



# HANDY HINTS FOR GOVERNMENT LEGAL PRACTITIONERS

August 2019

## 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.<sup>1</sup>

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.

**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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As members of the state’s 35,000 strong legal profession we are all united in our objectives; serving court and client, standing up for the rule of law and access to justice and meeting our ethical and professional obligations.

While many threads tie us together, we understand that the needs of a government solicitor differ from the rest of the legal profession. Government careers are steeped in nuance and specificity reserved only for those working within our government departments and agencies. You have additional obligations that are unlikely to arise in private practice.

That’s why the Government Solicitor’s Committee of the Law Society of NSW, which I am proud to have been a member of for more than a decade, has prepared this “Handy Hints for Government Legal Practitioners” guide.

It is a valuable online resource designed to help you carry out your day to day work, advising and representing government or other clients, serving the administration of justice and acting in the public interest. Importantly, this guide has been designed for solicitors working in all tiers of government – Commonwealth, NSW and Local.

This guide is part of our ongoing commitment to adapt and progress, to react and respond to our member’s needs and to further our continued standing as one of the most resilient and respected legal associations within Australia and internationally.

**Elizabeth Espinosa,**  
President, The Law Society of NSW



## 1. 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, guidelines and surrounding 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.<sup>2</sup>

You must comply with the Uniform Law, and the Uniform Rules made under it, that govern the conduct and set out the obligations of your profession.

Key legislation that government legal practitioners should be aware of or is particularly relevant to government practice include:

### New South Wales

- *Crimes Act 1900* (NSW)
- *Government Information (Public Access) Act 2009* (NSW)
- *Government Sector Employment Act 2013* (NSW)
- *Government Sector Finance Act 2018* (NSW)
- *Independent Commission Against Corruption Act 1988* (NSW)
- *Land Acquisition (Just Terms Compensation) Act 1991*
- *Local Government Act 1993* (NSW)
- *Modern Slavery Act 2019* (NSW)
- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Public Interest Disclosures Act 1994* (NSW)
- *Public Finance and Audit Act 1983* (NSW)
- *Public Works and Procurement Act 1912* (NSW)
- *State Records Act 1998* (NSW).

### Commonwealth

- *Archives Act 1983* (Cth)
- *The Criminal Code 1995* (Cth)
- *Freedom of Information Act 1982* (Cth)
- *Judiciary Act 1903* (Cth) (also see *Legal Services Directions* issued under that Act)
- *Lands Acquisition Act 1989* (Cth)
- *Privacy Act 1988* (Cth)
- *Public Governance, Performance and Accountability Act 2013* (Cth) (also see the PGPA Rules and the Commonwealth Procurement Rules).
- *Public Interest Disclosure Act 2013* (Cth)
- *Public Service Act 1999* (Cth).

Some of the additional rules, code and guidelines that apply to government legal practitioners include:

- Model Litigant Obligations (Cth and NSW)
- Public Service Codes of Conduct (Cth and NSW)
- Equitable Briefing Policies (Cth and NSW);
- Briefing Senior Counsel (Cth and NSW);
- NSW Government Procurement Policy Framework (July 2019);
- M2019-01-Guidelines for the Provision of Ex-Gratia Legal Assistance for Ministers, Public Officials and Crown Employees;
- Litigation involving or between Government Agencies (Cth and NSW); and
- Government Core Legal or 'Tied Work' Work Guidelines (Cth and NSW)
  - 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'<sup>3</sup> 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 Generals 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.<sup>4</sup>

More information about the rules, policies and guidelines that apply to NSW government legal practitioners is contained in the NSW Department of Justice's publication *Legal Induction Booklet for In-House Government legal practitioners*:

[www.justice.nsw.gov.au/legal-services-coordination/Documents/government\\_lawyers\\_inductionbooklet.pdf](http://www.justice.nsw.gov.au/legal-services-coordination/Documents/government_lawyers_inductionbooklet.pdf)

## 2. What are government legal practitioners there for?

...[G]overnment lawyers are, as a group, talented lawyers with a deep understanding of the public interest role they perform as advisors to and representatives of government ...

*[W]hat I think distinguishes government legal practitioners from other categories ... is not so much the content of the work they do - but the responsibilities that come from advising and representing governments which, by constitutional or legal theory ... are obliged to act in the public interest and to treat fairly those with whom they deal.*<sup>5</sup>

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 your client's business, and thereby assist your client to achieve its 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, 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 can include 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, state significant development, large commercial contracts, environmental and mining law and a range of other areas with potentially significant social impact.

His Honour Justice Baker has observed that government legal practitioners have a demanding client – the government. However, that also means you 'assume a special responsibility'<sup>6</sup> of ensuring your client acts in accordance with the rule of law and as a model litigant. However, as his Honour commented, what unites government legal practitioners is their deep understanding of, and commitment to, the public interest.

