HANDY HINTS FOR GOVERNMENT LEGAL PRACTITIONERS

Updated October 2024

GOVERNMENT SOLICITORS COMMITTEE

THE LAW SOCIETY
OF NEW SOUTH WALES

AIM

The Government Solicitors Committee of the Law Society of New South Wales has prepared this guide to help you in the day-to-day work of advising and representing government or other clients, serving the administration of justice and acting in the public interest. The aim of this publication is to provide you with a consolidated source of information and some hints to help you in your legal practice.

This guide is not binding on government legal practitioners but should be read in conjunction with the suite of legislation known as the legal profession legislation (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014*) that is binding on all lawyers in NSW[1]. The various Rules made under the *Legal Profession Uniform Law 2015* (**Uniform Law**) are collectively known as the 'Uniform Rules'. These include the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**Solicitors' Conduct Rules**) which are referred to throughout this guide.

Our guide is a living document, and we note that from time-to-time hyperlinks may break and laws may change. We kindly invite our readers to let us know if any corrections are required by emailing us at governmentlawyers@lawsociety.com.au.

DISCLAIMER: This document has been produced solely for use by government legal practitioners to provide general assistance in relation to some aspects of practice. It is not exhaustive of issues which government legal practitioners may encounter, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, 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.

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A message from 2024 Law Society President Brett McGrath

The role of government solicitors is invaluable to the administration of justice and upholding the role of law in our society, and yet it often goes unrecognised.

The work undertaken to bring a matter to its conclusion—and the personal service behind it—is largely unseen by the public. Having spent four years as a government lawyer myself, please know that your colleagues in the legal profession understand and appreciate the work you do.

A vibrant legal profession requires a balanced, healthy environment. Our wellbeing portal has a number of resources to support you in staying well in legal practice, including a Vicarious Trauma Awareness course designed specifically for government solicitors. Our Solicitor Outreach Service (SOS) provides confidential counselling with up to three psychology sessions per financial year and 24/7 telephone crisis counselling with a psychologist.

We also want to remove barriers for lawyers in accessing physical and mental health services. With our Member Benefits Provider WHEREFIT, Law Society members can also enjoy up to 50 per cent off fitness services, activewear, healthy meals, and much more to help you perform at your best. This offer is available until March 2025.

Recognising the service of lawyers in this state is a priority for my term as President of the Law Society of NSW. Thank you for the work you do, and for the service you provide to communities across NSW.

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WHERE TO START?

1. Resources for NSW Government Solicitors

The NSW Department of Communities and Justice [**DCJ**] has prepared useful guidance material to assist government lawyers and those new to the sector to understand some of the key policies and procedures relevant to government legal practice. There is a wealth of information which can be found via the DCJ website including the NSW government lawyers handbook, guidance on the model litigant policy and government core legal work guidelines.

The Induction Booklet can be accessed here.

Further, the NSW Public Service Commission's Legal Professionals Capability Set has been designed for those working as a lawyer in the NSW public sector.

2. A Government Lawyer's Guide to Rules on Ethical Issues

The Law Society has prepared a helpful guide on navigating your way through these challenges. It is available here 'A Government Lawyer's Guide to Rules on Ethical Issues'

The Rules identified in the above Guide provide an ethical framework for the decisions, actions and behaviour of government legal practitioners working in New South Wales.

When a government legal practitioner is confronted with an ethical issue, the Guide can assist with dealing with the issue. The Guide should be read in conjunction with the specific policies and procedures that exist in your own department or agency and also with the Solicitors' Conduct Rules.

The Law Society NSW Professional Support Unit (**PSU**) of the Professional Standards Department provides a free, confidential service. Legal practitioners can telephone (02 9926 0114) or email (ethics@lawsociety.com.au) to discuss their concerns or seek clarification or assistance on any ethical dilemma issue, each business day from 9am to 5pm.

The PSU also have a dedicated publication Ethics & Standards Quarterly, which aims to provide the profession with more information about the co-regulatory role of the Law Society and the outcomes it achieves through regulation.

3. Additional obligations apply

Government legal practitioners have the same professional and ethical obligations as any other legal practitioner in NSW. However, additional obligations apply that are unique to government legal practitioners. These include laws, public sector rules, codes of conduct - particularly dealing with the prohibition on receiving gifts such as bottles of wine at Christmas, free tickets to fund raising dinners etc. - guidelines and broader workplace situations that are unlikely to arise in private practice.

As is the case with all lawyers, first and foremost you are an officer of the court and have a paramount duty to the court. This duty prevails to the extent of inconsistency with any other duty: see Solicitors' Conduct Rule 3.[ii] You must comply with the Uniform Law, and the Uniform Rules made under it, that govern the conduct and set out the obligations of our profession.

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4. Key legislation

Key relevant legislation of which government legal practitioners in NSW should be aware includes (but is not limited to) the following:

