



Australian Government
Attorney-General's Department

Secretary

REDEFINING THE ROLE OF GOVERNMENT LAWYERS IN TODAY'S PUBLIC SERVICE

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INTRODUCTION

If I asked you to identify the most obvious changes to legal practice over the last 10 or 15 years, I would guess that increased expectations of speedy or even immediate service would be at the top of the list.

The rationale is plain.

The rapid development of technology, the globalisation of the Australian economy and the close scrutiny of the 24 hour media cycle provide both the means and the need to be on duty all the time.

While most of us haven't succumbed to Graeme Samuel's¹ disturbing habit of checking incoming emails on his BlackBerry at 3 am, I am confident most of us would feel we are – and have to be – constantly available to respond to the demands of our employers or clients.

So we might argue that this is one obvious area where Government has redefined its expectations of lawyers.

But, interestingly enough, this demand for immediate advice and instant service is not a cross only modern lawyers have to bear.

The demands placed on Australian Government lawyers in the earliest days of the Commonwealth were, at least on some occasions, much the same.

EARLY DAYS

Let me give you two illustrations to prove the point.

Sir Robert Garran was the Commonwealth's first public servant and the first Secretary of the Attorney-General's Department, a position he held from 1 January 1901 until he retired on the eve of his 65 th birthday in 1932.

His memoirs, *Prosper the Commonwealth*, were published in 1958. The title was taken from the last line of the *Federation Hymn* which Sir Robert wrote at the beginning of the 20 th century.

¹ Chairman, Australian Competition and Consumer Commission

The Attorney-General's Department was one of the seven original Commonwealth departments of State. It is one of only three departments, along with Defence and The Treasury, which have operated for over one hundred years under their original name and broad charter.

Sir Robert recorded that the Department's *principal work at the outset was to give legal advice, especially on constitutional matters, to all other departments, to draft bills and statutory regulations, and to conduct litigation in which the Commonwealth might be involved*².

His memoirs recall an occasion when the instructions for drafting an Act were '*A Bill is required for the establishment of a Commonwealth Bank*' – *just those words and nothing more; and political exigencies demanded that the Bill should be ready next day. The job was assigned to (the Crown Solicitor, Gordon Harwood) Castle who, with a junior, worked through the night and produced the Bill on time. The Act constituted the Bank and sufficed for all its purposes*³ for many years.

The second illustration involves the Commonwealth's fifth Attorney-General, Sir Isaac Isaacs. He was Attorney in Prime Minister Deakin's second administration for 15 months until his elevation to the High Court of Australia, which had been established in 1903.

Sir Robert noted that Sir Isaac had an amazing capacity for work: *By day he carried the biggest practice of the Victorian Bar; by night he did full justice to the duties of Attorney-General*⁴.

Sir Robert continued: *I once left him at the office at midnight, and on my way home took to the printer a draft Bill that was to be ready in the morning. Coming to the office early, I found on my table an envelope from the Government Printer, containing an entirely different draft, which, in some wonderment, I took in to the Attorney. He confessed that in the small hours he had had a new inspiration, had recovered the draft from the printer, and had reshaped it lock, stock, and barrel*⁵.

MODERN EXPECTATIONS

Nonetheless, despite the parallels those two instances might have with modern practice, we are practising in a different environment in the 21st century.

My view is that government has very clear expectations of its lawyers today. Those expectations have redefined or, at least, varied the emphasis government places on our role over the last few years.

While at first sight a change of emphasis might not seem significant, recognising and responding to those expectations is important. Failure to meet them can affect the view the government has about the value of the services we provide.

Some of the government's expectations of lawyers are broadly the same as its expectations of the public service as a whole. Some of them are more specific to our particular functions.

Today, I have collected those general expectations, as I see them from my perspective as a departmental secretary, under six headings.

² Sir Robert Garran, *Prosper the Commonwealth*, page 151

³ *Ibid*, page 153

⁴ *Ibid*, page 157

⁵ *Ibid*, page 157

The first of them is initiation and competition.

