

## **ACT Law Society**

### **Government Law Afternoon 2023**

Wednesday 8 November 2023

#### **The need for ethical guidance for government lawyers advising in a non-litigation context**

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#### **Introduction**

1. Could I start by confessing my lack of qualification to be addressing you. You, I assume, are all government lawyers – either in the employ of government or possibly working in the private sector for government clients. I am not.
2. I want to assure you that in what I say today I wish to acknowledge your experience as government lawyers and recognise the difficulties and complexities that you face in delivering legal services to government. I hope that what I say today will be understood as a contribution to attempt to make things better and not merely a criticism, by an outsider, who does not understand the realities of government legal practice.

#### **What I am talking about**

3. The other point I want to make clear at the outset is that I am talking about is a very specific but important aspect of government legal practice. I focus upon legal advice that is given outside the context of litigation. Legal advice given in the context of litigation is provided in a context where a government decision has been made and is subject to challenge. Whether or not that challenge is successful will depend upon numerous evidential, procedural and substantive law factors. What I am here to talk about is the pervasive but little studied advice given by lawyers advising the government outside the context of litigation. In particular, I am focused upon those areas of government legal advice where the prospects of the decisions being tested in the courts are low and hence the prospect of a motivated and well-resourced adversary is not there to impose discipline upon the legal advice.

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## Fundamental assumptions

4. Having said that, I will make clear some fundamental assumptions which I bring to considering the obligations and challenges faced by government lawyers. If you do not share these assumptions, then we will probably be talking past each other.
5. The first is the fact that the government is bound by the law. Sir Ninian Stephen, in an article in 2003 entitled “The rule of law”<sup>1</sup>, described the first of four cardinal principles of the rule of law as being that:

Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen.
6. In the current context I think it is necessary to go a little bit further. Not only does the law apply to government in the same way as it does to an ordinary citizen, but the obligation of the government to comply with the law is, in my view, a greater one. Government is the creation of law. It only exists by reason of the law. It has no legitimacy that goes beyond the law. Although we remain a constitutional monarchy, I do not anticipate that anyone will be defending the proposition that the King of Australia derives his ultimate authority from God.
7. What is interesting is that the fundamental assumption that governments have a duty to comply with the law is difficult to find written down. Good luck to you if you are searching through the text of the Constitution. You may have some more luck if you are looking in the terms of the oaths or affirmations taken by Ministers, but when looking for an authoritative textual hook upon which to hang the obligation to comply with the law it is difficult to find one.
8. My point is to make clear that those advising the government should do so on the basis that there is a greater obligation upon government actors to comply with the law than there is upon the average citizen. The average citizen may well take the view that they will do whatever they can get away with. Such an approach to advising government would, in my view, be inconsistent with government itself being a creature of the law.
9. The second fundamental assumption that underlies what I say is that responsible government depends upon accountability to the Parliament or Legislative

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<sup>1</sup> Sir Ninian Stephen, “The rule of law” (2003) 22(2) *Dialogue* 8.

Assembly as the case may be. Ultimately, ministers are responsible for their areas of executive responsibility to the Parliament. The theory is that by being accountable to the Parliament, the connection between the democratic will and the executive government is maintained between elections. The prospect of accountability to Parliament and parliamentary control over the budget are the principal means by which executive government is controlled between elections and by which electors are informed about the conduct of the executive government so as to be able to make a choice at the next election.

10. Why is this significant for those providing legal advice? If you accept the importance of accountability of the elected members of the executive government then this significantly influences the conception of the role of the government lawyer. It means that in working out the appropriate role of the government lawyer you will recognise that it is the role of the government lawyer to provide advice about what the law is, and the role of the Minister, usually acting through the medium of non-lawyer public servants, to make a decision about what course to follow. That may involve complying with the law as articulated in the legal advice that has been given. It may involve departing from the law as articulated in the legal advice that has been given. The role of the lawyer is to give legal advice about what the law is. The role of the Minister or public servant is to decide how to act and to be accountable for that action. Accountability for the decision to act must lie with the executive government and not with the lawyer if the system is to work.
11. I want to bring these two fundamental assumptions together so as to really explain why, as a government lawyer, you will be in the hot seat. That is because Australian governments have, at the very least, a rhetorical commitment to the rule of law. We have not reached the point where it is culturally acceptable for a government to say out loud and in public that it does not care what the law is.
12. That rhetorical commitment runs headlong into the understandable policy desires of the executive government. There will be many occasions in which a government proposal to do X will, on a proper understanding of the law, be contrary to statute law or require legislation in order to authorise it. That is often politically inconvenient, involves significant work, significant delay and the expenditure of political capital which governments would rather not spend. As a

consequence, there are lots of incentives to attempt to avoid being advised of that bad news by the lawyers. That is particularly so when operating in areas where government decisions are unlikely to be discovered or readily challenged in the courts.