New South Wales	Commonwealth
• *Aboriginal Land Rights Act 1983* • *Administrative Decisions Review Act 1997* • *Anti-Discrimination Act 1977* • *Age Discrimination Act 2004* • Australian Human Rights Commission Act 1986 • *Child Protection (Working with Children) Act 2012* • Civil and Administrative Tribunal Act 2013 • *Constitution Act 1902* • *Coroners Act 2009* • *Crown Proceedings Act 1988* • Disability Discrimination Act 1992 • *Electronic Transactions Act 2000* • *Evidence Act 1995* • *Government Information (Public Access) Act 2009* • *Government Sector Employment Act 2013* • *Government Sector Finance Act 2018* • *Health Records and Information Privacy Act 2002* • *Independent Commission Against Corruption Act 1988* • *Interpretation Act 1987* • *Land Acquisition (Just Terms Compensation) Act 1991* • *Legal Aid Commission Act 1979* • Legal Profession Uniform Law • *Local Government Act 1993* • *Modern Slavery Act 2018* • *NSW Self Insurance Corporation Act 2004* • *Ombudsman Act 1974* • *Privacy and Personal Information Protection Act 1998 (Note: Mandatory Notification of Data Breach (***MNDB***) Scheme under this legislation)* • *Public Interest Disclosures Act 2022* • *Public Finance and Audit Act 1983* • *Public Interest Disclosures Act 1994* • *Public Works and Procurement Act 1912* • Racial Discrimination Act 1975 • Sex Discrimination Act 1984 • *Road Transport Act 2013* • *Royal Commissions Act 1923* • *'Special Commissions of Inquiry Act 1983* • *State Records Act 1998* • Subordinate Legislation Act 1989 • *Young Offenders Act 1997*	• *Acts Interpretation Act 1901* • *Administrative Decisions (Judicial Review) Act 1977* • *Archives Act 1983* • Auditor General Act 1976 • Australia Act 1986 • *Criminal Code Act 1995* • Competition and Consumer Act 2010 • Commonwealth of Australia Constitution Act • *Freedom of Information Act 1982* • Federal Circuit and Family Court of Australia Act 2021 • Government Procurement (Judicial Review) Act 2018 • High Court of Australia Act 1979 • *Human Rights (Parliamentary Scrutiny) Act 2011* • *Judiciary Act 1903 (*also see *Legal Services Directions* issued under that Act*)* • *Jurisdiction of Courts (Cross Vesting) Act 1987* • *Lands Acquisition Act 1989* • *Legislation Act 2003* • *Modern Slavery Act 2018* • *National Anti-Corruption Commission Act 2022* • *Ombudsman Act 1976* • *Privacy Act 1988* • *Public Governance, Performance and Accountability Act 2013 (*also see the PGPA Rules, Commonwealth Grants Rules and Guidelines and the Commonwealth Procurement Rules*).* • *Public Interest Disclosure Act 2013* • *Public Service Act 1999* • Regulatory Powers (Standard Provisions) Act 2014 • *Royal Commissions Act 1902* • Security of Critical Infrastructure Act 2018

5. What are government legal practitioners there for?

At both the NSW and Commonwealth levels, the following additional rules, code and guidelines apply to government legal practitioners:

- Model Litigant Obligations;
- Public Service Codes of Conduct;
- Equitable Briefing Policies;
- Briefing Senior Counsel;
- The Australian Public Service Commissioner's Directions 2022 and Directions made by the Public Service Commissioner (NSW)[iii]
- Litigation involving or between Government Agencies and
  - Government Core Legal (NSW) or 'Tied Work' Work Guidelines (Cth)
    - The NSW Government Core Legal Work Guidelines identify the types of legal matters that are regarded as 'core legal work', and therefore that must be referred to the NSW Crown Solicitor. The Guidelines are available here: M2016-04 NSW Core Legal Work Guidelines.
    - 'Core Legal Work'[iv] comprises legal matters which, because of their complexity, sensitivity or the need to be handled or managed centrally on behalf of the Government, must be referred to the Crown Solicitor's Office. A matter will constitute core legal work where:
      - the best interests of the Government as a whole require a single source of authoritative legal advice and central management; or
      - it relates to the statutory or common law functions of the Attorney General.
  - For Cth lawyers, 'Tied Work' is non-contestable work which pursuant to the Attorney General's Legal Service Directions, the Australian Government Solicitor and other 'Tied Providers' are required to perform. 'Tied Work' includes work associated with the Constitution; Cabinet; National Security and Public International Law.[v]

Government lawyers should also be aware of the 'act of grace' payment regime in their jurisdiction, under the Government Sector Finance Act 2018 in NSW, as explained by the Treasury Circular TC22-01 of January 2022 and the Public Governance, Performance and Accountability Act 2013 (Cth) and Public Governance, Performance and Accountability Rule 2014 for the Commonwealth.

Generally, 'act of grace' payments may be made by a Minister or their delegate where:

- a person, or persons, have suffered financial or other detriment as a result of the workings of government, or

- a person, or persons, have suffered financial or other detriment as a result of significant natural, health, or other disasters requiring an emergency government response; and
- the State has no present legal obligation to compensate the person or persons for that detriment,

but it is nonetheless morally justifiable for the State to make a payment in the circumstances.

6. What distinguishes/sets apart the government lawyer?

The Australian Government Legal Service has produced a statement which is intended to guide and support Australian Government Solicitors in performing our roles as government lawyers, and to complement the General Counsel Charter. The statement details the expectations of government lawyers and is something of great value which can easily be pinned to your wall as a visual reminder of the intrinsic value government solicitors provide.

Government legal practitioners are often on the frontline providing legal advice and representation. You are there to provide expert advice and services, frankly, fearlessly and independently of your client in accordance with your obligations as a legal practitioner. This attests to your independence, professionalism, and reputation as a lawyer. It also benefits your client in ensuring sound decisions are made in compliance with the law.

Government legal practitioners are in the best position to have a comprehensive understanding of the workings of government, policy objectives, and their client's business, and thereby assist the client to achieve their goals and objectives in accordance with both the law and the public interest.

The range of work of government legal practitioners is extremely broad. It encompasses litigation, advocacy, advice, drafting/reviewing commercial and property agreements, statutory interpretation, legislative review and drafting, and policy development. They work in a range of agencies including for Attorneys General, Crown Solicitors' Offices, various government agencies, Legal Aid, Offices of the Director of Public Prosecution, Ombudsman's offices, statutory authorities, and regulatory agencies.

The work of a government legal practitioner is often some of the most important and rewarding of all legal work. It includes work on complex constitutional law issues and disputes, international law issues, inter-government and inter-country relations, immigration, important public safety matters, child protection, criminal investigations and prosecution, Coronial Inquests, Royal Commissions of Inquiry, state significant development, large commercial contracts, environmental and mining law, and a range of other areas with potentially significant social impact.

