

# Ethics in practice for government lawyers

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# Lawyers and their ethical role in justice

*“Lawyers may generally be said to be necessary to the working of the law in all its respects. **But it is only the ethical lawyer who is essential to a system of justice.**”*

## ***ETHICS AND THE PROFESSION OF THE LAWYER***

**The Hon Susan Kiefel AC, Chief Justice, High Court of Australia**

**Queensland Law Society, The Vincents' 48th Annual Symposium, 26 March 2010**

# Australian Solicitors' Conduct Rules 2015

## 3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

## 4. OTHER FUNDAMENTAL ETHICAL DUTIES

4.1 A solicitor must also:

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
- 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
- 4.1.4 avoid any compromise to their integrity and professional independence; and
- 4.1.5 comply with these Rules and the law.

# Lawyers' ethics are protected by LPUL

## s 39 Undue influence

A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations.

Penalty: 100 penalty units.

*Legal Profession Uniform Law Application Act 2014 (Vic) Schedule 1*

## Custodians of public trust

*“Government lawyers arguably have a greater responsibility than their private sector counterparts to foster integrity, for they are custodians of the public trust not only in the legal profession and the administration of justice, but also in the administration of government.....in line with the foregoing, government lawyers’ conduct must both be, and be seen to be, above reproach. It is critical that the government should, in all its legal endeavours, be seen to uphold the law.”*

**Lawyers’ Professional Responsibility**, G E Dal Pont, 7<sup>th</sup> edition Thomson Reuters at para 13.80

# Government lawyers – justice gatekeepers

*“It is likely impossible to articulate or capture the importance of ethics in government....If government lawyers—those who advise government actors about the legality of their actions, those who work for government agencies, those who exercise prosecutorial power, and those who administer the law—fail to act as gatekeepers of the law, the law and its purposes can and will be undermined. Further, such a failure is particularly serious because it makes way for government unlawfulness and corruption.”*

**Introduction, The Ethics of Lawyers in Government, New Orleans, Louisiana, Professor Margaret Tarkington, January 3, 2019**

[Introduction: The Ethics of Lawyers in Government by Margaret Tarkington :: SSRN](#)

## Upholding the rule of law is essential

*“In all of the examples discussed the (government) client is subject to the rule of law. This obviously affects the duties and responsibilities of the lawyer instructed to act for the government. An instruction given to such a lawyer to do something that is unlawful, or to assist in something that is unlawful is not an instruction that the client can give in accordance with the law. The lawyer acting for the government cannot accept such instructions. By definition the person purporting to give the instructions does not have authority to do so. The responsibility of the lawyer to the client is to take whatever steps may be appropriate and to give such advice as may be necessary in order to have the instructions changed or varied.”*

**The Duties of Lawyers Acting for Government, Selway (1999) 10 Public Law Review 114.**

# Government lawyer role (1)

*“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”*

## Remarks to the Government Lawyers Conference

The Hon. Marilyn Warren AC, Former Chief Justice of Victoria

Friday 23 June 2017



## Government lawyer role (2)

*“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.”*

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# Victorian Government Lawyers and Ethics

1. [Public Administration Act 2004](#) (Victoria)
2. [“Safeguarding Integrity”](#) – IBAC guide to the integrity system in Victoria (December 2016)
3. Individual statutory provisions for various government agencies, e.g. [Legal Aid Act 1978](#) (s 16)
4. [Revised Model Litigant Guidelines for the State of Victoria](#) (March 2011)
5. Individual codes of conduct or policies published by Victorian government departments and agencies, including the [VPS Code of Conduct](#) published by the VPSC.

# Ethics issues we will discuss today

1. Pandemic Ethics
2. Paramount duty to the court and administration of justice
3. Ethical duty to maintain integrity and independence
4. The ethical dangers of social media
5. Ethical duty of integrity and independence
6. Who is your client?
7. What does it mean to be a model litigant?

**Your ethical  
compass**

## My child read counsel's opinion...

You are a solicitor working in a government legal department. During the various pandemic lockdowns in Victoria you worked from home using a laptop provided by your employer and shared a printer with your family including your spouse and 3 children aged 8 to 16 years. You shared a study with your spouse, but you each tried very hard to keep a “clean desk” policy as far as paper documents are concerned. During the last lockdown you were working on very sensitive legal issues for your employer where an urgent response was required. You printed off an opinion from counsel and put it down when you stepped out and took a mobile phone call. It appears that your eldest child read the opinion as he is doing legal studies at school.