13. Plainly enough, as Robodebt illustrates, one of the ways in which to get around that problem is to not seek legal advice or to bury draft legal advice that comes to an inconvenient conclusion. However, the other way to get around the problem is to get your lawyers to give you advice that, one way or another, accommodates what you would like to do without confronting whatever the legal problem happens to be.
14. One way to do that is to bring either subtle or not so subtle pressure upon the relevant lawyer to reach the convenient conclusion. Usually there will be a plausible, but incorrect, alternative argument and there are various ways, which I will deal with later, of influencing the outcome of the request for legal advice.
15. Another way is to not seek legal advice in the traditional sense at all. Instead of asking what the law is, requests can be couched instead as requests for advice on legal risk. This avoids the necessity of the lawyer responding to such a request to articulate any definitive conclusion as to what the law is. Instead, the lawyer is being invited to articulate a plausible legal contention that might support whatever course of action the executive government desires and perhaps recognise and articulate the existence of contrary arguments which generate risk for the government in proceeding as it wishes. It is much easier to achieve positive legal advice if the lawyer is being asked whether there is a plausible legal argument in support of a government proposal followed by an explanation of the risks of proceeding with that proposal, than if the lawyer is simply asked to advise upon what the law is.
16. For governments that only have a rhetorical, and not a deep seated, commitment to the rule of law, advice that is couched in terms of risk will be interpreted and relied upon as if the lawyer has given positive advice as to the lawfulness of a particular course of action. "The risks are low", "There is a reasonable argument that...", "It would be reasonable to proceed..." All of these will be interpreted as if they said, "The proposed action is lawful". The relevant Minister or public servant will be able to say, "I proceeded in accordance with legal advice" and

therefore will be able to defend their actions as consistent with the rule of law. Because client legal privilege will inevitably be claimed over the terms of the legal advice, any prospect of accountability will, in the absence of a Royal Commission (or equivalent) of the relevant polity, be extinguished.

17. For that reason, the parameters of what is in legal advice provided by government lawyers is very important. If it extends beyond a clear conclusion as to what the law is or is not, then it has the potential to undermine the accountability of the Ministers or public servants who are making the decisions. As I pointed out in the article in *Ethos* in June this year,<sup>2</sup> it also corrodes the intellectual discipline of the lawyer giving the advice, requires lawyers to go beyond their technical competence and allows incremental departure from what the law actually is. I will not repeat what I have said there.
18. The take-home point is that the parameters that you set around what is the appropriate content of advice provided by government lawyers is important in keeping the system of responsible government working. Lawyers themselves should not, if they are to maintain their integrity and independence – words I will come back to – conspire with the executive government so as to undermine the potential for it to be held accountable.

### **Risk-based advice**

19. I have mentioned the corrosive effect of asking government lawyers to advise about risk rather than what the law is. Risk corresponds to the risk of getting caught. It is influenced by numerous non-legal factors, most obviously whether or not there is an entity with the financial and other capability to challenge the decision and the motivation to do so.
20. To illustrate the pervasiveness of a risk-based approach to government legal advice, could I just remind you of the following.
21. The Attorney-General of the United Kingdom has, for many years, asked government lawyers to advise by reference to legal risk rather than simply advising on what the law is. I commend to you the report of the House of Lords Select Committee on the Constitution “The roles of the Lord Chancellor and the Law Officers” published on 18 January 2023, which describes this rather sorry

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<sup>2</sup> D Mossop, “Government lawyers and the rule of law” (2023) 268 *Ethos* 40.

state of affairs.<sup>3</sup> In particular at paragraphs 135 to 149. That discloses, disturbingly, that government lawyers are asked to advise on whether there is a “respectable legal argument” that might support a government proposal and that it is only if there is no “respectable legal argument” that a proposal should be characterised as unlawful. The situation is made quite explicit in the “Attorney General’s Guidance on Legal Risk”, most recently published in 2022.<sup>4</sup> It is guidance “for lawyers advising on lawfulness and legal risk in Government”. I suggest that you get a copy of this document and read it so you appreciate the full horror of it. However, it includes:

If, having assessed the likelihood of a successful challenge, you conclude that there is no respectable legal argument that can be put to a court, then you will need to advise that the proposed action is unlawful. A legal argument is respectable if a lawyer representing the Government could properly advance that argument before a court or other tribunal. In other words, unless there is no respectable legal argument that can be put to the court in support or defence of the action we wish to take, you can advise that there is a sufficient legal basis to proceed, even if high risk. It is likely to be exceptional that there are no respectable arguments and if you are in this territory you should refer the matter to your line manager and Legal Director before you advise.

22. You will note the following features:

- (a) The “no respectable legal argument” test for unlawfulness is an incredibly low threshold.
- (b) It is also an incredibly vague threshold, because it is dependent upon an assessment of whether “a lawyer representing the Government could properly advance that argument before a court or tribunal”, something which is inherently subjective and depends upon the intelligence and integrity of the lawyer who is being asked.
- (c) The policy recognises that unlawfulness will only be found in “exceptional circumstances” – a direction which is likely to be contrary to reality.
- (d) The policy incorporates a bureaucratic requirement of escalation of the issue before any conclusion of unlawfulness is reached, allowing more senior and potentially more politically-attuned lawyers to intervene before any adverse conclusion is reached.