Chief Justice Gageler defined the exceptional trait which distinguish a government lawyer as follows:

> The trait unique to government lawyering (or at least most strongly displayed in government lawyering) is a sense of purpose . The sense of purpose is not adequately captured in the notion of acting for a client; it transcends the issues of the moment and the government of the day. It involves adherence to a concept of a continuing polity, the fabric of which is held together by enduring principles and values consistently recognised and acted upon. Some of those enduring principles and values have found their way into the law reports. But many have not, in part because skilful and conscientious government lawyers have been astute enough to avoid the problems that might end up in court.[vi]

The Law Society of New South Wales' statement on the ethical responsibility of lawyers:

Law Society of New South Wales' statement on the ethical responsibility of lawyers:

> "The law should protect the rights and freedoms of members of the community. The administration of the law should be just. The lawyer practises law as an officer of the court. The lawyer's role is to both uphold the rule of law and serve the community in the administration of justice.

7. Model litigant obligations

All government legal practitioners and their government clients are bound by the obligations of the model litigant. The obligations of a model litigant arise under the common law[vii], policy instruments[viii] and legislative enactment[ix]. These obligations are consistent with your obligations as an officer of the Court to ensure the efficient and proper administration of justice[x], and your obligations as a public sector employee to act in the public interest[xi]. Like any other lawyer, your first obligation is as an officer of the Court. Your next obligation is to act in the interests of your client – who is required to be a model litigant.

Government legal practitioners must advise their clients of their obligations as a model litigant and act in accordance with those obligations. Private practitioners acting for government agencies must be made aware of the model litigant policy and their client's obligations under this.

The obligations of a model litigant involve acting honestly and fairly in accordance with the highest professional standards. They go beyond a lawyer's ethical obligations and acting in accordance with law and court rules. The obligations include:

- Acting promptly and not causing unnecessary delay
- Paying legitimate claims without litigation
- Acting consistently in the handling of claims
- Endeavouring to avoid litigation, including through Alternative Dispute Resolution (ADR)
- Keeping costs of litigation to a minimum
- Not taking advantage of a claimant who lacks resources
- Only appealing where there are reasonable prospects of success or the appeal is otherwise justified in the public interest
- Apologising for wrongful or improper actions.

Here is a link to the NSW Policy and the Commonwealth Policy.

NOTE – the Model Litigant Policies only apply to civil cases and do NOT apply to criminal prosecutions. The specific duties of a prosecutor arise from various sources including the common law, Solicitors' Conduct Rules and *Prosecution Policy Guidelines* (NSW and Cth).

8. Other obligations

i. Equitable Briefing Policies (NSW and Cth)

The NSW Equitable Briefing Policy is available in full here.

In summary, when selecting barristers, NSW Government agencies should use all reasonable and genuine endeavours to:

- identify women barristers in the relevant practice area; and
- engage women barristers.

In selecting barristers, each agency must take all reasonable efforts to brief and select:

- women senior barristers for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers; and
- women junior barristers for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers.

By 31 October each year, all briefing agencies must prepare a confidential report on their progress towards these targets in the previous financial year for the Office of the General Counsel, Department of Communities and Justice.

See also the NSW Government Legal Services Panel below at Part 19.

For **Commonwealth** lawyers, the rules governing the selection of Counsel are set out in Appendix D to the Legal Service Practice Directions 2017. In summary, Rules 4C and 4D, require that all barristers are to be selected for their skill and competency; Cth agencies are to ensure that arbitrary and prejudicial factors do not operate to exclude female barristers; and, set out targets for the briefing of junior and senior female barristers. Specifically, Rule 4D(d) requires that in selecting Counsel all reasonable efforts are made to…select female Counsel with relevant seniority, expertise and experience in the relevant practice area, with a view to:

- senior female barristers accounting for at least 25% of all briefs or 25% of the value of all brief fees paid to senior barristers; and
- junior female barristers accounting for at least 30% of all briefs or 30% of the value of all brief fees paid to junior barristers.

ii. Prosecution Policy

NSW – The ODPP is responsible for the prosecution of all serious offences committed against the laws of the State on behalf of the people of NSW. The ODPP does not investigate crime – that is the role of investigative agencies such as the NSW Police Force.

The ODPP conducts prosecutions in the public interest in accordance with the Director's Prosecution Guidelines. The Guidelines serve to guide prosecutors and to inform the community about actions taken in its name. The guidelines are publicly available and are currently under review.

The ODPP also has a Witness Assistance Service (**WAS**) officer in each office. WAS officers provide information, support and assistance to victims of crime and witnesses in the matters prosecuted.

Commonwealth – The Prosecution Policy of the Commonwealth is a public document issued by the OCDPP. It provides guidelines for the making of decisions in the conduct of Commonwealth prosecutions, endeavours to promote consistency in decision making, and informs the public of the principles which guide the OCDPP in the exercise of its statutory functions. For example, it sets out the factors and tests to be applied in relation to the following matters: the commencement and (dis)continuation of a prosecution (including specific public policy considerations); the choice of charges; the provision of undertakings to a witness; charge negotiation and the institution of appeals.

The Prosecution Policy of the Commonwealth also refers to the Statement *On Disclosure In Prosecutions Conducted By The Commonwealth.* These documents set out in detail the disclosure obligations that apply to both Commonwealth prosecutors and investigative agencies in the conduct of Commonwealth prosecutions.

iii. The NSW Government Guiding Principles for Government Agencies responding to Civil Claims for Child Sexual Abuse

The NSW Government released the Guiding Principles for Government Agencies responding to Civil Claims for Child Abuse[xii] in November 2014 in response to the Royal Commission into Institutional Response to Child Sexual Abuse.

While the Guiding Principles are binding on all NSW government agencies, they must be applied flexibly according to the circumstances of the case. They do not prevent NSW Government agencies from protecting the proper and legitimate interests of the State, which include legitimate steps to defend claims, including where a claim is vexatious, unmeritorious or an abuse of process.

Agencies must report annually to the Secretaries' Board or Social Policy Cabinet Committee on their compliance with the Guiding Principles.

Solicitors must be aware that some of the work they can do is traumatic and employers must be aware of the risk of vicarious trauma to their legal officers working in this area.

iv. General Counsel Charter

The Australian Government Legal Service has prepared a General Counsel Charter which complements the Statement of Expectations of Australian Government Solicitors. The charter sets out a list of comment expectations for Commonwealth officers in both corporate Commonwealth entities and non-corporate Commonwealth entities who are responsible for the delivery of legal services.