**What is your ethical position and what steps might you take?**

## These documents are not to be produced

You are working as part of a government agency legal team instructing counsel in a board of inquiry. Certain documents relevant to the work of the inquiry have been sought by senior counsel assisting it. You have been tasked with gathering documents from across the agency and sending them to the inquiry's senior counsel. In the course of carrying out the work it has been necessary for you to question agency staff about whether they hold any of the documents being sought. In one instance, a senior agency executive has instructed you that several of the documents under her control are not relevant to the work of the inquiry and they are not to be produced. You are of the clear opinion that these documents are relevant and you advise that they must be produced. The senior executive will not budge from her position.

**What is your ethical position and how should you respond?**

## Good outcome, but what about the process?

You were appointed to be a member of a 4 person selection panel to interview applicants for a new position in your department. Ms X is also a member of the panel given her hands-on expertise in the particular work area. After interviewing 5 applicants, the panel concluded that none was suitable for appointment to the position. Following supportive internal panel discussions, Ms X subsequently decided to submit an application for the position. The interview panel was reconvened with Ms X no longer being a member. She performed very well in the interview and all panel members believed that she would be very good in the position. However, because you are a lawyer, you have doubts about the process.

**What is your ethical position and how should you respond?**

## It's not my job to interfere in P&C issues

You work as a member of a team of 9 lawyers in a government department. Your People and Culture department has recently published a code of respectful workplace conduct for all employees of the department and training sessions are to be held for all staff as part of its implementation. You have become aware through your EA's friendships in other parts of the department that there is a senior manager who is bullying staff generally and indulging in inappropriate remarks to two female members of his staff. Because of fears for their job security, no complaints have been made by any of the affected employees. Your EA is very concerned about the welfare of her friends and asks if you can help.

**What is your ethical position and how should you respond?**



## The hidden dangers of social media...

You are part of a police taskforce involved in responding to requests from IBAC. An IBAC investigation is underway, and several officers are covertly under surveillance by IBAC investigators. You and a select number of people within your team have been provided with the list of police officers in whom IBAC is interested, and you are instructed that this list is highly confidential. At a team meeting later in the day you emphasize again the need for strict confidentiality. A day later you receive a telephone call from a police officer whom you do not know, but whose name is on the confidential list, demanding to know why a junior solicitor from your team has been viewing his Linked-in profile which he can see as he is a Premium member. This police officer asks you directly if he is under IBAC investigation.

**Has there been a breach of client confidentiality? What should you do?**

## I want you to downplay the legal risks!

You are a senior lawyer in a government department legal team. You completed an Execution Request Form setting out the legal position to support a document being approved and signed by the Secretary. In giving your opinion, you expressed views on certain legal risks in your usual independent and objective manner. You have been informed by the relevant manager in your client department that he would like you to modify your views on some of the legal risks since your Memo could be subject to audit by the Auditor General if something goes wrong with the transaction. The manager does not want to be placed in a position where he may be criticised for not heeding and acting on your legal advice.

**What is your ethical position and how should you respond?**

## We need supportive legal advice

You are the principal legal officer of a government statutory agency and have been instructed by your CEO to prepare written legal advice on a new financial initiative which he wishes your agency to implement. You and your staff carry out in-depth research and form the clear view that the proposed initiative, if carried into effect, would be outside your agency's powers under its governing Act of Parliament. You brief senior counsel who confirms your advice. You send your advice and that of senior counsel to the CEO who returns it to you with a request that you and senior counsel remove from it any reference to the statutory issue saying that no-one will ever know and, in any event, it's just your and your senior counsel's opinion and the government has received a contrary legal opinion from the Solicitor General.

**What, if anything, should you do?**

# I need urgent instructions for an inquest

You are working on a coronial inquest for your agency in a matter where an agency employee lost his life in a workplace accident and you require instructions about a particular issue of importance which will need to be addressed by the Coroner. You receive instructions from two separate business areas of the agency about strategy for the inquest that are conflicting. You have tried to persuade the two business areas to come to an agreed position on your instructions without success. Time is running out and you now need urgent instructions from the agency on what to do.

**What is your ethical position and what should you do?**

## Do whatever it takes...

Your departmental internal FOI team has sought your legal advice as it has received a request for a document about a client of the department by a major media outlet. The area responsible for the document does not want it to be released due to the risk of the information in it reflecting badly on the department. You are instructed by your client to “do whatever it takes” to keep the document from being released. You do not believe that there are any proper legal grounds to withhold the document from public release, but you wish to keep your client and the Minister’s office happy if possible.

What advice should you give?

How do you manage your client’s and others’ expectations?

## Some useful resources on ethics

- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*  
<https://www.legislation.nsw.gov.au/regulations/2015-244.pdf>
- *Law Institute of Victoria Ethics website:*  
<https://www.liv.asn.au/Professional-Practice/Ethics>
- *Lawyers Professional Responsibility*, 7<sup>th</sup> edition, G E Dal Pont, