

The Model of a Modern Government Litigant

Practical Legal Ethics

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Litigation Issues for All Government Lawyers

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Introduction

1. This session considers the topic of the Model of a Modern Government Litigant.
2. The intention is to address the topic from a practical ethics perspective, and particularly from the view point of internal or in-house Government lawyers.
3. The topic will be addressed in two parts:
 - (a) First, a consideration of some of the obligations a Government lawyer has and how those are relevant to the model of a modern Government litigant.
 - (b) Second, a practical discussion of some examples or scenarios that might be encountered by Government lawyers and the issues that might arise.

First: sources of a Government lawyer's obligations

4. Government entities litigate. The very nature of what Governments do makes their everyday business a common subject of litigation.
5. Many Government entities are service providers and statutory decision-makers, so the content of their everyday business will often become the subject of litigation – perhaps merits review, judicial review, or common law claims.
6. Other Government entities are investigators, law enforcers or industry regulators, so their everyday business includes bringing or defending proceedings – prosecutions, civil enforcement, disciplinary action.

7. It is difficult to imagine anything of substance that a Government entity does that could not realistically lead to litigation. In that way, the everyday business of a Government entity fundamentally informs the litigation in which it is involved.
8. When the conduct of a Government entity is scrutinised in Court and found to be lawful and reasonable, that promotes confidence in public administration. Government lawyers play a significant role in achieving that result.
9. The obligations that Government lawyers have provide an important framework or context for the important role they play in contributing to confidence in public administration. Those obligations are central to maintaining the high standards of lawfulness and reasonableness with which public administration in Australia is associated.
10. There are multiple sources of a Government lawyer's obligations. Some include:
 - (a) The model litigant principles.
 - (b) Public service legislation and policy.
 - (c) Legal profession legislation.
 - (d) The common law.
11. The Queensland model litigant principles include:¹
 - (a) Endeavouring to avoid, prevent and limit the scope of legal proceedings where possible.
 - (b) Giving consideration to ADR, and participating fully and effectively in ADR.
 - (c) Keeping the costs of litigation to a minimum.
 - (d) Appropriately testing all claims.
12. The *Public Service Act 2008* (Qld), s 26(1), is a source of obligations. A public service employee's work performance and personal conduct must, *inter alia*, be directed towards:
 - (a) Achieving excellence in service delivery.

¹ See <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

- (b) Giving effect to Government policies and priorities.
 - (c) Carrying out duties impartially and with integrity.
 - (d) Acting honestly, fairly and in the public interest.
13. The *Public Service Act 2008* obligations apply to those Government lawyers employed as public service employees. The obligations also apply to the public service officers who instruct the lawyers. That makes those obligations relevant to both the lawyer’s conduct, and the lawyers advice to the client officers.
14. The public service obligations are similar to the norms of conduct discussed in the Report of the *Banking Royal Commission*. That Report identified six norms of conduct which were said to be “fundamental precepts” in relation to the banking and finance industry; namely:²
- obey the law;
 - do not mislead or deceive;
 - act fairly;
 - provide services that are fit for purpose;
 - deliver services with reasonable care and skill; and
 - when acting for another, act in the best interests of that other.
15. Although those norms of conduct were reflected in pre-existing legislation, the *Banking Royal Commission* noted that one of the key questions was what more could be done to achieve effective leadership, good governance, and appropriate culture so that the industry lived up to those norms. That may be a useful question to assist in promoting maintenance of the norms.
16. The *Public Service Ethics Act 1994* (Qld) is also relevant to a Government lawyer’s obligations. One of its principles is accountability and transparency. Again, that applies to both Government lawyers and the officers who instruct them.
17. More obligations can be found in the *Australian Solicitors Conduct Rules 2012*, including:
- (a) “A solicitor’s duty to the court and the administration of justice is paramount and

² See <<https://financialservices.royalcommission.gov.au/Pages/reports.aspx>>.

prevails to the extent of inconsistency with any other duty” (ASCR, s 3.1).

- (b) “A solicitor must not engage in conduct, in the course of practice or otherwise, which ... is likely to a material degree to: be prejudicial to, or diminish the public confidence in, the administration of justice” (ASCR, s 5.1.1).
- (c) A solicitor must “act in the best interests of a client in any matter in which the solicitor represents the client” (ASCR, s 4.1.1).
- (d) “A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s instructions where applicable” (ASCR, s 17.1).
- (e) “A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement” (ASCR, s 7.1).
- (f) “A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation” (ASCR, s 7.2).

18. It may also be of some guidance to consider common law duties. Depending upon the circumstances, a lawyer will probably have an obligation to:³

- (a) Warn the client of any material risks when advising in relation to a transaction.
- (b) Warn the client of any material risks arising from litigation in which the lawyer acts.

19. Finally, it is a general principle that “As a participant in the administration of justice and the legal system, the lawyer must foster respect for the law and its administration”.⁴ A lawyer

³ See, eg, *Avwest Aircraft Pty Ltd as trustee for Avwest Aircraft Trust v Clayton Utz (a firm)* [No 2] [2019] WASC 306, [375]; *Bird v Stonham trading as John Stonham & Co Lawyers* [2019] NSWDC 419, [134]; *Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2012] QCA 272, [64].

⁴ *Legal Services Commissioner v Winning* [2008] QLPT 13, [25]; *Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205, [87]; *Bunbury Water Board v Ertech Pty Ltd* [2010] WADC 20, [27].

must not advise or encourage a breach of the law, and if a lawyer becomes aware that a client is engaging in unlawful conduct the lawyer must counsel the client against it. This is so regardless of whether the breach might be detected or prosecuted.⁵

20. Those are some of the obligations that a Government lawyer has. Some obligations fix reasonably clear or ‘bright line’ rules. Many others, such as the obligation to act fairly and to exercise independent forensic judgments, are perhaps more difficult to delineate.
21. And whilst legal obligations will inform or give guidance to ethical questions, acting ethically might mean something more than merely complying with legal obligations.

Second: some examples and scenarios

22. This part looks at some examples or hypothetical scenarios that a Government lawyer might encounter, and poses questions that might arise. A fairly broad approach is taken to these scenarios and questions, so perhaps some of them do not involve strictly ethical questions.
23. First, some scenarios that might arise before litigation is under way, or where litigation is not being contemplated.
 - (a) **Scenario One:** A delegate has to make a decision under relatively new legislation, and there is a question about the correct legal test to be applied. You are asked to advise on what the correct legal test is.
 - (i) Assume the client identifies a preferred test, and simply asks whether that test is a reasonable interpretation of the law? If the answer is ‘yes’, is giving that answer good enough?
 - (ii) Should you seek to identify and advise in relation to material risks involved in adopting any particular test? Eg, consistency with other parts of the scheme; potential inconsistency with Government policy / priorities?
 - (iii) What advice should be given if there is non-binding authority against the client’s preferred test?
 - (iv) What advice should be given if there are conflicting authorities?

⁵ *Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205, [87]

- (b) **Scenario Two:** A delegate instructs you to prepare a draft statement of reasons for a proposed statutory decision.
- (i) Is that appropriate? Are there circumstances that would make it inappropriate?
 - (ii) Is it appropriate for the lawyer to draft reasons for a decision where the client indicates what the intended decision is?
 - (iii) What advice should the lawyer give if, in preparation of the reasons, the lawyer forms the view that the matter should be decided in a way different from the client's preferred outcome?
 - (iv) Should the fact that the reasons were drafted by a person other than the decision-maker be disclosed to the person who is the subject of the decision?
- (c) **Scenario Three:** A 'fact finding' investigation is to be carried out by an external workplace investigations company, in circumstances where the resulting evidence and findings might be used to inform a disciplinary process.
- (i) Should you advise the client to engage the investigator via lawyers so that legal privilege may apply to the investigation report?
 - (ii) The employee who is the subject of the investigation asks for a copy of the investigation report, but there is no legal obligation to disclose it – what advice should you give?
 - (iii) The client intends to disclose witness statements to the employee under investigation, but wants to redact parts that the client considers irrelevant – what advice should you give? Should you to determine which parts are irrelevant?
 - (iv) The client asks your advice about whether the investigation report and evidence is sufficient to enable a finding of misconduct – is that appropriate advice to give?
- (d) **Scenario Four:** In the course of preparing advice on an unrelated matter, you learn from discussions with agency staff that an administrative practice has developed over time that is contrary to published policy but is implicitly condoned by management.
- (i) Do you need to do anything?

- (ii) Do you need to give advice or report the information? To whom?
- (iii) What about if you learn from a discussion with an agency staff member that some staff deliberately avoid, wherever possible, making written notes or records so as to minimise the ‘risk’ of their thoughts being accessed through RTI?

24. Next, some scenarios where litigation is being planned or contemplated.

- (a) **Scenario Five:** A client is considering commencing litigation where an important question of law arises and could be clarified by the Court. The individual who would be the respondent has done nothing wrong, has serious health problems and is of limited means, but none of that is directly relevant to the question of law.
 - (i) If you are asked to advise on prospects, should you comment on the question of whether the case is more broadly a ‘suitable vehicle’ for a test case?
 - (ii) Is the health of the respondent a relevant consideration in the question of whether to commence litigation?
 - (iii) Is the client’s reputation a relevant consideration?
- (b) **Scenario Six:** Client instructs you to draw a claim and statement of claim in respect of a significant debt, but as you work through the material there is no information about any settlement or ADR attempts.
 - (i) Do you need to ask for that information?
 - (ii) Do you need to give advice about ADR?
 - (iii) When drawing the statement of claim, you form the view that the claim is arguable but has poor prospects of success – do you need to give this advice if not asked? Is it appropriate for you to draw the claim if it has poor prospects?

25. Some scenarios during the course of litigation.

- (a) **Scenario Seven:** A damages claim against the agency is scheduled for a settlement conference, where liability has been denied. You are told that if the matter does not settle, liability will probably be admitted but you are instructed to attend the settlement

conference and negotiate on the basis that liability is denied – is this appropriate?

- (b) **Scenario Eight:** A judicial review application is brought against a decision of the client agency by a self-represented litigant. When reviewing the application, you form the view that the grounds are doomed to fail but there is a potential legal error that the applicant has not identified.
- (i) Do you need to give advice to the client about the potential error?
 - (ii) Do you need to tell the applicant about the potential error? Are you permitted to do so without instructions?
 - (iii) Do you need to tell the Court about the potential error?
- (c) **Scenario Nine:** A matter where the other party is self-represented comes before Court. As you walk in to Court, the client's instructing officer mentions that she is dating the Judge's associate.⁶
- (i) Do you need to do anything?
 - (ii) Raise the matter with the other party? With the Court?
- (d) **Scenario Ten:** A matter where the other party is self-represented comes before a Court for review of a tribunal decision. You realise that the Judge is a close friend of the tribunal member who made the decision, but that is not obvious from the material.
- (i) Do you need to do anything?
 - (ii) Raise the matter with the other party? With the Court?

Dated: 5 March 2020

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⁶ See *Billington v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] FCA 480, [61]-[62].