9. Your client

As a government legal practitioner, generally your client is the Crown. The Crown includes the Commonwealth; government departments; the Crown in right of New South Wales; the Government of New South Wales; a Minister of the Crown in right of New South Wales; and a statutory corporation, or other body representing the Crown[xiii].

However, there are exceptions, such as:

- Legal Aid - where your client is a member of the public who has applied for or been granted Legal Aid[xiv];
- Office of the Director of Public Prosecutions – where solicitors act for the Director;
- Local councils – which are bodies politic under the *Local Government Act 1993*.

Government legal practitioners generally are employed by a government department or body, and, apart from the exceptions (some of which are listed above), you owe your professional obligations as a lawyer to that department or body – who is your client. However, in some circumstances your client may also be multiple government departments or agencies (see also section 12 below on privilege). Although you may obtain instructions from individual officers, managers or other employees of your client, you do not owe your professional obligations to those employees; rather, your duty is to your client.

You also have obligations as an employee of your client. Although your obligations as an employee and as a government legal practitioner may at times appear to conflict, your obligation as a government legal practitioner to act in the interest of your client takes priority over your obligations as an employee of your client. If, for example, an individual in a senior management position is seeking legal advice to support an agenda that is not in the interests of your client, then as a government legal practitioner your obligation is to your client, not to the senior executive. Please also refer to 'Frank and fearless advice', below at item 11.

Conflicts of interest may arise between government departments or bodies. In such cases, your duty is to your particular client and employer. There are policies and directions that provide guidance in such situations of conflict, for example the Legal Services Direction 2017 (Cth) – which provide a set of binding rules issued by the Attorney-General about the performance of Commonwealth legal work - and the NSW Premier's Memorandum 97-26 – *Litigation Involving Government Authorities.*

10. Your obligation to maintain client confidentiality

The Law Society of New South Wales has a *Statement of Ethics* which requires that lawyers 'act confidentially and in the protection of all client information'. These obligations are found in Solicitors' Conduct Rules 9 and 10.

As with any lawyer, and any employee, you should maintain the confidentiality of information disclosed to you by your client both during and after the term of your employment. This is subject to any overriding legal obligation to disclose such information, or a legal compulsion to do so. As with other professional obligations, your professional obligation to maintain confidentiality is owed to your client.

11. Frank and fearless advice

As a government legal practitioner, you must provide your legal advice independently, competently, honestly, fairly, and fearlessly even where it incurs the displeasure of your client and regardless of your personal views about a policy or program. That doesn't mean that you shouldn't work to support and assist your client to solve their problem or achieve their goal. Getting involved early and partnering with your client in an important project is a great way to add value, help achieve the desired goal in a timely manner and identify and manage risks along the way.

However, there are pitfalls in becoming too focused on achieving your client's objectives and losing sight of your role as an independent advisor whose paramount duty is to the administration of justice and the public interest. Unfortunately, a particularly egregious example of the failure of government lawyers to provide frank and fearless advice was detailed in the 2023 report of the Royal Commission into the Robodebt Scheme, a scheme developed by the Commonwealth Department of Human Services and designed to recover supposed overpayments from welfare recipients going back to the financial year 2010-11. It relied heavily on a process known as "income averaging" to assess income and entitlement to benefit, and, as used, it neither produced accurate results nor complied with the income calculation provisions of the *Social Security Act 1991* (Cth).

Robodebt was described by Commissioner Hon Catherine Holmes AC SC as 'a crude and cruel mechanism, neither fair nor legal' in which government lawyers 'took a remarkably passive approach to the provision of legal advice'. Commissioner Holmes noted that what was 'truly striking' was that for all the many government lawyers involved:

> …so little attention was paid to the provisions of the social security legislation which actually governs entitlement, payment, authority to require information, debt recovery and imposition of penalties.

Among the Commission's 52 recommendations was that Services Australia should provide regular training to its in-house lawyers on the core duties and responsibilities set out in the Commonwealth Legal Practice Standards, including:

- an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation.
- appropriate statutory and case authority references in advice writing.

The Commission's full report is available here and the Government's response is available here.

12. Your client's ability to claim client legal privilege

Your government client[xv] can claim client legal privilege over your advice or legal services, provided that:

1. the relevant communication is confidential;
2. the communication was between lawyer and client; and
3. the 'dominant purpose' for which it was provided was for obtaining legal advice, or for litigation which is on foot or reasonably contemplated.

You must also be appropriately qualified. Admission as a lawyer, holding the correct practising certificate (which causes you to be an *Australian legal practitioner*) evidences your status as an Australian lawyer and your entitlement to engage in legal practice. They also mean that you are subject to professional standards and discipline.

The communications covered by privilege can include file notes, emails, minutes, draft documents, and other records of communication, including those that were not actually u sed. However, the communication must be confidential[xvi], i.e., the person who made it, or the person to whom it was made, was under an express or implied obligation not to disclose its contents. Privilege may extend to confidential communication between lawyers and experts, agents, and even between the client and another person where the dominant purpose of the communication is legal advice or litigation.

However, your client may not be able to claim privilege where your advice or communication is mixed with policy, commercial, financial, or other advice or information. In these cases, the dominant purpose of the communication may no longer be the provision of legal advice, or for litigation, and privilege may not protect the communication. It is therefore important to separate policy, commercial or other non-legal advice from legal advice wherever possible so that your client does not lose the ability to claim client legal privilege. In considering privilege matters,
you may find it useful to refer to the Law Society's Chart, *Client Legal Privilege for Government Solicitors*.

Often clients do not understand the implications of forwarding on or disseminating legal advice provided to them. Educating your client about legal professional privilege will assist the client to understand what legal privilege is, that certain actions they take may waive privilege, and the implications of this. The client can then make an informed decision when dealing with legal advice. To assist you, the Law Society has drafted a one-page *Guide to Ethical Obligations Of Government Lawyers – For Non-Lawyer Colleagues*.

