



Being a government lawyer

The Honourable Marilyn Warren AC Chief Justice of Victoria

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I am a former government lawyer and very proud of my background.

The work performed by government lawyers in all sectors is extremely important to the machinery of government and the maintenance of our democracy.

The role of the government lawyer has changed dramatically and grown exponentially in the last 40 years. It used to be that government legal work was largely confined to the offices of the government solicitor, formerly known as the Crown Solicitor and the office of Chief Parliamentary Counsel. That was very definitely the case when I started my public service career in 1974. Then there was the Victorian Crown Solicitor, Mr John Downey and the Victorian Chief Parliamentary Counsel, Mr John Finemore QC. There were some specialised 'outposts'. The solicitor to the Public Trustee where I did my articles, and the Titles Office where the legal examiners worked, were the exceptions. There were one or two individual offices opened, for example for Victoria Police, but those lawyers were on secondment from the Crown Solicitor's office.

Generally speaking there was not that much litigation involving government. Where it occurred it was conducted through the Crown Solicitor.



Otherwise, the main areas of legal practice within the public service were offices within the Crown Solicitor's office, such as the Criminal Law Branch where all criminal prosecutions were managed, or the Public Solicitor's Office which managed defence work. There were also specialist outliers dealing with workers' compensation and insurance, at one point the office of Michael Walsh and later that of J D O'Brien, the solicitors to the Insurance Commissioner. There were also a few lawyers sprinkled here and there in places such as the Companies Office, later the Corporate Affairs Office.

One aspect I must mention is that in the 1970s there was no equal opportunity legislation in place. Under the *Public Service Act* at that time women could not work in the administrative division when they married. The only division available to women was the professional division. When I joined the Victorian Public Service as its first articulated clerk in the office of the Solicitor to the Public Trustee, there were only four women lawyers in the service of the State government: Rowena Armstrong and Jan Wade as Assistant Chief Parliamentary Counsel, Susan Bath at the Stamps Office and Ruth Trait at the Titles Office.

A remarkable change has occurred. Women lawyers now work throughout the State government, including Marlo Baragwanath the Victorian Government Solicitor and Marina Farnan the Chief Parliamentary Counsel (whose predecessors include Rowena Armstrong QC and Gemma Varley).

In the latter part of the 1970s some significant law reform commenced in Victoria under the stewardship of the then Attorney-General the Honourable Haddon Storey QC in the Hamer government. The type of reform that was seen included the Uniform Companies Code, the Credit Legislation (which recognised properly for the first time consumers' rights in the



provision of credit), residential tenancies reform (which did away with centuries of property law and for the first time gave balanced rights to tenants), status of children legislation to remove discrimination against children born outside marriage, and sexual offences reform including the decriminalization of same sex acts.

For the first time lawyers were employed in the then Law Department to work directly on the development of legal policy with the Attorney-General. I was one of the first. The opportunities were glorious. I had the chance to work constantly with a minister embarking on seismic law reform. Very quickly other and in some instances very senior legal policy officers were engaged. We became a division within the Law Department and a very busy one too. Our roles involved developing policy that led to changes in the law, engagement with and instructions to parliamentary counsel and quite frequently assistance to the minister through attending parliamentary committees and sub-committees and even sitting in the officers' box on the floor of the chambers in the parliament. There was also work with the Standing Committee of Attorneys-General- at one point I was the Victorian officer to the Committee.

If we look at the shelves in our libraries we see the growth of legislation over the last 40 years has been utterly extraordinary. We see volume after volume of new acts each underpinned by careful legal analysis and policy development, meticulous drafting and, of course, the presentation of the legislation to the parliament. One of the things I did in my role at the Law Department was write the explanatory memorandum and the second reading speech for many bills. The other thing I did often as a legal policy officer was to participate in interdisciplinary and inter-departmental committees. This work exposed me to quite different areas of government- building and planning approvals, child welfare, victims of crime reform, in vitro fertilisation and estate agents are a few examples. During this era engagement with



the wider legal profession was generally constrained or non-existent. However, there were pieces of legislation which created a template and I would add raised expectations of consultation and acknowledgment of the rights of individual members of the community. Let me give an example. The *Residential Tenancies Act* came about through the establishment of a residential tenancies working party chaired by the then Ombudsman, Norm Geschke. It involved legal policy officers from the Law Department, what I might term the property interests, estate agents, consumers, and significantly consumers' lawyers, including Michael Salvaris from the Tenants' Union. To my knowledge it was one, if not the first, of a democratic consultative legislative reform exercise in Victoria's history. The provisions in the Residential Tenancies Bill were doubtless reflective of compromise but nonetheless broadly purported to reflect all interests at the law reform table. It was a model that has been expanded upon and developed across government for many years. Indeed it was one I used on occasion in more recent times when chairing the Civil Procedure Advisory Committee established by the Victorian Attorney-General.

Of course, historically the government has been advised and represented by the Solicitor-General. Victoria has a long and distinguished lineage and many of the solicitors-general have been appointed to the High Court of Australia and the Supreme Court of Victoria. The Solicitor-General up until the 1980s was the government's advocate in both civil and criminal matters before the Supreme Court and especially the High Court. During the late 1970s and 1980s there were hotly contested cases before the High Court dealing with the topic of state rights. Simultaneously, the federal government was engaging in consultation over very significant international treaties such as the Law of the Sea. Historically, Victoria always played a very significant, leadership role in the development of state interests in the treaties which we now find reflected in extensive federal legislation. Government lawyers



within the Crown Solicitor's Office and Parliamentary Counsel worked closely with Ministers and government on these areas.

From my perspective, working as a government lawyer brought me opportunities and exposed me to experiences which were extraordinary and un-paralleled with any experience I could have had in private practice at that time. It is a very significant responsibility to provide advice to a minister and prepare documents for Cabinet. It was a responsibility which was burdensome but exciting.

The changing, and expanding role of the government lawyer over the last forty years is extraordinary. There are significant changes I would highlight.

First, the growth in volume of government legal work especially driven by huge increases in legislation.

Second, the growth in litigation generally. We live in a much more litigious, rights-conscious and articulate society. Suing the government is not unusual, particularly in a forum such as the Victorian Civil and Administrative Tribunal. There are community legal centres and other services including pro bono work by the Victorian Bar and the profession which support and facilitate citizens in litigation.

Third, the proliferation in non-centralised legal offices. Ministers, departmental secretaries and departments require specialised legal advice and support in an immediate, proximate and readily accessible capacity.



Fourth, the growth of outsourcing of government legal work. Governments have approved firms (on Legal Services Panels), which represent the public sector. Obvious examples are large government contracts. I suspect the outsourcing of legal services has made government lawyers highly competitive as to their skills and capacity. Anecdotally, I sense in the last few years, leaving to one side major commercial transactions, there has been a swing back to government lawyers because the quality and service they offer is of a desired standard and is cost- and skill-competitive.

Fifth, the dramatic increase in the representation of women as government lawyers, including in very senior positions. Relevantly, women represent Government as counsel in litigation, royal commissions and inquiries. To the fore was Justice Pamela Tate who was Victoria's first female Solicitor- General and Justice Karin Emerton who was Victoria's first female Crown Counsel - Melinda Richards SC presently occupies that role.

Sixthly, the substantial legal obligations that press on the shoulders of government lawyers. I will expand on that topic shortly.

Reflecting on the shift over the last 40 years and the growth in work for government lawyers, it is worthwhile reflecting on the wide-range of work that is performed these days. The Crown Solicitor has become the Victorian Government Solicitor, the criminal role of the Crown Solicitor has devolved to the Director of Public Prosecutions, the Public Solicitor's office has morphed into Victoria Legal Aid, the legal examiners of the Titles Office still exist but are now part of the Registrar's Office. The Companies Office has been 'nationalised' and forms part of the Australian Securities and Investments Commission, superannuation and financial matters are administered through the Australian Prudential Regulation Authority, the Office of



Parliamentary Counsel is located within the Department of Premier and Cabinet, other prosecutorial agencies have their own offices for example the Environment Protection Authority. And then there are the institutions which represent the state in workers' compensation - the Victorian Workcover Authority - and motor vehicle accident matters - now through the Transport Accident Commission. There are many more.

Of course, government lawyers function within the state public service. They are not part of the political machine. Their obligation is plainly to provide independent and impartial advice to the government of the day and to ministers. I sometimes wonder to what extent things are more short-lived these days than when I worked in government. At that time most public servants were permanent unless they were going through the temporary phase before becoming permanent. Permanence, of course, brought with it integrity, confidence and independence from the government of the day. The tension is not that portrayed in *Yes Minister* with Sir Humphrey Appleby and all his shenanigans. Inevitably there is a tension and quite properly so between lawyers who work in and serve the public service and political offices. Ministers have advisers who are able to advise upon the 'politics' of law reform and legal action.

This independence operates from the highest level. An exemplar is the role of the Solicitor-General for Victoria. Under the *Attorney-General and Solicitor-General Act 1972* the Solicitor-General receives a salary, allowances and pensions equivalent to that of a judge of the Supreme Court. It was a significant move towards recognition of the need for independence. It was a far cry from the 1850s when law officers were introduced as members of the colonies' executive council, as advisors to the Governor. That role was a political one of governance. In New South Wales, the Solicitor-General shared the responsibilities of the



Attorney-General. In Victoria, the Solicitor-General often took the folio of the Minister of Justice. This history is explored by Associate Professor Appleby in her text *The Role of the Solicitor-General: Negotiation Law, Politics and the Public Interest*. Appleby notes that during the colonial period there were 'tensions between the Law Officers' loyalty to the political Executive as members of the Executive Council on the one hand, and their legal and public obligations on the other'.

Government lawyers are advisers to the government but not part of it. The role is fundamental to the rule of law. While closely associated with government, government lawyers remain fundamentally separate from it and provide the first check on any abuse of executive power.

This interpretation of the role is equally true for all those government lawyers who work as part of a statutory body and who may define themselves as a member of that particular organisation. For example, for all Independent Broad-based Anti-corruption Commission lawyers or Office of Public Prosecutions lawyers or Freedom of Information Commission lawyers, the paramountcy of the rule of law and the prioritisation of their work as a check on the power exercised by that body is no less crucial than those who are not embedded in a particular department.

The advocacy aspect of the role of the government lawyer can obscure the role as adviser but it is this role that is more critical. As an advocate an individual must be wary of becoming a mouthpiece of the client. One's role as an advocate is coloured by the responsibilities of the government lawyer as an agent of the rule of law and officer of the court. The role of advisor stays ever-present. The reverse is not true: there is no need to maintain



adherence to the client's point of view when acting as an advisor. As Justice Gageler has observed 'rather, it is often more valuable to be able to disagree or say no'. The role of advisor and agent of the rule of law is the paramount one.

I was very struck by the comments of Sam Silkin, a former Attorney-General of England, Wales and Northern Ireland:

I regard it as the Law Officer's duty to learn as much as he can of his colleague's policies, their intentions, their wishes, their methods, indeed the very temperaments and characters. I believe that only so can he give them the best possible advice, not merely as to what they cannot lawfully do, or should not with propriety do, but also as to how they can achieve their aims by means which are both lawful and proper ... the Law Officer must know the colleague he is dealing with and the colleague he is dealing with must know the Law Officer, and know him well enough to be able to place his trust in his experience, his wisdom and his full-hearted desire to achieve the governmental objectives which unite them in a common Ministry.

This view might resonate in particular with those who work as government lawyers in statutory bodies. They may identify as part of the body and live and breathe their work, philosophy and approach. The question is whether the individual crosses the line and aims to achieve the governmental objectives of the institution. It is always important for the government lawyer to maintain a level of removal from the client even if the role of government lawyer is embedded within the office of the institution.



In practical terms, this is sometimes achieved through a geographical distance or separate office. I note that when she was Solicitor-General of Victoria, Justice Pamela Tate maintained chambers privately in Owen Dixon Chambers and chose not to maintain a presence in government offices.

When he succeeded her Honour, Justice Stephen McLeish set up two sets of chambers, one privately and one within government. As Appleby observed, having private chambers maintained a level of autonomy and involvement with the private bar and was symbolic of independence from government.

There is no doubt it can be challenging for government lawyers to meet all the pressures and obligations upon them. They have a special type of client who is quite different from the commercial or criminal client for example. The government client, often the politician, has policies and practices they wish to see implemented and when relevant enforced and applied across society.

Simultaneously, there are legal burdens. The government lawyer is subject to the requirements of legislation such as the *Civil Procedure Act 2010*. It can sometimes be a balancing act to meet the demands of overarching obligations to the court and simultaneously meet the demands and expectations of the government client.

The Supreme Court has made it plain that the overarching obligations are mandatory. There is of course the paramount duty to the court to further the administration of justice in relation to any civil proceeding, and an additional ten overarching obligations. These are the duties to:



- (1) act honestly;
- (2) only make claims that have a proper basis;
- (3) only take steps to resolve or determine the dispute;
- (4) cooperate in the conduct of the civil proceeding;
- (5) not mislead or deceive;
- (6) use reasonable endeavours to resolve the dispute;
- (7) narrow the issues in dispute;
- (8) ensure costs are reasonable and proportionate;
- (9) minimise delay; and
- (10) disclose the existence of documents critical to the dispute.

Then there is the fact that acting for the government, whatever the governmental institution or role, is subject to the Model Litigant Guidelines.

The guidelines can impact on the way the government client operates including, for example, the administration of a beneficial fund under the *Titles Act*. This occurred in *Solak v Registrar of Titles*. In that case the Registrar had run an argument which the Victorian Court of Appeal considered tenuous at best- entirely without merit at worst. The Court of Appeal reminded the government agency that:

The purpose of the fund is not to accumulate money but to provide compensation to persons who are deprived of an interest in land by the operation of the indefeasibility provisions. The registrar's primary role is to ensure that persons who are entitled to compensation receive it.



