis of confidentiality. I realise that even if I have misunderstood my supervisor's conduct, that misunderstanding would not necessarily have the result, under the Act, that I would lose the protection it confers. But supposing I was wrong about the conduct, how could it ever be possible for a professional relationship to be re-established between us? What should I do?"

Response

The issues are (1) what procedure should be followed if the government lawyer made a disclosure under the *Public Interest Disclosures Act*; and (2) how would it affect the government lawyer's future relationship with her/his supervisor or the Department.

If there was no suspicion that the Department Head might support the government lawyer's supervisor, it would be easier to make the disclosure to the person appointed to receive it under the Department's Code of Conduct for Protected Disclosures than to speak to investigative authorities; but the choice would be hers/his. If the supervisor was cleared of wrongdoing, the government lawyer, though immune under the Act from reprisal, might need help from senior officers to re-establish a working relationship with her/his supervisor.

3.13.6. Disclosures may also be made to an external investigating body. Corrupt conduct should be disclosed to ICAC, maladministration to the Ombudsman and substantial waste of government property to the Audit Office of New South Wales.

3.13.7. Public Service Act 1999 (Cth)

There is a Commonwealth equivalent to the *Public Interest Disclosures Act 1994* (NSW). Historically, the *Public Service Act 1999* (Cth) provided, however, that a person performing functions in or for an agency must not victimise or discriminate against an Australian Public Service employee because they have reported breaches (or alleged breaches) of the Code of Conduct to specified Commonwealth authorities.²²

²² The specified authorities are the Public Service Commissioner appointed under the Act; the Merit Protection Commissioner so appointed; an Agency Head; or, in any of those cases, the authority's delegate for that purpose. For the action these respective authorities may take see s.41, s.50 and s.20.

As of January 2014, the APS whistleblowing scheme has been replaced by the *Public Interest Disclosure Act 2013* (Cth) (PID Act). The PID Act aims to:

- encourage and facilitate disclosure of information by public officials about suspected wrongdoing in the public sector;
- ensure that public officials who make public interest disclosures are supported and protected from adverse consequences;
- ensure that disclosures by public officials are properly investigated and dealt with.

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the PID Act and more information on this Act can be found on the Ombudsman's website at www.ombudsman.gov.au.²³

- 3.14. It is not unethical to pass on legal advice to another agency in accordance with law or government policy.

²³ See <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice/whistleblowing>

Example

“I’m asked for legal advice by the Department Head in a memo that sets out the background facts. I find the legal question novel and difficult. I have a friend who is a government lawyer in another Department, with experience on the issue, and would be able to help me. Is my duty of confidentiality owed to the Department (or Head), so that I would need approval to discuss the problem with the other government lawyer? Or is it owed to the Government, so that, perhaps, I would not be breaking confidentiality anyway in speaking to another employee of the same Government.”

Response

The circulation of legal advice by one agency to another, where the advice is relevant to the latter’s operations or powers, is not the same as passing on instructions for advice. The Law Reform Commission has said that “other legal advisers act on the instructions (often implied) of the Attorney General who represents the Crown”. That would support the conclusion that passing on the resulting advice was subject to the control of the Attorney General which could be achieved by a scheme stipulating the purposes for which advice could be passed on. However, it also supports a conclusion that the circulation of instructions for advice might be subject to the Attorney General’s control, though it is harder to see how control could be achieved.

The government lawyer must obtain approval from the Department Head or delegate to show the memo to his or her friend or to discuss the instructions with the friend. It is possible that legal professional privilege might be jeopardised. It would seem best that:

- the discussions with the friend should be in very general terms, with no specifics being disclosed, and only in confidence; or
- the discussions should be held with another officer in the government lawyer’s own agency; or external advice should be sought, e.g. from the Government legal office or counsel, instead of the friend.

3.14.1. The NSW Law Reform Commission has said that, where both agencies represent the Crown, there is no implied waiver of privilege. The Commission didn’t consider whether the same rule applies to instructions so, to be safe, ensure all disclosures are made confidentially.

3.14.2. The Commission, in its report on Circulation of Legal Advice to Government²⁴ considered it established, in *Western Australia v Watson*²⁵ that:

- a. Ministers, and in many cases, senior officials of a government department or agency, constitute “the Crown”;

²⁴ For further information see: NSW Law Reform Commission, Report 86 (1998) – Circulation of Legal Advice to Government

²⁵ For further information see: *Western Australia v Watson* [1990] WAR 248

- b. Knowledge acquired by a minister or senior official may, at least in some situations, be taken to be the knowledge of the Government as a whole; and
- c. Every minister or senior official has a duty to communicate relevant knowledge to the Government as a whole (para. 3.9).