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<sup>3</sup> Select Committee on the Constitution, *The roles of the Lord Chancellor and the Law Officers* (House of Lords Paper No 118, Session 2022-23).

<sup>4</sup> Attorney General’s Office, *Attorney General’s Guidance on Legal Risk* (UK Government, 2 August 2022).

23. I will show you the table which is incorporated in the guidance note.<sup>5</sup> It involves a mixture of legal and policy inputs to come up with a traffic light system. This incorporates the “no respectable legal argument” test as the threshold for considering the decision or policy unlawful. The notable feature of this table is that at no point is anybody asked to form a definitive conclusion as to what the law is. Everything is couched in terms of arguments and risk.
24. Now of course, in light of this you may be inclined to feel very smug that this is all happening in the United Kingdom. You should not be.
25. I am sure that many of you have been asked to advise on risk. What is the official position of the Australian Government Legal Service (AGLS)? The AGLS is branded as “The professional network of Australian Government Lawyers”.
26. In its Statement of expectations of Australian Government lawyers,<sup>6</sup> published in February 2022, it says:
- Recognising that generally our client is the Commonwealth, when we provide our advice to, or identify and manage legal risk for, our agency we do so with a whole-of-government focus.
- We understand that our role requires us to balance managing legal risk with assisting our agency to achieve the government’s objective.
27. In its General Counsel Charter, it identifies common expectations of Commonwealth officers “who are responsible for the delivery of legal services and management of legal risk in their entity”.<sup>7</sup> It contains four expectations. The only one relating to substantive law is:
- Manage legal risks and deliver legal services with due regard to the Commonwealth’s interest as a whole including by supporting their entity head to ensure compliance with the Legal Services Directions 2017.
- Identifying legal risks and issues that might require or benefit from a whole of government approach, and taking steps to engage relevant stakeholders.
28. You will see that, without blinking, legal risk and legal advice are mixed up. There is no clear delineation. There is no guidance on the appropriate ethical approach to providing advice. There is no recognition of any caution that should be applied if a risk-based approach is adopted.

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<sup>5</sup> Included as an annexure to this paper.

<sup>6</sup> Australian Government Legal Service, *Statement of expectations of Australian Government Lawyers* (14 February 2022).

<sup>7</sup> Australian Government Legal Service, *General Counsel Charter* (14 February 2022).

29. An example of how risk-based advising and language can make it less unattractive for the executive government to do things which are, on a proper assessment, unlawful, is provided by the Commonwealth Auditor-General's report on Australia's Provision of Military Assistance to Ukraine.<sup>8</sup>
30. Now, just before all of the Commonwealth government lawyers get too upset, I want to quarantine the issue of "constitutional risk" required as part of the Department of Finance's Budget Process Operational Rules.<sup>9</sup> Some interesting public insights have been given into that process by the Robodebt Royal Commission's report and some of the evidence that was given to it.<sup>10</sup> Anne Twomey has criticised the use of the concept of constitutional risk.<sup>11</sup> There may be a case for distinguishing between difficult constitutional questions and issues of statutory power and interpretation. It is not necessary to go into that issue in any detail for present purposes.

### **Some problems faced by government lawyers**

31. Now I want to address some of the practical consequences of the pressures of executive government upon government lawyers. Some of them you may well be familiar with. I would be very interested to hear your experiences with problem areas that I have not covered.

#### *Draft advice that is not finalised*

32. What is the problem? Everybody by now should be familiar with the Robodebt draft advice scenario. The Royal Commission heard evidence that legal advice from external lawyers about the legality of income averaging was potentially "catastrophic" for the government position and would have ended the Robodebt scheme. The decision was made somewhere within the Department of Social Services to simply pay the external lawyers' bill and never get the advice finalised.
33. The purpose of providing draft advice is usually to ensure that the advice addresses the question that has been asked (often with less than perfect clarity)

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<sup>8</sup>Australian National Audit Office, *Australia's Provision of Military Assistance to Ukraine* (Auditor-General Report No 45 of 2022-23, 29 June 2023) [3.47]-[3.63].

<sup>9</sup> Australian Government Department of Finance, *Budget Process Operational Rules* (December 2022) at [1.14].

<sup>10</sup> *Royal Commission into the Robodebt Scheme* (Final Report, July 2023).

<sup>11</sup> Anne Twomey, "'Constitutional Risk', Disrespect for the Rule of Law and Democratic Decay" (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 293.

by the client and that the factual assumptions upon which it is based are correct. Allowing a client to look at the advice allows them to correct any obvious errors that you may have made when drafting it. The purpose is not to allow the client to decide whether they like the advice so that they can kill it off before it becomes finalised if it does not suit the executive government's policy or goals.

34. There needs to be introduced some system which provides a disincentive for public servants to treat draft advice in this way. One way to address the possible abuse of the system by which a draft advice is provided prior to the advice being finalised would be to expressly identify that the usual course is to have advice finalised and if there is a decision taken that formal written draft advice is not to be finalised, then that decision is to be taken at a particular senior level within the public service and is to be properly documented. This is more or less what the Royal Commission recommended.<sup>12</sup> That will mean that there is a senior person who takes responsibility for, and is accountable for, their decision to terminate the advice and a body such as a Royal Commission or Parliamentary committee does not face the prospect of having to interrogate large numbers of people in order to work out who was responsible for the decision to kill off the advice and when was that decision made.
35. I accept that another way would be, as Commissioner Brereton has suggested, to strongly discourage draft advice and address any errors or misconceptions by way of a supplementary advice. I accept that this would provide superior transparency and support the independence of the lawyer.

*Request to not put advice in writing*

36. A variation on the draft advice scenario is a request or culture of not having legal advice reduced to writing. There was certainly some discussion of this in the evidence at the Robodebt Royal Commission in relation to advice being provided by a departmental secretary to the Minister.<sup>13</sup> However it applies equally in relation to legal advice. So far as private sector lawyers are concerned, conscious of the potential that they may be sued by their own client, the first thing that they will do if asked not to reduce unwelcome advice to writing is to make a file note

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<sup>12</sup> Royal Commission into the Robodebt Scheme, *Final Report* (July 2023), xviii, 528 (recommendations 19.5, 19.6).

<sup>13</sup> See Transcript of the Royal Commission into the Robodebt Scheme at 4000; Royal Commission into the Robodebt Scheme, *Final Report* (July 2023) at 645.

of the unwelcome advice and the fact that they were requested not to put it in writing.

37. This is a matter which should be the subject of some ethical guidance for government lawyers. The prospect of a government lawyer, either in-house or in a government solicitor's office, being sued by the government client is remote. There is therefore less of a self-protection incentive to ensure that oral advice is properly documented. Yet, if they fail to properly document the advice that was given and the request for it not to be reduced to writing, they will be conspiring with the client to give legal advice in a manner which avoids accountability. Such conduct could not be consistent with an appropriate level of professional independence.

*Pressure from the Ministers/Secretaries/other senior people*

38. Another way of bringing pressure on government lawyers is to receive their draft or even final advice and ask them to change it. That can be done by arranging a meeting. I am sure you have all been to these sorts of meetings. Usually, they will involve senior public servants from the client entity. Sometimes they will involve more senior lawyers from your own organisation. Sometimes they will involve some opinionated staff from the Minister's office who attend by telephone or by video. More usually, the Minister's staffers will not be present but will have obviously been in the ears of the senior bureaucrats beforehand. Usually, it will involve the public servants explaining to you how your advice just must be wrong because of their opinion about the law or how they have always done things. The message will be clearly sent that the Minister's office is very unhappy, that this is a very important issue for the Minister and that your organisation's reputation or, if relevant, business prospects, is on the line.
39. What are you meant to do? Where is it in any guidance note for government lawyers, Legal Services Directions or Solicitors Rules that tells you how to deal with such a difficult situation. Obviously if you are grizzled and grey-haired, it will have all happened so many times before that you will be in a better position to know what to do. But I can see that not all of you fall into that category.
40. You only maintain your integrity and professional independence – words I will come back to – if you give your opinion on the law based upon your legal skill as a lawyer and your independent judgment. What that means in practice is that you

need a way of ensuring that any arguments put to you by those seeking to bring pressure upon you to change your mind are dealt with on their merits, but you are not influenced by political or bureaucratic convenience or business considerations arising from the capacity of the client organisation to go elsewhere.

41. That is the personal response. Assuming you are a public servant or a lawyer with a government solicitor, there should also be internal written guidance as to how to deal with that issue. It will presumably involve consulting with a more senior lawyer in order to allow the merits of the arguments being put to you to be dispassionately assessed. However, it is also not appropriate for public servants or the Minister's office to be seeking to bring pressure upon lawyers to reach conclusions inconsistent with their professional judgment. The line between having a civilised debate and bringing illegitimate pressure is, I accept, a very difficult one to draw. However, that does not mean that there should not be guidance for lawyers on this issue.

*The content of requests for advice*

42. I have said little bit above about the undesirability of giving advice couched around the concept of risk. It is difficult to conceive of a situation, outside the context of litigation, in which it would be appropriate to advise on risk without having first reached a definite conclusion as to what the law is. If the issue is a finally balanced one, reaching a definite conclusion as to what the law is will often involve recognising the strength of the competing arguments. However, it is important that government lawyers maintain the intellectual discipline of forming a view on what the law is. It will then be for the client to decide what to do and whether to adopt your advice as to what the law is or some other approach to that legal issue.
43. Once a definite conclusion as to what the law is has been reached then there is some room for advising on risk, although that will inevitably encompass advice about things which are beyond the lawyer's technical skill. Will the government publicly notify the decision or policy? Who are the players who are likely to be motivated to challenge it? Will they be financially able to challenge it? Who in Parliament is likely to be keeping close track upon government actions in this area? Are they likely to ask questions in a Senate estimates or Legislative

Assembly committee? What are the prospects of the relevant documents being subject to a successful freedom of information request? These are things about which lawyers can express an opinion but in many subject areas they will be assessing factual matters which are beyond their expertise. Why is it not more reasonable to simply give advice on the law and allow the public servants, with whatever additional assistance they wish, to form their own view about whether or not the Minister is likely to be able to get away with it?