Then there is the obligation with respect to the very way in which litigation is conducted. One example occurred before Hargrave J in the Trial Division of the Supreme Court in *Director of Consumer Affairs Victoria v Scully (No 2)*. Large volumes of material were being put before the court by the Director where the defendants were either unrepresented or the extent of their representation was in doubt. The volume of, and manner in which, the material had been filed, contributed to Hargrave J's conclusion that the case was not being conducted in accordance with the model litigant guidelines- amongst other things by maximising the delay in the duration of the trial and the time for delivery of judgment.

In *Operation Smile*, where the defendant was a self-represented litigant, Justice Pagone in the Supreme Court held that the Director had obligations to cooperate with unrepresented parties, to bring matters adverse to the Director's case to the attention of the court, to act so as to narrow the scope of the issues in dispute and to act to ensure that the costs incurred are both reasonable and proportionate to the amount in dispute.

Justice Croft of the Victorian Supreme Court in *Comaz Aust Proprietary Limited v Commission of State Revenue* put it this way:

The Model Litigant Guidelines have evolved from the recognition at common law that governments should play fairly, and seek to bridle excessively adversarial behaviour by setting acceptable standards and boundaries for the conduct of litigation. It has been said that the guidelines reflect the expectations citizens have of their government and its agencies to respect the rule of law, to observe the spirit as well as the letter of the law, and to be fair, honest and even handed when dealing with members of the public.



Similar approaches have been followed in the New South Wales Supreme Court and the Federal Court.

So, Civil Procedure Act obligations, Model Litigant Guideline standards – what else could possibly be required of the government lawyer in the conduct of a case, acting in the best interests of the government client? Well there is the Human Rights Charter. It was intended to provide not only a vehicle for the interpretation of legislation so as to protect the human rights of individuals but also it had a clear intent to modify and influence behaviour across public administration. Justice Emerton in *Castles v Secretary of the Department of Justice* summed it up this way:

The consideration of human rights is intended to become part of decision making in processes at all levels of government. It is therefore intended to become a ‘common or garden’ activity for persons working in the public sector, both senior and junior.

As government lawyers I venture to suggest it is critical to the role to be informed of and have advanced knowledge and awareness of the application of the *Human Rights Charter*. There is now a solid body of jurisprudence that has been developed by the Supreme Court both in the Trial Division and the Court of Appeal. There is an excellent bench book on the Charter available through the Judicial College of Victoria JOIN website. It assists government lawyers greatly.

There is an expectation that in the day to day activities of government the Charter will be complied with. Obviously and self-evidently, this occurs when a minister introduces a bill to



the parliament. A bill requires certification of compliance with the Human Rights Charter at the point of introduction. However, Charter compliance not only relates to legislation and the conduct of litigation. It also arises in the context of the conduct of actual government business.

Examples of such arrangements were considered and discussed by the Supreme Court of Victoria recently in three matters which I will describe as the *Certain Children* litigation. The first case before Garde J concerned the detention of children who had been transferred from the Parkville Youth Justice Centre to a re-gazetted area called Grevillea within Barwon adult prison. The arguments in the case fell into two basic components. First, judicial review as to the conduct by government of government processes before gazetting the Grevillea facility. Secondly, as to whether the requirements of the Charter had been met in the exercise of the decision to make the gazettal. In *Certain Children No 1* Garde J held that the government party failed on both counts. In the course of the judgment it is revealed that the defendant minister was advised by her department and senior lawyers within the department. The case is relevant as to advice to be given by government lawyers. In the Court of Appeal, Garde J's decision with respect to judicial review was substantially confirmed. The Human Rights Charter aspect of the appeal was deferred but later abandoned. In *Certain Children No 2* Dixon J faced a similar dichotomy in argument, that is, judicial review as to the conduct of the ministerial office in reaching the decision that was subsequently gazetted and, also, the question of whether the process adopted by the department met the requirements of the Charter. Again the government parties were unsuccessful. There was not an appeal. In an endeavour to satisfy the Charter requirements in *Certain Children No 2* it would appear from the judgment and the evidence described that legal advice proffered to the minister was given externally but still by government lawyers through the Victorian Government Solicitor.



Legal advice in these areas is often complex and difficult and inevitably there are political pressures that bear down on the government lawyers giving advice because of the emergency that may surround the political decision being made. I venture to say that sometimes a government or a minister may have to be told that things simply cannot be done as quickly as they might hope. In other words it is better to give sound legal advice than rushed and pressured legal advice which may be vulnerable to attack in all the circumstances.

Ultimately there is one point I particularly want to make. The role of the government lawyer is important. It matters. Governments may make 'political' mistakes with legal consequences. The role of the government lawyer is to provide strong, sometimes courageous, accurate and independent legal advice.

In Victoria we have very fine traditions in the state's public administration. I was very proud, many years ago, to be a government lawyer in the Victorian Public Service. All government lawyers whether state or federal should be proud too.