Initiation and competition

In 1997, the Prime Minister, John Howard, said the task of public servants is to *recognize the directions in which a government is moving and be capable of playing a major role in developing policy options.*

There are two things to note about that comment.

The first is that the public service is expected to be sufficiently alert and well informed about current issues to recognize the government's policy directions without having to be told.

In other words, the public service is expected to initiate contributions to the government's policy agenda.

The second thing is that the public service is expected to have a major – but not the only – role in developing policy options.

From its early days, the Howard government made it clear that it was not going to be completely dependent on the public service for policy advice.

Max Moore-Wilton, the then Secretary of the Department of the Prime Minister and Cabinet, underlined this view in an address to the Senior Executive Service in November 2001.

He said: *The Public Service and the public sector remain central in the processes of developing and implementing public policy although they can never again aspire to a monopoly position in any area of policy.*

You are all well aware that that view has translated into a very competitive market for government legal services between private and public lawyers.

Connected government

My next observation is about connected government.

I don't mind whether you call it connected government, whole-of-government or joined up government, the principle is the same. The government expects the public service to work together as a cohesive, well-coordinated whole.

In his introduction to the Management Advisory Committee's report on *Connected Government*, Dr Peter Shergold⁶ said:

There are many reasons that we should work in a whole of government way. Not least is the fact that every major challenge of public administration – ensuring security, building a strong economy, coping with demographic change and crafting social policy – necessarily requires the active participation of a range of central and line agencies.

⁶ Secretary, The Department of the Prime Minister and Cabinet

It follows that the legal advice offered by government lawyers must have regard to the big picture across agency and portfolio boundaries, because that's the way government will assess the advice and judge its usefulness.

The most graphic example of this principle in operation is the Northern Territory Emergency Response following the *Little Children Are Sacred* report into child abuse in Indigenous communities.

The supervising secretaries' group of which I am a member is made up of 12 department heads.

The Attorney-General's Department has provided advice in relation to constitutional law, human rights, racial discrimination, criminal law, international law, native title, alcohol bans and permit zones.

We have contributed to the drafting of the authorizing legislation. We have led the development of policy proposals to improve community safety.

And we are assisting in the implementation of the response in hands on, practical ways such as establishing night patrols in 73 Indigenous communities.

The Northern Territory Response is a massive undertaking that can only be achieved by close and constant cooperation between all of the agencies involved.

Reducing regulation

The third point is that government is – once again – looking for ways to reduce red tape.

The Australian Government commissioned a task force under the chairmanship of Mr Gary Banks AO to recommend ways to reduce over-regulation of business.

In its *Rethinking Regulation* report, the task force said (at page 146): *Governments should not consider introducing or amending regulation unless a case for action is established. What is the problem being addressed? Why are existing regulations inadequate to deal with it? Why are (additional) measures warranted?*

A similar view has been taken in the United Kingdom.

The former British Prime Minister, Tony Blair, hit the nail on the head when he summarized the situation in these terms:

... we are in danger of having a wholly disproportionate attitude to the risks we should expect to see as a normal part of life. This is putting pressure on policy making (and) regulatory bodies ... to act to eliminate risk in a way that is out of all proportion to the potential damage. The result is a plethora of rules, guidelines, responses to 'scandals' of one nature or another that ends up having utterly perverse consequences.

Unfortunately, there is a template response.

A mishap of one form or another occurs and generates media interest; under pressure to act, the government appoints some type of inquiry to find out what went wrong; and the inquiry is 99 times

out of 100 going to make recommendations for increased regulation in the ambitious hope that it will stop the problem occurring again.

When did you last hear of a report that said, in effect: *Things went wrong, but that's life. Trying to do anything about it will cause more harm than good?*

And having asked for the report, the government is virtually bound to act on it.

If the government adopts the philosophy of the Banks report, then I think the message for policy makers and lawyers is loud and clear.

We should think long and hard before recommending more regulation to overcome a relatively minor problem.

Governments make decisions

My fourth point is that the main function of ministers, the Cabinet and the government is to make decisions.

This point was brought home to me very directly one day when a minister looked despondently at an empty in-tray and sighed: *I don't have any decisions to make. I like making decisions.*

Just about everything that is put before Cabinet is framed as a recommended decision.