13. Limits to client legal privilege

There are several limits to client legal privilege, in particular in the context of working in government. In the case of *AWB Ltd v Cole*, Young J found that client legal privilege did not extend to non-adversarial inquiries. There is also a question as to whether client legal privilege applies in proceedings before the then Administrative Decisions Tribunal[xvii]. Inquiries and Royal Commissions and some integrity agencies, e.g., the NSW Ombudsman, have broad powers to require documents and evidence including those otherwise protected by client legal privilege. In these cases, complete legal files have been produced to Commissions and lawyers cross examined about their analysis and advice to their government clients[xviii]. However, in these cases client legal privilege is not waived over

the documents, because they were produced under a statutory compulsion to produce.

As privilege belongs to the client, the client may consent to its waiver. Privilege will also be waived where the client or an employee knowingly or voluntary discloses the substance of the communication to another person. However, privilege may not be waived if the relevant employee was not authorised by the client or lawyer to make the disclosure. Privilege may also not be waived where the disclosure was inadvertently made to another legal practitioner[xix].

Finally, client legal privilege will not protect confidential communications that relate to crime, fraud, or an abuse of power[xx].

Privilege and the GIPA Act

The Government Information (Public Access) Act 2009 (**GIPA Act**) aims to provide an open and transparent process for giving the public access to information from NSW public sector agencies. 'Government information' is information in a record held by an agency, on behalf of an agency by a government contractor, or by the State Records Authority.

The GIPA Act applies to all NSW public sector agencies, including:

- Government departments;
- Ministers and their personal staff; and
- NSW local councils, public offices and courts.

However, under clause 5(1) of Schedule 1 to the GIPA Act there is a conclusive presumption that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege, unless waived by the person in whose favour the privilege exists.

Clause 5(2) provides that if an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency must consider whether it would be appropriate for the agency to waive that privilege before refusing to provide access on the basis of clause 5 of Schedule 1. Such a decision is not subject to review by the NSW Information Commissioner or by the NSW Civil and Administrative Appeals Tribunal [**NCAT**]: clause 5(3) of Sch 1 to the GIPA Act.

14. Sharing advices between government agencies and retaining privilege

There is no waiver of privilege where a confidential advice or communication has been disclosed by a government client to the Minister responsible for administering the relevant Act[xxi]. In addition, because your ultimate client is the Crown there is also no waiver of privilege where a confidential communication is shared with other government agencies, provided it is made explicitly clear that the communication is confidential and is shared on the basis that it remains a confidential and privileged communication[xxii].

NSW state government lawyers

In 2016, the NSW Land and Environment Court held in *Woollahra Municipal Council v Minister for Local Government* that various departments of the State Government can be a single 'client', such that sharing advice among departments does not waive privilege. This extends to communications between non-legal officers where this involves passing of legal advice to the State among officers of the State.

The NCAT Appeal Panel in *Transport for NSW v Robinson* made clear that government agencies can share legal advice with other agencies without waiving privilege provided the advice is shared on a confidential basis. In this case, the Appeal Panel overturned the original NCAT decision that found client legal privilege had been waived over legal advice when it was shared by the NSW Office of the Environment and Heritage with the NSW Roads and Maritime Services (**RMS**), on the basis that RMS was a statutory corporation which had a separate legal entity to the State, The Appeal Panel concluded that the document was shared on 'that [confidential] basis with persons who were employees of the Crown, even if they were not necessarily public servants'. Privilege was therefore not waived.

You can access shared NSW government legal advices, precedents and other documents by registering with the NSW Department of Justice's NSW Government Legal Practitioners' Network. Here is the link.

Commonwealth government lawyers

The *Legal Services Directions 2017*, referred to above at Item 9, are a set of binding rules issued by the Commonwealth Attorney-General under s 55ZF of the *Judiciary Act 1903* in respect of the performance of Commonwealth legal work. They set out requirements for sound practice in the provision of legal services to the Australian Government and offer tools to manage legal, financial, and reputational risks to the Australian Government's interests.

The Office of Legal Services Coordination administers the directions and provides guidance notes to help agencies to comply with their obligations under the directions.

15. Holding a current practising certificate

Under the Uniform Law, practising as a government legal practitioner requires admission as an Australian lawyer and a practising certificate, unless otherwise exempted. The holder of a government legal practitioner practising certificate in NSW is not required to hold an approved (as defined in the Uniform Law) professional indemnity insurance (**PII**) policy with respect to their work as a government legal practitioner.

A government legal practitioner usually holds either a government legal practitioner (supervised) or a government

legal practitioner (unsupervised) certificate:

- **SUPERVISED** – The holder is entitled to engage in supervised legal practice as a government legal practitioner until the holder has completed the period of supervised legal practice required.
- **UNSUPERVISED** – The holder is entitled to engage in unsupervised legal practice as a government legal practitioner. Such a practising certificate would authorise the holder of that practising certificate to supervise legal practice by other legal practitioners in the organisation who hold a supervised certificate. This is subject to any other conditions that may apply to the practising certificate.

  To vary to an unsupervised practising certificate, a practitioner will need to make a successful application for the removal of the statutory condition to engage in supervised legal practice only (condition 2). The required period of supervised legal practice must be completed (usually 24 months full time or the equivalent on a part time basis). More information about supervised legal practice can be found on our website.

The Law Society's website provides additional information about categories of practising certificates and the requirements for each:

Agency staff and labour hire companies – A non-government labour hire entity that is not a law practice is not a qualified entity for the purposes of section 6 of the Uniform Law and is not entitled to engage in legal practice as a law practice.

If you are employed by a labour hire entity and are contracted out to provide legal services to a government entity, you must ensure that the category practising certificate that you hold entitles you to practise as a government legal practitioner. It is the individual practitioner's responsibility to ensure compliance with all conditions on their practising certificate.

16. Your health and wellbeing

The Law Society increasingly is focused on the broader wellbeing of its members, and Government solicitors are no exception. Mental health and wellbeing in the profession is a shared responsibility. Workplace culture, workload and design, leadership, level of psychological trust and safety, client expectations, societal and cultural commentary, global environmental issues can all impact on your wellbeing.

We can all benefit from being open to learning from professionals outside of law and applying scienced backed wellbeing practices.

In 2023 the International Bar Association formed a Global Wellbeing in Law Commission, with representatives from around the globe. In 2023 the psychosocial risk legislation was formed, which holds all workplaces and businesses, including all legal sectors leaders responsible to assess and mitigate psychosocial hazards (risks). The code of practice is comprehensive guide to the ongoing consultative management of all workers wellbeing, including contractors, casual, part-time, and full-time employees, consultants, and volunteers. Leaders are held accountable and advised to consult regularly with all people/workers.

- The Law Society of NSW has some excellent resources to help you if you are experiencing difficulties. These include: www.lawsociety.com.au/resources/mental-health and-wellbeing
- Wellbeing Manager: Elli Balafas Elli.Balafas@lawsociety.com.au
- Mental Health and Wellbeing Portal titled: Staying Well in the Law (SWitL) – Numerous Professional Development Wellbeing Modules specific to all NSW Solicitors. New presentations each month as live webinars.
- Solicitors Outreach Service – Access to 3, free confidential consultations with experienced registered psychologist. Outsourced to maintain privacy and confidentiality. Contact: PeopleSense on 1800592296
- Wellbeing Champions – Mental Health First Aid training – comprehensive awareness and prevention training.

17. Pro Bono Legal

Work Engaging in legal practice as a volunteer at a Community Legal Service (CLS) or otherwise on a pro bono basis

Engaging in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, enables you to play an active role in supporting access to justice in the community and build on your legal and professional skills.

As the holder of a government legal practitioner practising certificate (**Gov PC**), you are entitled to engage in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, in accordance with s 47(5) of the Uniform Law.

Change in Particulars – Prior to undertaking any volunteer work with a CLS or otherwise on a pro bono basis, you must notify the Law Society of any change in particulars, pursuant to Reg 61 of the Legal Profession Uniform Law Application Regulation 2015. If your Gov PC is subject to condition 2 (supervised legal practice) you must ensure that any legal practice - including any work undertaken as a volunteer or on a pro bono basis - is supervised by the holder of an unsupervised practising certificate authorising them to supervise legal practice by others.

Professional indemnity insurance – As the holder of a Gov PC, you are exempt from the requirement to hold or be covered by an approved professional indemnity insurance (PII) policy in NSW (Lawcover) for your legal practice as a government legal practitioner. It is very important to note that the exemption only applies to you whilst engaging in legal practice as a government legal practitioner. The exemption does not extend to you engaging in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis.

The Australian Pro Bono Centre (**APBC**) has established the National Pro Bono PI Insurance Scheme. The Scheme can offer free PII through Lawcover to government legal practitioners providing pro bono legal work through projects approved by the APBC. Lawcover is the approved insurer in NSW. For further information on this scheme, please contact the APBC directly.

How can I volunteer within the requirements of the Uniform Law?

If you intend to engage in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, please check which of the following four scenarios applies to you and ensure you take the relevant steps set out below:

1. If you are volunteering with a CLS you should:
   (a) contact the Law Society to ensure that the CLS is registered with the Law Society (only CLSs registered with the Law Society are authorised to engage in legal practice in NSW); **and**
   (b) ensure that your legal practice is covered under the PII policy held by the CLS with which you volunteer.
2. If you intend to volunteer with an organisation other than a CLS registered with the Law Society, you must ensure that your legal practice is either insured with the National Pro Bono PI Insurance Scheme established by the APBC; or you hold, or are covered by, an approved PII policy purchased directly through Lawcover. Any engagement in legal practice in this manner will need to be in compliance with any conditions on your Gov PC.
3. If you intend to:
   (a) volunteer at an organisation other than a CLS that is registered with the Law Society; and
   (b) your practice is not insured by the National Pro Bono PI Insurance Scheme, then you will need to set up your own law practice (as defined in the Uniform Law) so as to be eligible to obtain PII with Lawcover.

Under the Uniform Law a law practice includes a sole practitioner; to be a principal of a sole practice you must hold a principal of a law practice PC. This will allow you to engage in legal practice as a sole practitioner and in your capacity as a government legal practitioner. However, Condition 2 (supervised legal practice) and Condition 3 (Completion of a Practice Management Course) must be lifted from your current PC to vary to a principal's PC.

If you would like to engage in legal practice exclusively as a volunteer at a CLS (and in no other capacity) you may apply to the Law Society for a volunteer PC which does not attract a PC fee. To obtain a volunteer practising certificate, the applicant will first need to be employed by a registered CLS. Please note however, that you cannot hold both a volunteer PC and a Gov PC concurrently.

Access the Pro Bono Centre website for further information about volunteering and the Law Society website for further information about a principal's PC.

18. Reporting Lines – reporting to a non-lawyer

> Both independence and loyalty are important qualities. Neither should be carried to extremes. Both, properly understood, are necessary - and indeed work in tandem.[xxii]

Many government departments and agencies, both State and Federal, have internal governance structures which involve lawyers reporting directly to a non-lawyer superior. In these instances, it is important to remember that your legal advice, whether in preliminary draft or final form, must never be rendered as either a policy recommendation, nor tilted towards forming a legal justification for a pre-determined policy objective. It is important to maintain your professional independence.

You must not compromise the provision or quality of your legal advice in any way, particularly if your superior requests,

either expressly or impliedly, that your advice should be revised, rewritten or 'more delicately worded' to accommodate a stated position or policy. The reasons are twofold. First, your role as a government legal practitioner, whose paramount duty to the Court is to always uphold and respect the rule of law obliges you to provide full and frank advice on the 'best view of the law', not merely 'what is plausible or arguable'. The second, being that to do otherwise will seriously erode your standing and reputation as a source of authoritative, objective and credible legal analysis.

Of course, the lines may become blurred, particularly when the issue is either currently, or may at some time in the future, attract significant media attention, substantial political controversy, or pointed questioning by a Parliamentary Committee, or all three, at the same time. In such instances, having regard to the practicalities of the situation with which you are faced, it would be legitimate for you to state your best view of the law and then outline, in a sequence of successive, numbered paragraphs each of 'the competing perspectives', that is, the 'plausible' or 'arguable' views of the law which have been either intimated to you, or are currently circulating, with or without your comment (as the circumstances dictate) to each, but ensuring, in your concluding paragraph, that you clearly state your best view of the law, 'after having carefully considered the 'competing perspectives'.

If you are concerned at all - and provided that it does not breach any internal protocols - you may provide a copy of your advice to the relevant senior officer(s) within the department or agency, but clearly indicating that you have done so, by stating under your signature block 'Copied to: …'.

Finally, the Commonwealth Attorney General issued guidance in relation to the use of 'draft' legal advice in December 2023 (Guidance on the use of draft legal advice within government). In summary, the guidance states that it can be appropriate to receive legal advice in draft form, particularly where there are complex factual or other matters that need to be determined or clarified prior to the advice being finalised. However, once this is done, the advice should be finalised. If the author is instructed not to finalise the advice then the instructing officer must provide reasons. It is **never** acceptable to not finalise advice because it may be inconvenient or unwelcome.

19. Engaging external legal service providers

In NSW, a Government Legal Services Panel satisfies the external legal requirements of a range of NSW Government departments, agencies, statutory bodies and state-owned corporations who are eligible to purchase from NSW Government contracts. The Panel includes a range of law practices that are approved to provide legal services in the Sub Panel areas which include: major transactions, commercial law, planning, property and environment, employment, work health and safety, government regulatory and administrative law, and litigation and inquiries.

More information about the NSW Government Panel, including how to buy services from the Scheme, is available here.

In NSW it is government policy that any engagement by in-house government legal practitioners of external law practices must be compliant with delegations and so as to ensure legal services are relevant, effective and deliver value for money. When you engage a private sector legal practitioner or law practice you must ensure that they are aware that your agency is a model litigant and is bound by the obligations of a model litigant. All law practices on the NSW Whole of Government Panel are aware of your government client's model litigant obligations.

Commonwealth entities needing to procure legal services must do so in accordance with the Commonwealth procurement framework – including the Commonwealth Procurement Rules issued by the Department of Finance. More information regarding the procurement of legal services by Commonwealth agencies is provided on the website of the Office of Legal Services Coordination.

20. Your advice may become public

When you are providing advice and legal services, always be aware that your advice could be disclosed to third parties including the media. It may be good practice to keep in mind what is known as the New York Times Rule, which can be narrowly defined as 'Don't put anything in writing that you wouldn't want to see published on the front page of the New York Times'.

This does not mean that you should not be honest and ethical in your advice, but you should keep in mind how your advice may be interpreted by a third party or the public. Some legal practitioners make the mistake of assuming that client legal privilege will protect their communications and advice, resulting in them taking less care than might otherwise be the case. However, as discussed above, there are limitations to the privilege, such as overriding statutory powers and the ability of the client to waive the privilege.

A recent example concerns formal written advice to the Queensland DPP from the then-Deputy Director of the NSW DPP, Margaret Cunneen SC. Ms Cunneen's advice was tendered in a case study relating to swimming coaches in the Royal Commission into Institutional Responses into Child Sexual Abuse and was quickly published by media outlets across the country. Her advice, which included comments such as that the allegation was 'trivial' and querying whether twelve year old swimmers even had breasts, was never meant for public scrutiny and was written in the context of assessing the prospects of conviction. However, once published, her advice resulted in significant reputational damage to the NSW DPP and Ms Cunneen, as well as causing further trauma to the complainants.

21. When the interests of clients' conflict and litigation between government agencies

Premier's Memorandum 97-26, referred to above under item 9, contains guidelines dealing with litigation involving NSW Government authorities.

The aims of the Guidelines are to ensure that:

- In the prosecution of one Government authority by another the cost to the public purse is kept to a minimum;
- Only appropriate prosecution action is taken;
- Inappropriate or irrelevant defences are not pleaded;
- The Court's time spent in resolving prosecutions or disputes involving Government authorities is kept to a minimum;
- Responsible Ministers are kept informed of pending prosecutions and possible disputes between Government authorities; and
- Government authorities act, so far as is possible, as model litigants in proceedings before the Court.

22. Finally: be confident in what's right – broader ethical and statutory obligations

The underlying principles of ethics and professional responsibilities are fundamentally the same for legal practitioners working in public and private practice. However, the principles present different challenges for government practitioners and lawyers who must perform their role in the public interest.

23. Other useful publications/guides and websites

Procurement

Procurement for government involves the process of buying goods, services, or works on behalf of government agencies or departments, to ensure that the government gets what it needs to operate effectively and efficiently. By following strict rules and procedures, procurement helps prevent corruption and ensure that goods and services are acquired at the best value for the public purse. Follow the below links for more detailed information:

NSW procurement

NSW Government Legal Services Panel: Legal Services Panel | info.buy.nsw

NSW Government Procurement Website: buy.nsw

NSW Procurement Policy Framework: NSW Government Procurement Policy Framework

Procurement (Enforceable Procurement Provisions) Direction 2019: EPP-Direction - 1 October 2023 (nsw.gov.au)

Public Works and Procurement Act 1912: Public Works and Procurement Act 1912 No 45 - NSW Legislation

Commonwealth procurement

Commonwealth Government Legal Services Panel - Home Page - Legal Services Panel

Commonwealth Procurement Rules June 2023: Commonwealth Procurement Rules - 13 June 2023 (finance.gov.au)

Department of Finance Procurement webpage: Procurement | Department of Finance

Department of Finance – Handling Complaints under the Government Procurement (Judicial Review) Act 2018: Handling complaints under the Government Procurement (Judicial Review) Act 2018 (RMG 422) | Department of Finance

Government Procurement (Judicial Review) Act 2018: Federal Register of Legislation - Government Procurement (Judicial Review) Act 2018

Public Governance, Performance and Accountability Act 2013: Federal Register of Legislation - Public Governance, Performance and Accountability Act 2013

Whistleblowing

Whistleblowing involves an individual within an organisation reporting misconduct or illegal activities they've witnessed to higher authorities or the public. For government solicitors, this awareness is crucial as they play a key role in upholding the law and serving the public interest, however, can be complicated because of who their employer is. Further information can be found below:

- Legal practitioner's duty to disclose unprofessional conduct of colleagues
- Public interest disclosures – Commonwealth agencies
- Public interest disclosures – The NSW Ombudsman has published guidelines on the Public Interest Disclosures Act 2022 (NSW), designed to help agencies and their staff handle public interest disclosures and to meet their obligations under that Act NSW agencies.