3.14.3. The Commission went on to say that:

- a. Legal personality includes the ability of the Crown or government to receive advice, and therefore the indivisible nature of government remains important (para 3.12);
- b. At common law the Crown enjoyed a range of privileges and immunities in relation to litigation which could be brought within the 'shield of the Crown' (para. 3.13);
- c. When a party is 'the Crown', it is also the client of the Attorney General, or the Attorney General as represented by the Solicitor General, Crown Advocate or Crown Solicitor. This is so, even when instructions are received from, and advice delivered to, particular office holders within the executive government (para 3.14);
- d. Legal advice to 'the Crown' or to any department, agency or official within the 'shield of the Crown' is the property of the Crown. The government as a whole, therefore, has property in the advice, and the right to disclose it (para 3.15);
- e. The Attorney General, as the first law officer, is responsible for legal advice to government. Other legal advisers act on the instructions of the Attorney General, even when the advice is requested by, or delivered to, a department, agency, or official (para 3.17). It would be impossible for the Attorney General to know about all legal advice to government but the government receives advice from officials who may also be part of government. If advice is disclosed, the disclosure would be by the Attorney General (para.3.19).

- 3.14.4. The Commission said that: “If a government legal officer distributed amongst departments advice provided by a private legal practitioner... disclosure of a document by one Crown servant to another would not constitute a breach of copyright” (para 3.23).²⁶
- 3.14.5. The Commission advised that: “The power of the Attorney General would not be limited to circulating advice provided by Crown Law Officers, such as the Solicitor General, the Crown Advocate or the Crown Solicitor, but would include advice provided to government by private practitioners” (para 5.5).²⁷
- 3.14.6. The NSW Department of Justice encourages agencies to share legal advice which affects their operations or powers. There should be procedures for sharing and a government lawyer acting in accordance with those procedures would not breach the duty of confidentiality.

However, in *Osland v Secretary to the Department of Justice* [2008] 234 CLR 275, Kirby J cautioned that:

“It would be a mistake to assume that all communications with government lawyers, no matter what their origins, purpose and subject matter, fall within the ambit of the State's legal professional privilege. Advice taken from lawyers on issues of law reform and public policy does not necessarily attract the privilege.”²⁸

- 3.14.7. The duty of confidentiality doesn't apply if an agency is a corporation which does not represent the Crown, but may be subject to a Minister's direction.²⁹ Furthermore, the division of work within government, or a statute, may allow or require information to be shared between one agency and another.³⁰

²⁶ Ibid, para. 3.11. By “the indivisible nature of government” it meant the doctrine by which “at one time, the symbolic Crown was represented as being one and indivisible”. For passing reference to the doctrine in a different setting, see the decision of the NSW Court of Appeal in *Haines v. Tempesta* (1995) 37 NSWLR 24.

²⁷ The proposed scheme included the deletion of material identifying individuals where publication might embarrass them. The then NSW Attorney General's Department commented that “there is now a practice whereby NSW public sector agencies are encouraged to share their legal advice with another agency if that advice has an impact on the latter agency's operation or powers. In instances where agencies disagree about the sharing of advice, the proper course is for the Crown Solicitor to refer the matter to the Attorney General for determination as First Law Officer of NSW”.

²⁸ *Osland*, 309 [89].

²⁹ See, for example, para. 10 (Advice on legislation administered by other agencies) of the Commonwealth Attorney-General's Legal Services Directions issued pursuant to the *Judiciary Act 1903* (Cth), s. 55ZF.

³⁰ *Mann v Carnell* (1999) HCA 66, Gleeson CJ, Gaudron, Gummow and Callinan JJ in their joint judgment at para. 16.

- 3.14.8. The following Ministers are always entitled to information about a legal matter in an agency:
- a. The Prime Minister or Premier, as the principal Minister of the Crown;
 - b. The Attorney General, as the first Law Officer of the Crown;³¹
 - c. The Minister of the agency; and
 - d. Ministers working together in Cabinet or a committee of Cabinet or by some other arrangement between them, on issues to which the legal matter is relevant.
- 3.14.9. The effect of sharing advice on legal professional privilege was considered in *Mann v Carnell*.³² The High Court agreed that the Chief Minister of the Australian Capital Territory was entitled to see legal advice provided to the Territory, without waiving the legal professional privilege which the Territory had in the advice. This position was confirmed by the *Osland* case.
- 3.14.10. The Queensland Information Commissioner gave a good example of how to judge whether what one claims to be legal advice meets the standard for attracting legal professional privilege. This example was offered:
- “...In *Potter and Brisbane City Council* (1994) QAR 37, the Information Commissioner found that the Brisbane City Council City Solicitor and the professional staff of the City Solicitor's office:
- were appropriately qualified legal practitioners;
 - conducted their practice with the requisite degree of independence from their employing organisation; and
 - had given legal advice to the Council which attracted legal professional privilege.