## 3. 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,<sup>7</sup> policy instruments,<sup>8</sup> and legislative enactment.<sup>9</sup> These obligations are consistent with your obligations as an officer of the Court to ensure the efficient and proper administration of justice,<sup>10</sup> and your obligations as a public sector employee to act in the public interest.<sup>11</sup>

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 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; and
- Apologising for wrongful or improper actions.

Here is a link to the NSW Policy

[www.justice.nsw.gov.au/legal-services-coordination/Documents/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf](http://www.justice.nsw.gov.au/legal-services-coordination/Documents/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf)

and the Commonwealth Policy

[www.legislation.gov.au/Details/F2018C00409](http://www.legislation.gov.au/Details/F2018C00409)

**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).

## 4. Other obligations

### Equitable Briefing Policies (NSW and Cth)

The NSW Equitable Briefing Policy is available in full here:

[www.justice.nsw.gov.au/legal-services-coordination/Documents/nsw-equitable-briefing-policy.pdf](http://www.justice.nsw.gov.au/legal-services-coordination/Documents/nsw-equitable-briefing-policy.pdf)

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 Justice.

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.

### 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.

## 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 in November 2014 in response to the Royal Commission into Institutional Response to Child Sexual Abuse, in particular, *Case Study 19: Bethcar Children's Home*. A link to the Guiding Principles is here:

[arp.nsw.gov.au/sites/default/files/NSW%20Government%20Guiding%20Principles%20for%20Government%20Agencies%20Responding%20to%20Civil%20Claims%20for%20Child%20Abuse.pdf](http://arp.nsw.gov.au/sites/default/files/NSW%20Government%20Guiding%20Principles%20for%20Government%20Agencies%20Responding%20to%20Civil%20Claims%20for%20Child%20Abuse.pdf)<sup>12</sup>

The 19 Guiding Principles are binding on all NSW government agencies. Agencies must report annually to the Secretaries' Board or Social Policy Cabinet Committee on their compliance with the Guiding Principles. They include that agencies must:

- Be mindful that litigation can be a traumatic experience to claimants;
- Make training available for lawyers who deal with child abuse matters;
- Consider resolving claims without a formal statement of claim;
- Provide early acknowledgement of the claim and provide information about services and supports available;
- Regularly communicate to claimants;
- Facilitate access to free counselling for victims;
- Facilitate access to records relating to the claimant and alleged abuse; and
- resolve claims as quickly as possible.

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.

## 5. 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.<sup>13</sup> 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;<sup>14</sup>
- 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 are generally 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 9 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 8.

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) and the *NSW Premier's Memorandum 97-26 – Litigation Involving Government Authorities*.

## 6. 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 the Solicitors’ Conduct Rules: see *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.

## 7. 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 focussed 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.

The 2009 Home Insulation Program (HIP or pink batts) provides a number of lessons for government legal practitioners and public officials in a program plagued by multiple catastrophic failures, especially failures by government officials to provide clear, frank and fearless advice. In the 2014 *Report of the Royal Commission into the Home Insulation Program*, Ian Hanger AM QC notes that ‘the stated aim of the HIP was to install insulation into the ceilings of some 2.2 million Australian houses in a period of two and a half years’, which involved a fifteen-fold increase in the number of installations, from 70,000 each year undertaken by around 200 businesses to 1 million each year.<sup>15</sup>

Hanger found that many of the shortcomings of the HIP that resulted in the deaths of four young men involved failures by senior public officials, including:

- Failure to provide candid advice to ministers – for example, a failure to warn candidly that the 1 July 2009 commencement date for the HIP was unachievable if there were to be appropriate protections including an adequate compliance scheme, and a failure to warn candidly about the effect and significance of the decision to relax training requirements for installers;
- Lack of subject matter expertise which resulted in advice being inaccurate, based on false assumptions or poorly targeted; and
- Failure to clearly identify and advise on risks inherent in the recommended approach.

In his report, Hanger emphasised the importance of providing frank and fearless advice to ministers and government. He also recommended that written advice be clear and as frank and robust as the advice given verbally<sup>16</sup> and cautioned that public officials must be ‘encouraged to think clearly, to free themselves as much as possible of institutional biases and taboos, and to have courage when giving advice’.<sup>17</sup>

The HIP case provides lessons for us all about the critical importance of our role as trusted independent advisor to provide accurate and clear advice without fear or favour. This not only helps to ensure that good decisions are made in the public interest but also to avoid disasters such as the HIP.

## 8. Your client’s ability to claim client legal privilege

Your government client<sup>18</sup> 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 used. However, the communication must be confidential,<sup>19</sup> 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 where ever possible so that your client does not lose the ability to claim client legal privilege.

## 9. Limits to client legal privilege

There are a number of limits to client legal privilege, in particular in the context of working in government. In the case of *AWB Ltd v Cole*,<sup>20</sup> Young J found that client legal privilege did not extend to non-adversarial inquiries. 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.<sup>21</sup> 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 voluntarily 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.<sup>22</sup>

Finally, client legal privilege will not protect confidential communications that relate to crime, fraud, or an abuse of power.<sup>23</sup>

## Government Information (Public Access) Act 2009

*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 NCAT: clause 5(3) of Sch 1 to the GIPA Act.