44. The real difficulty is that public servants, either through ignorance or cunning, will continue to ask questions based upon risk. This makes it easier for them to get answers favourable to the position adopted by the executive government and easier to avoid accountability by being able to rely upon the green light given to them by the lawyers, even when the so-called legal advice either does not address or goes well beyond expressing an opinion as to what the law is.
45. My contention is that public servants should be discouraged from asking questions of lawyers based upon risk. Rather, they should be required to formulate their request for advice by reference to what the law is. If there is any role for advice on risk then it should be subordinate to, and following upon, advice about what the law is.
46. This requires a degree of education and leadership within the executive government which is unlikely to exist. Therefore, the more practically relevant question is how should lawyers respond to requests by public servants for risk-based advice? First, it involves negotiating with the client so as to attempt to reformulate their request in a way which is consistent with your skill set – namely advising about what the law is. Next, to the extent that the client wishes you to advise on questions of risk, doing so only after you have expressed an opinion on what the law is and within parameters which are expressly set out.

*Assumptions that may not be reliable*

47. It will not be uncommon for difficult questions to be dependent upon the assumptions that you are asked to make. One technique by which public servants may achieve favourable legal advice is by formulating assumptions that you are asked to make in a way that encourages the outcome that they wish to achieve. Once again, if positive legal advice is obtained then, institutionally, reliance may be placed on the positive answer without sufficient focus on the factual

contingencies upon which that answer was based. If you recognise that hazard, then you will need to be very careful about how you treat the assumptions that you are given. It is relatively easy for a public servant to imagine facts surrounding a new policy proposal or relevant to some existing law. If your opinion about the lawfulness of a particular course of conduct or the need for new legislation is dependent upon particular factual assumptions, then you need to make sure that those assumptions are given to you expressly as assumptions. It would be good practice and consistent with an appropriate level of accountability to identify the person who has provided you with those assumptions. If you are doubtful as to whether or not the assumptions are reasonable or realistic then, without necessarily expressing your doubts in a way that would insult the client, you should make clear that you have made no investigations or reached any conclusions as to the accuracy or reasonableness of those assumptions and the conclusion that you have reached is contingent upon those assumptions being accurate, if that is the case.

#### *How to deal with past advice that is wrong*

48. Institutional government legal practices seek to maintain a degree of consistency in their legal advice. Governments cannot afford to be chopping and changing their views about legal issues whenever somebody new provides them advice. They will undertake administration of legislation on the basis of the correctness of their legal advice and will develop policy proposals over time in light of previous legal advice. The need for consistency in approach generally requires that government lawyers assume that past legal advice has been accurate. While that creates consistency and predictability for public servants and ministers, it has the potential to create institutional tensions for the government legal service provider. Obviously, in any organisation, different lawyers will have different opinions. There will be occasions when a government lawyer who is asked to advise on a particular issue will examine past advices relevant to that issue and form the view that the previous advice is wrong. How to deal with that issue is important. While there is an institutional desire to assert that all previous advice has been correct, the more important public policy consideration is that the government gets

accurate advice about what the law is. As is sometimes said in the sphere of constitutional law, it is better to be ultimately right than persistently wrong.<sup>14</sup>

49. How to deal with such situations is a matter that should be the subject of some ethical guidance. There are two particular issues as I see it.
50. The first is how the issue is escalated within the organisation. If a more junior lawyer forms the view that earlier advice, which is relevant to what they are currently being asked, was wrong, who do they refer it to and at what level is the issue ultimately decided? It may be that only general principles can be articulated, but they should be articulated because otherwise the issue will be addressed in an ad hoc and potentially inconsistent way. Some more junior lawyers will assume that they need to simply follow the previous, potentially incorrect, legal advice. Others will escalate it within the organisation. At what level a significant about-face is achieved is important. It reflects the need to confront the institutional desire for self-protection with the public policy desire of governments being properly advised.
51. The second is whether it is appropriate to simply advise on the basis of the correctness of past legal advice even when there are doubts about its accuracy. This is one way of avoiding the need to squarely confront the issue of a difference of opinion between past and present legal advisers. Is it consistent with the integrity of a government lawyer to simply say in the introductory parts of an advice, we have previously advised X in circumstances where the current advisor, having looked at the issue, thinks that X is likely to be wrong. Should there be a greater flagging of the doubts about the accuracy of earlier advice, even in circumstances where it is not seen as essential for the legal advisers to go back and confront the earlier issue?

*How to deal with conclusions you do not agree with*

52. An issue faced, most commonly by more junior lawyers, is what to do if they are asked by more senior lawyers to reach a conclusion which they do not agree with. Obviously much of the learning process for a junior lawyer is to accept and learn from the approach taken by more senior lawyers. However, there may be

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<sup>14</sup> *Australian Agricultural Co v Federated Engine-Drivers' & Firemen's Association of Australasia* (1913) 17 CLR 261, 278.

situations in which the more junior lawyer, who may well have significant experience, is asked to reach a conclusion that they do not agree with. Is it consistent with the requirement of integrity – a word I will come back to – for them to simply sign off or co-sign an advice which reflects a conclusion which they have been asked to reach but does not actually reflect their opinion?

53. The obvious answer in the world of theory, which may be much more difficult to implement in practice, is that they should not sign the advice. If they are not comfortable with the conclusion reached, then they should ask the more senior lawyer who has suggested that they reach the conclusion to sign the advice instead of them. That is a difficult position to be in. As I have indicated, it applies in any circumstance where a more senior lawyer is directing a more junior lawyer to reach a particular conclusion. In my view, it would be appropriate that there be some explicit guidance upon which a more junior lawyer can rely in order to address such circumstances.

#### **How these issues should be addressed**

54. There has been increased attention paid to the ethical obligations of lawyers as a result of the Robodebt Royal Commission. That appears to have been a case where the legal issues were relatively straightforward but the culture within the departments and, in particular, the legal area of those departments was not consistent with the government being properly advised about what the law was. The 13 recommendations coming out of chapter 19 “Lawyers and legal services” of the Royal Commission’s report were quite modest.

55. They were as follows:

##### **Recommendation 19.1: Selection of chief counsel**

The selection panel for the appointment of chief counsel of Services Australia or DSS (chief counsel being the head of the entity’s legal practice) should include as a member of the panel, the Australian Government Solicitor.

##### **Recommendation 19.2: Training for lawyers – Services Australia**

Services Australia should provide regular training to its in-house lawyers on the core duties and responsibilities set out in the 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.

##### **Recommendation 19.3: Legal practice standards – Social Services**

DSS should develop Legal Practice Standards which set out the core duties and responsibilities of all legal officers working at DSS.

**Recommendation 19.4: Training for lawyers – Social Services**

DSS should provide regular training on the core duties and responsibilities to be set out in the Legal Practice Standards which should include: 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

**Recommendation 19.5: Draft advice – Social Services**

DSS should issue a further direction providing that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

**Recommendation 19.6: Draft advice – Services Australia**

Services Australia should issue a direction that legal advice is to be left in draft form only to the extent that the administrative step of finalising it has not yet been undertaken by lawyers or there are remaining questions to be answered in relation to the issues under consideration and that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

**Recommendation 19.7: The Directions 1**

The Legal Services Directions 2017 should be reviewed and simplified.

**Recommendation 19.8: Office of Legal Services Coordination to assist agencies with significant issues reporting**

The OLSC should provide more extensive information and feedback to assist agencies with the significant legal issues process.

**Recommendation 19.9: Recording of reporting obligations**

The OLSC should ensure a documentary record is made of substantive inquiries made with and responses given by agencies concerning their obligations to report significant issues pursuant to para 3.1 of the Directions.

**Recommendation 19.10: The Directions 2**

The OLSC should issue guidance material on the obligations to consult on and disclose advice in clause 10 of the Legal Services Directions 2017.

**Recommendation 19.11: Resourcing the Office of Legal Services Coordination**

The OLSC should be properly resourced to deliver these functions.

**Recommendation 19.12: Chief counsel**

The Australian Government Legal Service's General Counsel Charter be amended to place a positive obligation on chief counsel to ensure that the Legal Services Directions 2017 (Cth) are complied with and to document interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under those Directions.

### **Recommendation 19.13: Review of the Bilateral Management Agreement**

The revised Bilateral Management Agreement should set out the requirement to consult on and disclose legal advices between the two agencies where any intersection of work is identified.

56. I initially saw the confined nature of the recommendations as a failing of the report – that its recommendations were modest and closely tied to the particular circumstances of the case. Subsequent experience has tended to indicate that being modest in your ambition and closely tied to the facts is a virtue rather than a vice.
57. However, the modest nature of the recommendations coming out of the Royal Commission means that addressing the broader issues about how government lawyers respond to the ethical issues that they face is something that is going to require further work.
58. Some of that work had been done in anticipation of the outcome of the Royal Commission. Services Australia developed a “Legal Practice Standard” for its legal officers.<sup>15</sup> The ethical highlights of that document were in clause 4:
- 4. In fulfilling these duties, a Legal Officer must (as a minimum):
    - a. act in their client’s best interests;
    - b. be honest and courteous in all dealings in the course of legal practice;
    - c. deliver legal services competently, diligently and as promptly as reasonably possible;
    - d. avoid any compromise to their integrity and professional independence;
    - e. provide clear and timely advice to assist their clients;
    - f. follow a client’s lawful and proper instructions; and
    - g. avoid any conflict of interests and maintain client confidentiality.
59. What is interesting to note is the extent to which these standards simply pick up the general obligations as outlined in the Solicitors Rules.<sup>16</sup> This tends to emphasise the significance of the role of the Law Society and standards that it sets in defining the professional standards adopted by government lawyers. The other point to note about this guidance is that it is formulated at a high level of abstraction and understandably cannot come to grips with the real-world