³¹ *Statement of Ethics*, proclaimed by the Council of the Law Society of New South Wales, 28 May 2009.

³² *Mann v Carnell* (1999) HCA 66. The Court did not consider whether sharing advice between Ministers or agencies representing the Crown could never amount to waiver of legal professional privilege, as appears to have been the view of the NSW Law Reform Commission. Sharing of advice, therefore, should to be done confidentially.

The Information Commissioner reasoned that holding a current practising certificate was not a necessary requirement for establishing the requisite degree of independence, but that where present, it would no doubt be of some weight in assisting to establish that the advice given was of an independent character.”³³

³³ <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/exempt-information-provisions/legal-professional-privilege>

4. Model Litigant

“There’s nothing wrong with being tough, in fact it’s our obligation to be tough when our clients want us to be tough. It’s just that we shouldn’t be tricky, we shouldn’t be dishonest, we shouldn’t be immoral if you like, we shouldn’t be in a position where the government will be embarrassed by the conduct of its litigators or by the litigation that it runs”. (Government Lawyer)

4.1. Government lawyers should advise client agencies to conduct themselves as model litigants. They should act in accordance with model litigant rules and assist agencies to do so.

4.1.1. The Model Litigant Policy for Civil Litigation in NSW³⁴ states:

4.1.1.1. The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.

4.1.1.2. The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

- a. dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- b. paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- c. acting consistently in the handling of claims and litigation;

³⁴ <http://www.iustice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>

- d. endeavouring to avoid litigation, wherever possible, in particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government Agencies;
- e. where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - i) not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;
 - iii) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
 - iv) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;
 - v) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and
- f. apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

4.1.1.3. The obligation does not require that the State or agency is prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

4.1.1.4. In particular, the obligation does not prevent the State or an agency from:

- a. enforcing costs orders or seeking to recover costs;
- b. relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- c. pleading limitation periods;
- d. seeking security for costs;
- e. opposing unreasonable or oppressive claims or processes;
- f. requiring opposing litigants to comply with procedural obligations;
or
- g. moving to strike out untenable claims or proceedings.

4.1.2. Procedures to minimise cost and delay will be adopted by a model litigant. A public sector employee claiming compensation for injury against the government, for example, would benefit by the early exchange of medical reports, clarifying the issues and helping to resolve them quickly.

4.1.3. Responsibility for wrong conduct towards members of the public should be readily accepted by agencies along with an enlightened attitude towards claiming legal professional privilege if disclosure may often actually assist the just resolution of disputes.³⁵

4.1.4. Government lawyers themselves must act as “model litigants” and, in all their dealings with the courts, be frank and honest and diligent in observing undertakings given to the Court or their opponents.

³⁵ Good Conduct and Administrative Practice Guidelines, NSW Ombudsman, 2006, pp.B-29 to B-34.

4.1.5. The Commonwealth Attorney-General's Legal Services Directions require agencies briefing counsel in matters covered by the "model litigant" policy to enclose a copy of the relevant Directions and instruct counsel to comply with the policy (clause 6.2). The Directions are legally binding under the *Judiciary Act 1903* (Cth).³⁶

4.2. Legal action should be instituted or defended only on a sound legal basis.³⁷

4.2.1. "Model litigant" requirements don't prevent governments and their agencies from acting firmly and properly to protect their interests. All legitimate steps may be taken to pursue claims by agencies and testing or defending claims against agencies.³⁸ (One government lawyer made the point that reporting by the media of claims, or the amassing of claims by a number of people, are not by themselves reasons for not firmly defending them.)

4.2.2. A "model litigant" would not engage in such conduct as the destruction of documents.³⁹ In *British American Tobacco Australia Services Ltd v Cowell* (rep. McCabe estate)⁴⁰ the right of a litigant to manage its own documents, whether by retaining or destroying them, versus the right of the opposing party to access them, was discussed. The case concerned documents that had been destroyed before litigation was begun, the respondent claiming (ultimately unsuccessfully) that the destruction had been carried out to frustrate foreseeable litigation. The Court held that it would intervene, particularly if the sanction sought was the striking out of the destroying party's pleading, only if "the conduct of (that) party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot."⁴¹

³⁶ See *Judiciary Act 1903* (Cth), ss 55ZF and s.55ZG. *Scott v Handley* (1999) FCA 404 also contains a valuable reference to recent authority.