## 10. 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.<sup>24</sup> 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.<sup>25</sup>

In 2016, the NSW Land and Environment Court held in *Woollabra Municipal Council v Minister for Local Government*<sup>26</sup> 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.

A recent decision of the NCAT Appeal Panel in *Transport for NSW v Robinson*<sup>27</sup> 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.

The *Legal Services Directions 2017* 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:

[www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx](http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx)

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:

[www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/nsw-government-lawyers-network-website.aspx](http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/nsw-government-lawyers-network-website.aspx)

## 11. 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 legal practice as a government legal practitioner. Such a practising certificate would enable a government legal practitioners to provide supervision to other legal practitioners in the organisation who hold a restricted certificate. To attain an unsupervised practising certificate, the required period of supervised legal practice must be completed (usually 24 months full time or the equivalent on a part time basis) and your application to remove the condition must be made to the Council of the Law Society and approved.

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

[www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/yourpractisingcertificate](http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/yourpractisingcertificate)

### 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. It is therefore not entitled to engage in legal practice. To provide legal services to a government entity, you must either be employed by a government entity or you must be employed by a law practice. In the latter instance, you would be required to hold either a principal/employee of a law practice practising certificate and be covered by professional indemnity insurance.

## 12. 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 are required to 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.

Depending on the government department or agency that you for, you may also be requested to disclose any voluntary work as “secondary employment” and need to keep in mind any perceived or actual conflict of interest that may arise.

### 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). 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.

### 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 Society to ensure that the CLS is registered with the Society (only CLSs registered with the Society are authorised to engage in legal practice in NSW); and
  - (b) ensure that your legal work is either insured under the National Pro Bono PI Insurance Scheme (through the APBC), or under a 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 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.
3. If you intend to:
  - (a) volunteer at an organisation other than a CLS that is registered with the 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.

4. 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 Society for a volunteer PC which does not attract a PC fee. Please note however, that you cannot hold both a volunteer PC and a Gov PC concurrently.

For further information about volunteering, access

[www.probonocentre.org.au/provide-pro-bono/](http://www.probonocentre.org.au/provide-pro-bono/)

and for further information about a principal's PC, access

[www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/regulatory-compliance](http://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/regulatory-compliance)

### 13. Reporting Lines – reporting to a non-lawyer

Many government department 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.

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: ...’.

### 14. Engaging external legal service providers

On 1 July 2016 the NSW Government established a Government Legal Services Panel. The 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 at:

[www.procurepoint.nsw.gov.au/2015068](http://www.procurepoint.nsw.gov.au/2015068)

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.

### 15. 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.

## 16. When the interests of clients conflict and litigation between government agencies

Premier's Memorandum 97-26 contains guidelines dealing with litigation involving NSW Government authorities. It is available here:

[arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities](http://arp.nsw.gov.au/m1997-26-litigation-involving-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.

## 17. 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.

## 18. Other useful publications/guides

### NSW Legal Induction Booklet

[www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/legal-induction-booklet.aspx](http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/legal-induction-booklet.aspx)

### 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 provide assistance and guidance in dealing with the issue. The Guide should be read in conjunction with the specific policies and procedures that exist in your department or agency and also with the Australian Solicitors' Conduct Rules.

## Endnotes

1. 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.
2. <https://www.legislation.nsw.gov.au/#/view/legislation/2015/244/part2/divfundamental/rule3>
3. 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.
4. Legal Service Directions 2017 (Cth) – Appendix A.
5. Hon M L Baker, Federal Court of Australia, 'What Makes a Good Government legal practitioners', Essentials for Government legal practitioners. Australian Government Solicitors, Canberra. Tuesday 16 November 2010.
6. Ibid.
7. 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; *Mahenthirasa 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.
8. M2016-03 Model Litigation Policy for Civil Litigation (NSW)
9. Appendix B, Legal Services Directions 2017 (Cth)
10. <https://lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/other-duties-solicitors>
11. 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).
12. 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).
13. See for example, the Judiciary Act 1901 (Cth), Legal Services Directions 2017 (Cth), and s 3 of the Crown Proceedings Act 1988 (NSW).
14. Section 25, Legal Aid Commission Act 1979
15. Ian Hanger AM QC, Report of the Royal Commission into the Home insulation Program, 2014, Commonwealth of Australia, p 1
16. Ibid., p 307.
17. Ibid., p 307.
18. 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
19. 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.
20. (2006) 152 FCR.
21. 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.
22. Rule 31, Uniform Law Australian Solicitors' Conduct Rules
23. Section 125 Evidence Act 2005; *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500.
24. Section 122(5)(a)(iv) Evidence Act 1995.
25. Section 122 Evidence Act 1995.
26. [2016] NSWLEC 44.
27. [2018] NSWCATAP 123.



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