Ministers may debate the pros and cons of a particular recommendation, but the debate will normally be limited to broad policy issues or the political ramifications of the proposed decision.

They will not be interested in a detailed discussion of the underpinning legal principles unless it is absolutely central to the decision they have to take.

Usually it will be enough for the Attorney-General to say something like: *I have been advised by my Department that this decision will accord with all of Australia's obligations under international law.*

So we have to frame our advice in a matter going to a minister or Cabinet in a way that will assist in reaching the recommended decision.

We also have to ensure that the advice is crystal clear and definite. Even if the legal position is uncertain, we can provide firm advice which takes that uncertainty into account and Cabinet can make its decision on that basis.

Understand the process

My next observation is related to the previous point.

The government's broad expectation of the public service generally, including lawyers, is that we understand how governments make decisions.

A while ago I attended a meeting with a large agenda - so large it caused complaints from participants about the volume, and even the weight, of the reading material.

Without thinking, I said: *Cabinet runs the country on less paper than this.*

It is counter-intuitive but it's true.

Many decisions have strict deadlines and ministers are busy people. They have hectic schedules and Cabinet only meets so many times a year. They have to get through a lot of business very quickly.

That is why the policy proposals the public service puts to Cabinet are refined to a point where they can be framed as a recommended decision and Cabinet is invited to say yes or no.

I think of the decision point as the apex of a triangle. It is the final distillation of all the policy development and analysis that has gone on before the matter reaches Cabinet level.

All of that work supports the decision and provides the road map for its implementation but – and this is a big but – Cabinet does not have to know about or get involved in all that detail.

Federal – State relations

The last general point I want to make is about federal – state relations.

We are lucky enough to live in one of the world's most stable democracies.

That stability is largely due to the fact that our system of government can adapt to meet changing times and circumstances.

But, in the global village of the 21st century, Australia will only be able to advance in many significant areas if it acts as one nation.

Fortunately, our federal system allows governments to do almost anything they want to do as long as they are willing to cooperate.

In the current election year, both the Government and the Opposition have acknowledged the importance of making our federation work effectively and efficiently.

In August, the Prime Minister spoke about *a sense of aspirational nationalism in the federation*⁷.

He said: *We should want and aspire to achieve the best possible outcomes for Australians wherever they might live and by whatever method of governance will best deliver those outcomes.*

Sometimes that will involve leaving things entirely to the states. Sometimes it will involve cooperative federalism. On other occasions it will require the Commonwealth bypassing the states altogether and dealing directly with local communities.

From the other side of politics, the Shadow Minister for Federal/state relations, Bob McMullan MP, made the following observation to a CEDA luncheon in September:

⁷ John Howard, *Address to the Millennium Forum*, Sydney, 20 August 2007

*In Australia, to achieve the full benefits of a modern federation, reform of our federal-state relations is necessary. We need to look at reallocation of roles to reduce duplication and clarify responsibilities. We need to improve the mechanisms for inter-governmental cooperation, and we need to look at a program of concrete measures for enhanced cooperation in particular policy areas*⁸.

It follows that lawyers can think more creatively about what might be constitutionally possible over the next few years, if the Commonwealth and State governments agree to work together on our most pressing national problems.

I am sure governments will expect us to contribute to finding solutions for positive initiatives, like the proposed electronic conveyancing system, when they hit jurisdictional hurdles that could prevent us reaching a beneficial national outcome⁹.

SOME MORE DETAILED POINTS FOR LAWYERS

The observations I have made so far apply to public servants generally.

Now I would like to move on to a few points which have more specific application to government lawyers.

There are some obvious areas where lawyers have to meet government expectations.

Australian Government lawyers have to comply with the Legal Services Directions.

We need to have regard to useful publications like the ANAO's Legal Service Arrangements Better Practice Guide and the ACLA In-house Lawyers Practice Manual.

We need to keep up to date with court decisions affecting the way we practice, like the recent *Telstra* decision affecting legal professional privilege.

All of these are givens. What I am more interested in is how we go about practicing as a government lawyer.

What does the government really want to know?

A major point to make straight away is that it is essential you understand what the purpose of your advice is and what it is the government really wants to know.

As I have said, Ministers are mainly interested in your conclusion and your judgment, and not all the research and the issues you took into account in getting there. Although – and I stress this qualification – they will expect you to be able to fully justify your conclusion if that becomes necessary.

This may sound blindingly obvious but, from my observation, not all lawyers understand it or at least put it into practice.

⁸ Bob McMullan, MP, *After the war with States is over: Reform in a post-Howard era*, Sydney, 6 September 2007

⁹ Chris Merritt, *The Australian*, *\$30m IP fight threatens national electronic conveyancing push*, page 33, 26 October 2007

You should also think carefully about how you deliver your advice. By this I do not – I emphasize – do not mean that you tailor your advice to the advice the government wants to hear. Bad advice will cause trouble for everyone.

What I mean is that you should make sure you get quickly to the point the government is interested in. It is important that you don't take up valuable time and space with what the minister or the government would regard as unnecessary verbiage. That will damage your credibility. It could also suggest that you don't actually understand what the real issue is and increase the likelihood that your opinion won't be asked for again or will be treated with reservation if it is.

Once again, we can learn some lessons from the earliest days of the Commonwealth.

In 1981, my Department published the *Opinions of the Attorneys-General of the Commonwealth of Australia* from 1901 to 1914.

The opinions provide great lessons in writing precise and useful advice. Let me quote two of them to prove the point.

The first Attorney-General, Alfred Deakin, was asked if the Commonwealth was liable to pay state stamp duty. On 20 January 1902, he dealt with the issue in these 55 words:

I am of the opinion that stamp duty is not payable under State Acts, either by the Commonwealth or by individuals with whom the Commonwealth deals, in respect of any documents which are part of any transaction between the Commonwealth and any other party for the purpose of conducting the public business of the Commonwealth¹⁰.

The next example is an opinion on the entitlement of a State agency – in this case, the Melbourne and Metropolitan Board of Works – to charge the Commonwealth interest in accordance with its governing State legislation.

The Attorney said: *These provisions are not applicable to the Commonwealth for two reasons: (1) that they do not purport to bind the Crown; and (2) that the State Parliament has no power to impose this liability on the Crown as represented by the Commonwealth Government¹¹.*

This precision in advice would greatly suit the Prime Minister, who insists his briefings be limited to one page, no matter what the subject.

But there were other occasions where the Attorney's succinctness left the question up in the air.

Under section 19 of the *Customs Act 1901*, a wharf owner was required to provide the customs collector with *suitable accommodation on his wharf*.

The question posed to the Attorney-General in December 1902 was whether that included the obligation to supply office furniture.

¹⁰ Attorney-General's Department, *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1, 1901-1914*, page 50, Opinion number 38

¹¹ *Ibid*, page 108, Opinion number 86, 18 August, 1902.

Mr Deakin opined: *The term ‘office accommodation’ is somewhat vague. I hardly think that a bare room is ‘suitable office accommodation’ – but what precisely can be claimed under that section it is impossible to say*¹².

Legal problem solvers

It is interesting to note that each of these brief opinions is focused on solving a problem, not expounding the law.

One sometimes irritating aspect of my job is that, when I attend a meeting, I am often the only lawyer there.

Other participants can look accusingly at me as if I am personally responsible for any perceived fault in legislation, any court decision that goes against the government or any legal advice, from whatever source, that the people present feel is unhelpful or impractical.

In one meeting, there was a lot of frustration expressed about the restrictions the *Privacy Act* imposes on what was seen as efficient administration.

As this Act falls under the Attorney-General, there was an unspoken implication that somehow the Department was responsible for this dilemma.

When I looked into the problem, I found it actually had nothing to do with the *Privacy Act*. It was, in fact, a problem arising from secrecy provisions in a number of other Acts, none of which are administered by the Attorney.