³⁷ Rule 21.4 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*, which provides that a solicitor must not allege any matter of fact amounting to criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that the available material provides a proper basis for the allegation or the client wishes the allegation to be made after having been advised of its seriousness and possible consequences if not made out.

³⁸ Commonwealth Attorney-General's Legal Service Directions 2005 require the Commonwealth and its agencies to act honestly and fairly in handling claims and litigation (Appendix B clause 2).

³⁹ Commonwealth and State documents are also protected under state archives legislation.

⁴⁰ *British American Tobacco Australia Services Ltd v Cowell* (representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197.

⁴¹ See paras. 173-176 of the joint judgment. The Court left open the question whether it is possible to hold conduct to be contempt, even criminal contempt, if it takes place before any proceeding has been instituted. It pointed out that it would be impossible to classify conduct as civil contempt i.e. disobedience to an order, in such circumstances.

- 4.2.3. The destruction of documents by a client agency to prejudice a future claimant would be unethical conduct, but the above case also leaves open the possibility of the agency's claim or defence being struck out.
- 4.2.4. Government lawyers should not advise a client that a document should be destroyed, or made illegible, or moved, if the practitioner is aware that:
- a. the document may be required in legal proceedings which are likely to be commenced, and
 - b. following the advice will result in the document being unavailable or unusable in court.
- 4.2.5. Government lawyers must not do any of these things (destroying or moving) themselves, nor aid or abet someone else to do them, even if there has been no indication that a specific person intends to commence proceedings in which the documents may be needed. It is not unethical, however, to move a document in their possession or control at the request of someone who is lawfully entitled to it.

5. Conflict of Interest

Lawyers should “avoid any conflict of interest and duties.” (Law Society’s Statement of Ethics)

“Well, it’s pretty standard procedure I guess that if you’ve got a court case on...you go to lunch with Counsel and invariably Counsel pays. That’s the practice...well, it just happens in litigation, and I’m not saying that on occasions I get embarrassed by it and insist on paying for myself...I just don’t want to feel that they’re obligated to buy me dinner or lunch or whatever.” (Government Lawyer)

5.1. Government lawyers must deal fairly with their clients, free of the influence of any interest that may conflict with their clients.

5.1.1. The *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* stress that practitioners must be acutely aware of their fiduciary relationship with their clients.

5.1.2. Rule 12 deals with avoiding a conflict between a client’s and a practitioner’s own interest. It states that a practitioner must not:

- a. allow the interests of the solicitor or an associate to conflict with those of the client;
- b. unduly influence a client to benefit the practitioner over and above fair remuneration for the legal services provided;
- c. borrow money, nor assist in borrowing money, from a client or former client.

5.2. Public sector law also prohibits conflicts of interest on the part of public sector employees.

5.2.1. Public Sector Codes of Conduct have detailed rules against conflicts of interest. See *Behaving Ethically: A Guide for NSW government sector employees* (Section 2.2).

- 5.2.2. In NSW, the Independent Commission Against Corruption provides advice on how to formulate and review the Code of Conduct and assists in making determinations about conflicts of interest. In particular, ICAC notes that in some circumstances, the failure to disclose a conflict of interest in accordance with public sector policy may constitute corrupt conduct as defined in the *Independent Commission Against Corruption Act 1988*.⁴² ICAC has also released Guidelines and a Toolkit on managing conflicts of interest in the public sector.⁴³
- 5.2.3. A Commonwealth public servant seconded to, or working for, bodies including the Australian Federal Police, the Australian Crime Commission and Customs should be aware of the definition of “engage in corrupt conduct” under s.6 of the *Law Enforcement Integrity Commissioner Act 2006 (Cth)*. On becoming aware of an allegation of corruption, the Department Head of a Commonwealth Agency must refer the matter to the Integrity Commission under s.19 of the Act.
- 5.2.4. For Commonwealth agencies, the Code of Conduct in the *Public Sector Act 1999 (Cth)* provides that an Australian Public Service (“APS”) employee:
- a. must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment (s.13(7)); and
 - b. must not make improper use of:
 - inside information; or
 - their duties, status, power or authority;to gain, or seek to gain, a benefit or advantage for themselves or someone else (s.13(10)).
- 5.2.5. The *Public Governance, Performance and Accountability Act 2013 (Cth)* includes general duties that apply to all Commonwealth entities. Part 2.2 Division 3A includes the following duties in relation to use of information and position:

⁴² For further information see: <http://www.icac.nsw.gov.au/preventing-corruption/knowning-your-risks/conflicts-of-interest/4897>

⁴³ For further information see: <http://www.icac.nsw.gov.au/publications-and-resources>

- a. An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose (s.26);
- b. An official of a Commonwealth entity must not improperly use his or her position to gain or benefit from an advantage for him or herself or for someone else, or to cause detriment to the entity or to another person (s.27);
- c. A person who obtains information because of their position must not improperly use the information to gain a benefit or an advantage for him or herself or someone else; or to cause detriment to the entity or to another person (s.28).

5.2.6. Public sector lawyers should bear in mind that their overriding duty is to the Court. In the relatively unlikely event of inconsistency between a public sector code and a lawyer's obligation to the Court, the latter must prevail.

5.3. Government lawyers should not act for more than one agency, or for an individual and an agency, in the same matter if they have conflicting interests. This is so, even where the conflict was not apparent at the beginning but becomes evident later. See further under Section 3, Who is the Client?

Example

"The solicitors acting for the private sector party to a projected agreement with the Government tell me that they have been so impressed by my work on behalf of the Government that at the conclusion of the deal they will gladly give me a job at a much higher salary than I get now, and with substantial prospects of future partnership. What do I say, and should I tell the Department Head about the offer?"

Response

If the government lawyer has reason to suspect the projected offer of future employment is an inducement not to advise the Government of any problems the officer sees with the agreement, he or she should report it immediately to a senior officer. Otherwise, it would be best to say that taking up the offered job is something the officer could not consider until the present task was completed. It would be advisable even so to tell a senior officer what the firm has said, and the response the officer has made.

- 5.3.1. Rule 11 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* deals with acting for parties with opposing interests. It applies to government lawyers employed in most government agencies. There are, however, statutory rules applying to the Attorney-General's lawyers and the Australian Government Solicitor ("AGS"), and the NSW Crown Solicitor.
- 5.3.2. Sections 55F and 55R of the *Judiciary Act 1903* (Cth), provide that an Attorney-General's lawyer or the AGS may act for two or more parties who have conflicting interests with the approval of the Attorney-General:
- a. in relation to the particular matter; or
 - b. under written arrangements covering the circumstances in which they may so act.
- 5.3.3. The *Legal Profession Uniform Law Application Act 2014* (NSW), s.44(2)(a), provides that the Crown Solicitor may act for a party in a matter that is not the subject of litigation, even if also acting for another party.

Example

The NSW Ombudsman has noted cases where clear conflicts between the interests of agencies have not even been realised by government lawyers acting for both agencies.⁴⁴ (The Ombudsman's Annual Report for 2013 – 2014).

The problem can arise if agencies arrange to share legal services or to use lawyers employed by another agency.

In the Legal Advice section of his "Good Conduct and Administrative Practice", the Ombudsman suggests that both agencies should ensure that the arrangements explicitly state what to do if a potential conflict is identified.

The Deputy Ombudsman has pointed out the extreme case where the same lawyers are retained for an agency and an individual; if a conflict of interest arises, the ongoing relationship between the agency and its lawyers is likely to induce the latter to favour the agency's interest over the individual's, making it imperative that the individual then have proper independent representation.

⁴⁴ For further information see: <https://www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/nsw-ombudsman/nsw-ombudsman-annual-report-2013-2014>

6. Giving Policy Advice

- 6.1. Subject always to the actual terms of the employment contract or “scope” of the position of the government lawyer, a government lawyer who is instructed to help the agency to carry out a transaction does not have to offer unsought policy, as opposed to legal, advice on the wisdom of the transaction⁴⁵ provided apt disclaimers are in place. It is, however, appropriate to point out the legal effect of provisions being drafted to carry out the transaction, especially where the government lawyer’s experience⁴⁶ allows useful comment by reference to prior, similar transactions.
- 6.2. Advice may be sought from government lawyers about a matter of policy or management of the exercise of discretions.⁴⁷ It is not unethical to provide such advice, but it is desirable, to prevent misunderstanding, to separate clearly the legal advice from the policy or management advice.
- 6.3. The government lawyer should consider whether this type of mixed advice⁴⁸ may later raise questions about whether, for the purposes of legal professional privilege, the dominant purpose of the advice was legal or something else.⁴⁹

⁴⁵ *Clark Boyce v Mouat* (1994) 1 AC 428 at 437, cited by Young J in *Marcolongo v Mattiussi* (2000) NSWSC 834. Those cases did not involve government lawyers, but the rule would seem to apply to them unless, at any rate, a lawyer’s duties included giving policy advice.