Modern Slavery

'Modern slavery' is the term used to describe situations where coercion, threats or deception are used to exploit victims and undermine or deprive them of their freedom. Examples are human trafficking, servitude, and deceptive recruiting for labour services. All NSW State government agencies must take reasonable steps to ensure that goods and services procured by and for the agency are not the product of modern slavery within the meaning of the NSW Modern Slavery Act 2018 [see s 176(1A) of the Public Works and Procurement Act 1912 (NSW)]. Information is available from the Office of the NSW Anti-slavery Commissioner, e.g., the list of 'covered entities'. Keep reading below for further information and guidance:

NSW Anti-Slavery Commissioner: Anti-slavery Commissioner | Communities and Justice (nsw.gov.au)

NSW Anti-Slavery Commissioner – Due Diligence and Reporting: Due diligence and reporting | Communities and Justice (nsw.gov.au)

Commonwealth Government Modern Slavery Resources: Resources (modernslaveryregister.gov.au)

Artificial Intelligence (AI) for Legal Professionals

The Law Society of NSW has a range of resources which have been curated and developed for legal practitioners to understand the impact Artificial Intelligence (AI) is having on the delivery of legal services.

ENDNOTES

[i] Comprised of the Legal Profession Uniform Law Application Act 2014 [NSW]; Legal Profession Uniform Law (NSW);Legal Profession Uniform Regulations 2015; Legal Profession Uniform Law Application Regulation 2015; Legal Profession Uniform General Rules 2015; Legal Profession Uniform Australian Solicitors' Conduct Rules 2015; Legal Profession Uniform Legal Practice (Solicitors) Rules 2015; Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 and the Legal Profession Uniform Admission Rules 2015.

[ii] . https://www.legislation.nsw.gov.au/#/view/ regulation/2015/244/part2/divfundamental/rule3

[iii] Although, following amendments to the *Government Sector Employment Act 2013*, the Public Service Commission was merged with the Premier's Department from 1 July 2024, the Commissioner's Directions remain in force.

[iv] Core legal work referred by General Government Sector agencies will generally be paid for from the Attorney General's Legal Fund, rather than by the agency

[v] Legal Service Directions 2017 (Cth) – Appendix A.

[vi] "What is it to be a government lawyer in the true sense" Australian Government Solicitor, Issue1: 2016 pg4 – 9.

[vii] See for example: Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333;Kenny v State of South Australia (1987) 46 SASR 268; Director of Public Prosecutions (Cth) v Saxon (1990) 28 NSWLR 263; Scott v Handley(1999) 58 ALD 373 ; Priest v State of New South Wales [2007] NSWSC 41; Mahenthirarasa v State Rail Authority of New South Wales (No 2) [2008] NSWCA 201; Director-General DADHC v Lambert [2009] NSWCA 102; and ASIC v Hellicar [2012] HCA 17.

[viii] M2016-03 Model Litigation Policy for Civil Litigation (NSW)

[ix] Appendix B, Legal Services Directions 2017 (Cth)

[x] https://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/other-duties-solicitors

[xi] See Director of Public Prosecutions v Smith [1991] 1 VR 63; Good Conduct and Administrative Practice Guidelines: Guidelines for state and local government. Third Edition. 2017. NSW Ombudsman; and Section 7 Government Sector Employment Act 2013 (NSW)

[xii] In 2016, the NSW Government also removed the statutory limitation period in cases where the death or personal injury to a person resulted from an action or omission that constitutes child abuse: see s 6A of the Limitation Act 1969 (NSW).

[xiii] See for example, the Judiciary Act 1901 (Cth), Legal Services Directions 2017 (Cth), and s 3 of the Crown Proceedings Act 1988 (NSW).

[xiv] Section 25, Legal Aid Commission Act 1979

[xv] The Court of Appeal confirmed previous authorities that the Director of Public Prosecutions is the "client" as defined in s.117 of the Evidence Act 1995 (NSW) and is entitled to object to the production of conference notes prepared by a lawyer employed in his office on the ground of client legal privilege DPP v Stanizzo [2019] NSWCA 12

[xvi] In Hamilton v State of New South Wales [2016] NSWSC 1213, the Court found that communication between the DPP and a police officer may not be privileged in circumstances where the communication was not confidential.

[xvii] As the proceedings are not truly adversarial: see Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (2006) 67 NSWLR 91.

[xviii] See for example, Crown Prosecutor Margaret Cunneen's evidence in Case Study 15: The response of swimming institutions, the Queensland and NSW Offices of the DPP and the Queensland Commission for Children and Young People and Child Guardian to allegations of child sexual abuse by swimming coaches; and the Crown Solicitor's files and evidence in Case Study 19: Bethcar Children's Home, Royal Commission into Institutional Responses to Child Sexual Abuse.

[xix] Rule 31, Uniform Law Australian Solicitors' Conduct Rules

[xx] Section 125 Evidence Act 2005; Attorney-General for the Northern Territory v Kearney (1985) 158 CLR 500.

[xxi] Section 122(5)(a)(iv) Evidence Act 1995.

[xxii] Section 122 Evidence Act 1995.

[xxiii] Frederick A. Schwarz Jr., 'Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy', 53 N.Y.L. SCH. L. REV. 375 (2008-2009).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

LS4545