I made this point at the next meeting and received this blithe response: *Oh, we know that, but it all comes to the same thing.*

I mention this story because it is completely contrary to my perception of the role of lawyers. I don't accept the commonly expressed sentiment that lawyers create problems. I regard good lawyers as legal problem solvers – people who solve problems rather than create them. They take a close interest in a client's problem and accept personal responsibility to try to find an acceptable solution.

They also think through the import of the specific advice they have been asked to give and point out any consequential issues that could arise but might otherwise be overlooked.

That's what I have always tried to do but it needs a continual, combined effort from government lawyers to get that helpful message across to their public service colleagues.

Ways to do that

I have already indicated some of the ways in which I think we can do that.

That includes giving short, sharp advice that deals with the real issue under consideration; focusing presentations so they cut straight to the heart of the matter; understanding how your advice can help the minister achieve his or her goals; providing options wherever possible; preparing advice that

¹² Ibid, page 141, Opinion number 114, 10 December, 1902

takes account of whole of government issues; and attending to the fundamentals of good service such as prompt responses and timely advice.

I urge people to avoid technical language, jargon and hackneyed, meaningless phrases. One illustration is that I asked staff to write this year's annual report in language appropriate for *an intelligent but uninformed reader*.

I insist on minimizing excessive definitions and acronyms.

If, for example, a letter refers to the Family Law Act and no other Act is mentioned, there is absolutely no need to add the redundant definition 'the Act'.

In my Department, one division in particular is the most devoted to the excessive use of acronyms. I have challenged it to reduce the use of acronyms and, to underline the point, I have christened it *Acronym Central (or AC)* until it gets its acronyms under control.

Even so, and despite my best efforts over nearly eight years, I have yet to rid my Department of this infuriating habit.

And I also expect lawyers to be prepared to stand squarely behind the advice they have given.

When the Department has taken extensive legal advice in a matter, I ask for a certificate from the lawyers who have assisted us in the negotiations before I sign on the dotted line.

If it is, say, a lease, I ask for a certificate on letterhead and signed by the responsible lawyer along these lines: *We have reviewed the documents and confirm that they contain the terms agreed between the lessor and the Department. The lease in its attached form is in order to be executed on behalf of the Commonwealth.*

I don't see anything wrong with asking lawyers to back up their advice in this summary form and, to their credit, whenever I have asked lawyers for this certificate, it has been given.

More operational roles

The final observation I want to make about lawyers in particular is that the Australian Government has greatly increased our operational roles over the last few years.

While Sir Robert Garran saw the Department's role as giving legal advice, drafting legislation and conducting litigation – that is, traditional lawyer roles – today we are also delivering some important government services.

I have already mentioned our role in establishing night patrol services for Indigenous communities in the Northern Territory.

I can also mention the Protective Security Coordination Centre, the National Security Hotline, Emergency Management Australia, the Australian Background Checking Service – known as AusCheck – and our new Personal Property Securities Division.

These are all operational as well as policy and advisory areas.

AusCheck is now providing what will be thousands of background checks each year for people who apply for aviation or maritime security identification cards.

The Personal Property Securities Division is developing and will operate the national personal property securities register.

All of these divisions perform significant functions which include policy advice and the implementation of the government's decisions and the operation of the resultant services.

This operational responsibility is something that Sir Robert Garran would no doubt have handed over to a line department.

Part of the rationale for this increased operational role is the Australian Government's resistance to creating more and more small executive or statutory agencies since the Uhrig Report recommended a greater consolidation of government activities a few years ago.

Part of it is simply that the legal, policy and operational activities (particularly in developing the software programs that will operate these services) are so interlinked that it makes sense to have the total responsibility for development and delivery of the service in one organization.

CONCLUSION

So, these are some of my thoughts on the role of government lawyers in today's Public Service.

My own, completely unbiased view, is that we – together – make an absolutely essential contribution to the effective government of Australia.

Put simply, while there are areas in which we can improve, as in all professions and occupations, governments could not function without lawyers.

If we concentrate on the issues I have touched on today, it will help both ministers and other public servants recognize the collective worth of the contribution lawyers make to sound administration and good government.

Robert Cornall AO
Secretary

2 November 2007

(4,228 words)