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<sup>15</sup> Evidence to the Royal Commission into the Robodebt Scheme, Brisbane, Exhibit 8572 - CTH.3857.0001.0011 - legal-practice-standard-legal-officer-duties.

<sup>16</sup> *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 4.1.

pressures and problems that are faced because of the tension between executive desires and the appropriate role of government lawyers.

60. My hypothesis is that you need some additional ethical guidance for government lawyers but that needs to be formulated by reference to general principles. Can I just identify some of the possible sources of that kind of guidance:

- (a) Legal Services Directions under the relevant Commonwealth or Territory legislation:<sup>17</sup> This is unlikely to occur as it will be very difficult to formulate guidance which is both flexible enough and detailed enough and will not have unsatisfactory consequences for the relevant government entity.
- (b) In-house training: It is possible that there could be in-house training within government solicitors that address some of these issues. It may be that this has already occurred. That seems to lack the long-term, formalised, institutional guidance that is appropriate. The incentives for institutional government solicitors to take a robust approach to such guidance is limited. Further, empirically it is probably the case that there are many more in-house lawyers spread around government departments than exist within the government solicitors and hence, in-house training is unlikely to be an effective means of disseminating ethical guidance.
- (c) Government wide legal network: So far as government wide ethical guidance is concerned, the Australian Government Legal Service publications appear to be modest in their extent of ethical guidance and defer, to an extent, to professional bodies.
- (d) Leave it to the public service: There are general ethical obligations of public servants under the *Public Service Act 1999* (Cth) and the *Public Sector Management Act 1994* (ACT). No useful guidance directed to lawyers is likely to come from these sources and would obviously not cover private-sector lawyers providing government legal advice.

61. The fundamental problem with all of these potential sources is that unless there is very explicit direction from the very highest level of government, the likelihood is that nobody will be prepared to call a spade a spade. Nobody will be able to

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<sup>17</sup> *Legal Services Directions 2017* (Cth); *Law Officers Legal Services Directions 2023* (ACT).

articulate the real-world tensions that exist or provide practically implementable guidance for lawyers on the ground about how to deal with those tensions.

62. As you may have detected, my view is that there is plenty of room for the Law Society of the ACT to formulate useful detailed guidance for government lawyers on how they should approach their role in a manner that is consistent with, and promotes rather than undermines, the principle of responsible government. This has been done by the NSW Law Society in a publication called “A guide to Ethical Issues for Government Lawyers”, the third edition of which was published in 2015.<sup>18</sup> There is also a briefer document published in 2021, summarising the rules applicable to New South Wales and federal government lawyers.<sup>19</sup>

### **What the Law Society could do**

63. One of the significant areas where the professional status of government lawyers has been examined by the courts is in relation to claims of client legal privilege. That was significant in a case called *Vance v McCormack* [2004] ACTSC 78; 154 ACTR 12, where Crispin J held that, in addition to admission to practice, it was essential for a claim of privilege that the lawyer in question have an actual right to practice, either by reason of a statutory entitlement or the holding of a current practising certificate. That decision was in the context of legal officers within the Department of Defence. However, it led to much greater enthusiasm for in-house lawyers to obtain practising certificates and hence solidify their status as lawyers whose advice warranted the protection of client legal privilege. Crispin J’s decision was overturned the next year by the Court of Appeal in which held that a current practising certificate:

... can be a very relevant factor take into account in determining whether or not an employed lawyer, whether or not in government service, is employed in circumstances where they are acting in accordance with appropriate professional standards and providing independent professional legal advice such that would attract a claim for client legal privilege under the Evidence Act. To make the holding of a practising certificate a precondition for such a claim, however, seems to us to go beyond the requirements of the Evidence Act, and to amount to appellable error.<sup>20</sup>

64. When you look at the content of the Solicitors Rules, what is notable is that they fail to address any specific ethical guidance to government lawyers. They are

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<sup>18</sup> The Law Society of New South Wales, *A Guide to Ethical Issues for Government Lawyers* (3<sup>rd</sup> ed, 2015).

<sup>19</sup> Government Solicitors Committee, *A Government Lawyer’s Guide to rules on ethical issues* (The Law Society of New South Wales, February 2021).

<sup>20</sup> *McCormack v Vance* [2005] ACTCA 35; 2 ACTLR 67.

really designed from a 19<sup>th</sup>-century perspective that the legal community being regulated comprises private practice and government prosecutors. They specifically address, in some detail, ethical issues which confront lawyers in those environments. A significant number of them are focused on conduct related to litigation. They address conflicts between lawyers and clients of the sort that arise in private practice, but are of less concern in government practice. They have very little to say about the circumstances of government lawyers providing legal advice about legislation or policy proposals that are well removed from the prospect of litigation. As I have indicated, that is the universe that I am discussing and it is a universe of legal practice which is of fundamental importance to the operation of government.

65. They say almost nothing about those in-house lawyers who exist in large numbers in government departments whose role and influence is significant, but who do not have the benefit of institutional training and culture that may be available in a dedicated government solicitors' legal practice.
66. I am not suggesting that a new chapter be introduced into the Solicitors Rules dealing with government lawyers advising outside the context of litigation. However, there are some of the "fundamental ethical duties" set out in the Rules which provide a foundation for the Law Society providing greater ethical guidance to government lawyers. They are that:
  - 4.1 A solicitor must also
  - ...
  - 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.
67. These two duties do not provide any actionable ethical guidance to address the sorts of issues that arise for government lawyers. However, they provide a reasonable foundation for the Law Society to formalise guidance for lawyers. In each of the situations that I have outlined above as being circumstances where a lawyer may have to choose how to conduct themselves, there is room for guidance as to what conduct will involve falling below the standards expected of a lawyer.
68. The benefit of such a course is that it will require government lawyers collectively to confront the rule of law tension that I have articulated and to set out guidance

as to the standards that should be met. Such guidance will apply to both government lawyers and non-government lawyers who are advising government.

69. I accept that many government lawyers, who rely upon statutory entitlements to practice, are not required to hold practising certificates and hence may not be directly subject to the rules or discipline at the instigation of the Law Society. However, the paucity of guidance that is currently available means that a document which frankly and pragmatically deals with significant ethical issues will have a substantial impact upon the approach of lawyers even where they are not directly the subject of Law Society regulation.
70. Here is my preliminary list of things that ought to be covered:
- (a) A statement that legal advice must be provided in a way that enhances rather than obscures the accountability of the executive government for its decisions.
  - (b) A statement of the purposes of providing draft advice, articulation of a default position that it should be finalised and a process to be followed if there is a request that it not be finalised.
  - (c) Guidance for lawyers if they are requested to change their draft or finalised advice.
  - (d) What to do if earlier advice upon which current advice is to be based is identified by a lawyer to be wrong.
  - (e) How to deal with requests to advise on risk.
  - (f) How client provided assumptions should be dealt with where the content of those assumptions is significant for the outcome of the legal advice.
71. These are only a few of the matters that ought to be addressed. The collective wisdom of those at the coalface of government legal advice will no doubt identify many other significant issues that need to be addressed. Now, so far as I am concerned, it is over to you.

Annexure – Extract of Attorney General’s Office, *Attorney General’s Guidance on Legal Risk* (UK Government, 2 August 2022) (see paper at [23])

<b>Narrative Summary and Commentary – points to consider in advising Ministers</b> Legal lead to summarise position, drawing on this language and noting the italicised comments in doing so.	<b>Likelihood of legal challenge</b> Policy lead with Legal input	<b>Likelihood of successful challenge</b> Legal lead with policy input	<b>Impact of challenge</b> Policy lead with Legal	<b>Colour key</b> (for each category separately)
We have strong legal arguments, and there is a low risk of successful challenge. <i>In presenting such assessments, it is important to ensure negligible or discounted risks are not given undue weight.</i>	<b>Low</b> Less than 30%	<b>Low</b> Less than 30%	<b>Low</b>	<b>Green</b>
We have stronger legal arguments in support, and there is a medium-low risk of successful challenge. <i>In presenting such assessments, it is important that legal risk is not elevated to disproportionate levels.</i>	<b>Medium Low</b> 30-50%	<b>Medium Low</b> 30-50%	<b>Medium Low</b>	<b>Green/ Amber</b>
We can identify comparable legal arguments for and against and there is a medium-high risk of successful legal challenge. <i>Identifying mitigations will be important in seeking to reduce the identified risk further.</i>	<b>Medium High</b> 50-70%	<b>Medium High</b> 50-70%	<b>Medium High</b>	<b>Amber</b>
We could mount at least a respectable legal argument in support, but there is a high risk of successful challenge. <i>A high risk assessment does not mean something will necessarily be found unlawful: advice should be clear on the impact and the distinction with unlawfulness drawn out for Ministers.</i>	<b>High</b> 70% +	<b>High</b> 70% +	<b>High</b>	<b>Amber/ Red</b>
No respectable legal argument exists to justify the decision or policy. <i>Ministers to be advised on mitigations to remove unlawfulness, alongside escalation routes to relevant senior lawyers &amp; AGO.</i>	<b>Policy or decision <i>prima facie</i> unlawful.</b>			<b>Red</b>