⁴⁶ And perhaps to require an exclusionary comment where that experience does not so allow.

⁴⁷ See *Waterford v Commonwealth of Australia* [1987] 163 CLR 54.

⁴⁸ In *Waterford v Commonwealth of Australia* [1987] 163 CLR 54, in response to the appellant’s argument that advice on the exercise of “administrative functions” could not be privileged, because the officer just had to be told how to do something, Brennan J said, at para. 9 of his judgment: “...the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimising that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimising the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration.” Advice that went further than the nature or extent of a power, or the legal restraints on its exercise, and expressed an opinion on what decision should be reached on the merits, would be policy advice, and not protected by legal professional privilege. See also per Mason and Wilson JJ at paras. 5-7 of their joint judgment. Dawson J dissented and Dean J reserved his opinion.

⁴⁹ On the dominant purpose test, see the *Evidence Acts 1995* of the Commonwealth and NSW and *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67.

Example 1

“I do my Department’s commercial agreements work. I have been working hard on a very complex agreement proposed with a major company for a project of obvious political importance to the Government. Through all the complexity I have begun to think that under the agreement the Government will be carrying all the risk involved in the project. What do I do, bearing in mind that the Government thinks that all that remains to be done is to settle the formalities? Policy-making is not in my job description”.

Response 1

If, but only if, it is clear from the government lawyer’s instructions that the agency properly understands that the Government will be carrying the risk involved in the project, then it is not the government lawyer’s duty to query those instructions. Where that is not clear, the government lawyer should, as an aspect of practical legal advice, point out how the risk lies and suggest that the relevant issue be referred back and considered by the relevant departmental or agency officer.

It may be necessary to draw a clear distinction between “commercial”, “political” and “legal” risk aspects of a transaction.

The government lawyer should, however, in advising on documentation for the transaction, point out the legal effect of its provisions, including those that impose the risk of the transaction on the Government, especially if the experience of the government lawyer allows.

- 6.3.1. Policy issues are often woven into requests for legal advice. It is not unusual for government lawyers to advise on matters that are concerned solely with policy or management, but government lawyers should draw a clear distinction between “legal” and “policy” advice.
- 6.3.2. Agencies benefit from having government lawyers who are willing to give advice from a legal perspective, particularly practical examples on similar matters, on policy and management issues and aspects of transactions. There is usually no difficulty, from an ethical or any other point of view. The important thing is to be very clear about the distinction.

- 6.3.3. Decision makers can be misled about the choices available, however, and can feel they have to take a particular course. If a client asked a government lawyer whether a particular course of action was possible, for example, the government lawyer might reply that it was not, because they thought it would be bad policy, not because it was not legally permissible. The government lawyer might be unaware of other policy considerations and the client needs know the legal position, so the terms of any advice should reflect clearly the distinction between “legal” issue risk and “commercial/political” risk.
- 6.3.4. When a question involves mixed issues of law and policy, it is best to separate them clearly. Separate documents could be used, or clear headings where the advice is given in one document. If verbal advice is given, double-check that the recipient understands which part of it is legal and which part is policy and make a clear file note of the discussion.

Example 2

I have been asked to advise a government client about whether there are procedures by which existing legislation can be used to achieve certain objectives and, if it cannot, the kind of legislative amendments which will be needed to achieve those objectives. However, in my view, those objectives, if realised, may yield some very undesirable outcomes. Is it my place to express such an opinion when I provide my advice?

Response 2

This may be complicated. If it is possible to envisage alternative procedures or legislative amendments which achieve these objectives but, in the opinion of the government lawyer, either do not produce these undesirable outcomes, or, if they do produce them, to a much smaller degree, then these are available options which can be brought to the client's attention.

The government lawyer is perfectly entitled to raise them for consideration. He or she may well be remiss if they omit to mention the issues, as an aspect of their role. The client is entitled to expect that a competent government lawyer will canvass all the reasonably available alternatives.

If, however, these undesirable outcomes will follow irrespective of the way in which the objectives are realised, the government lawyer needs to consider carefully whether his or her opinion to this effect should be expressed in the advice; especially when the opinion has not been sought. Where not sought, the government lawyer should consider noting that the advice does not so extend.

Assessing the likely outcomes of a particular policy can involve a variety of disciplines including economics, social science and psychology. The government lawyer should acknowledge that, when it comes to such disciplines, they may well be outside their area of professional expertise and they may be no more qualified to comment than any member of the general public.

Further, if the policy is capable of producing benefits, the question of whether those benefits are worth the anticipated drawbacks is one for the client to decide.

7. External Legal Service Providers

7.1. If an agency is bound to refer particular types of matter to the Government legal agency, the government lawyer should ensure that it does so. If the agency is free to select its external advisers, the government lawyer must:

- use informed purchaser models to engage external legal services and manage external legal services providers, including operating within the government procurement policy framework;
- try to ensure that the agency (and therefore the government) is best served by the choice; and
- avoid selection from habit, friendship or favour, or, of course, in return for some inducement.

7.1.1. When selecting external legal service providers, Government agencies should use the informed purchaser model⁵⁰ to obtain quality legal services and value for money from the government's external legal spend by selecting and managing good value, high quality legal services that support the agency's strategic objectives.

7.1.2. The choice of law firms should depend on the outcome of a tendering process, in which the legal services needs of the agency, capacity of the firm, its willingness to use experienced practitioners and the costs involved will all be relevant.

7.1.3. For NSW Government agencies, the NSW Procurement Policy Framework applies to both establishing legal panels, and engaging external firms for specific work, including outsourcing work to a legal panel.⁵¹ There is also a tailored leading practice model for informed purchasing of panel legal services for government agencies.

⁵⁰ The concept of informed purchasing is drawn from the Australian National Audit Office *Better Practice Guide: Legal Services Arrangements in Australian Government Agencies*, August 2006.

⁵¹ The NSW Procurement Policy Framework sets out the policy and operating framework for the NSW public sector procurement system, and provides a single source of guidance on the rules for procurement. See *NSW Procurement Policy Framework for NSW Government Agencies* issued by the NSW Procurement Board, July 2015: https://www.procurepoint.nsw.gov.au/sites/default/files/documents/procurement_policy_framework_-_july_2015.pdf.

7.1.4. The NSW Department of Justice's Guidelines for Outsourcing Government Legal Work⁵² can help agencies to decide:

- a. when legal work should be contracted out;
- b. the tendering process to be followed; and
- c. the management of the relationship with the selected external legal services provider(s).

7.1.5. In New South Wales, agencies are required to refer certain classes of legal matters, known as core legal work, to the Crown Solicitor. This is because of their complexity, sensitivity or the need for the matters to be handled or managed centrally on behalf of the NSW Government. The classes of such legal matters include those which:

- a. have implications for Government beyond an individual Minister's portfolio;
- b. involve the constitutional powers and privileges of the State and/or the Commonwealth;
- c. raise issues fundamental to the responsibilities of Government; or
- d. arise from, or relate to, matters for which the Attorney General is responsible.⁵³

7.1.6. If there is doubt about whether or not the Crown Solicitor's Office should be engaged, the Crown Solicitor's Office should be consulted. If it is still unclear, the Secretary of the Department of Justice will decide whether or not a matter is core legal work.⁵⁴

⁵² The Guidelines are available at: <http://www.justice.nsw.gov.au/legal-services-coordination/Documents/guide-outsourcing2008.pdf>

⁵³ For further information see: <http://arp.nsw.gov.au/m1995-39-arrangements-seeking-legal-advice-crown-solicitors-office>

⁵⁴ For further information see: <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/core-legal-work.aspx>

- 7.1.7. For Commonwealth agencies subject to the *Public Governance, Performance and Accountability Act 2013* (Cth), the head of the agency is ultimately responsible for ensuring that legal services expenditure constitutes an efficient, ethical, economical and effective use of resources and that legal services are carried out in accordance with the Legal Services Directions.
- 7.1.8. Pursuant to Appendix F of the Legal Services Directions, Commonwealth agencies may only enter into arrangements for the provision of legal services (other than the engagement of counsel) with a service provider listed on the legal services multi-use list (“LSMUL firm”) and in accordance with guidance material issued by the Attorney-General’s Department.⁵⁵ The LSMUL Guidelines allow agencies to establish parcels of work and to enter into specific arrangements with a number of LSMUL firms to provide legal services in respect of a parcel, similar to the establishment of a panel of legal service providers. The establishment of parcels provides a basis for the development of strong ongoing relationships with a number of firms, and encourages firms to commit to building expertise.
- 7.1.9. In the Commonwealth, the Australian Government Solicitor must be retained for what is known as ‘tied work’. Pursuant to the Legal Services Directions, tied work includes constitutional, Cabinet, national security, public international law and legislative work.⁵⁶
- 7.1.10. The experience of a government lawyer who has seen counsel in action will often be a very good means for choosing an appropriate barrister.

⁵⁵ The LSMUL Guidelines are available at:

<http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Purchasingservicesfromthelegalservicesmultiuselist.aspx>. The Guidelines note that agencies may seek an exemption from the requirement to use the LSMUL in relation to a particular matter or class of matters in exceptional circumstances. Such requests will be considered by the Office of Legal Services Coordination on a case by case basis.

⁵⁶ See the Legal Services Directions, Appendix A – Tied areas of Commonwealth legal work.

7.1.11. The Equitable Briefing Policy of the NSW Government is also relevant.⁵⁷ NSW Government agencies and their legal service providers are required to consider female counsel and ensure an equitable distribution of work to both male and female counsel. Under the policy, when government agencies engage counsel they should make all reasonable endeavours to identify and genuinely consider briefing female counsel in the relevant practice area. It also provides a format for monitoring, reviewing and reporting on the engagement of female counsel.

7.1.12. In New South Wales, Senior Counsel cannot be retained without the Attorney General's approval.⁵⁸ The Attorney General is also required to set the rate of remuneration of the Senior Counsel.

7.1.13. Commonwealth agencies and legal service providers are required to select counsel for their skills and competency independently of their gender. They are to ensure they brief a broad range of counsel and, in particular, women.⁵⁹

7.1.14. The Law Council of Australia has also published an Equitable Briefing Policy for female barristers and advocates. It provides that, in selecting counsel, all reasonable endeavours should be made to:

- Identify female counsel in the relevant practice area;
- Genuinely consider engaging such counsel;
- Regularly monitor and review the engagement of female counsel; and
- Periodically report on the nature and rate of engagement of female counsel.

⁵⁷ The Equitable Briefing Policy of the NSW Government was approved for adoption by all government agencies on 8 July 2008. The policy is available at <http://www.justice.nsw.gov.au/legal-services-coordination/Documents/cabinetapp-ebp.pdf>.

⁵⁸ For further information see the Premier's Memorandum M2009-17.

⁵⁹ Legal Services Directions, Appendix D – Engagement of Counsel.

Example 1

"I am acting for the Department to get the advice of a major private firm on how a proposal to alter certain rights over the use of water flowing through properties might be implemented. The firm has done a lot of government work. I am happy to work closely with them, but I can't be present at all of the discussions they have amongst themselves as they develop the advice. When the advice arrives I think the firm's scheme is far too complicated, and, indeed, that it would be far simpler and practical to introduce legislation to bring about the change. What do I do?"

Response 1

The government lawyer should raise with the firm the deficiencies she sees in the advice obtained, in an attempt, in the agency's interest, to resolve the issue. The government lawyer's experience may be very valuable to the firm in reviewing its advice. If the firm maintains its advice, and the government lawyer still thinks it is deficient, the agency should be told.

- 7.2. A government lawyer must act diligently in every case: to brief and assist external legal service providers and raise any problems with their advice.

Example 2

"The specialised work of the Department is remote from the experience of many barristers, so I like to brief a small number of counsel, to build up their experience in that work, and their acquaintance with officers in the Department. It saves me a lot of time, not having to explain things to a new barrister. Yet it worries me that some of the barristers are beginning to move into a price range that is bringing in some large bills to the Department."

Response 2

The government lawyer should always try to control the cost of external legal services, and so should always be on the lookout for new talent to gradually replace barristers whose fees are beginning to stretch the budget. There are always talented junior barristers available, and the experience of the government lawyer should be fully used to give them the necessary knowledge of the specialised work.

- 7.2.1. Repeatedly briefing the same counsel or firm improves their experience in the agency's work. Having a number of barristers doing advocacy work in the one field, however, could be useful in case a single barrister is unavailable. In country areas of course, there may be only one legal firm in town, and using that firm may be a substantial saving.

- 7.2.2. Commonwealth agencies and legal service providers are also encouraged to brief a broad range of counsel and, in particular, female counsel. Under the Commonwealth Legal Services Directions, which are binding, the selection of counsel by Commonwealth agencies must take into account the interests of the Commonwealth in securing suitable and expert counsel in a particular case but this shouldn't result in a narrow pool of barristers who regularly do Commonwealth work.⁶⁰
- 7.2.3. Agreeing on clear performance indicators at the outset, and talking early and frankly about any concerns, will help avoid serious problems with legal firms and barristers. Regular meetings between agency representatives and external service providers should be scheduled to discuss the work being performed. Future problems can also be avoided if the tender team regularly reviews and records progress.

⁶⁰ See the Legal Services Directions, Appendix D – Engagement of Counsel.

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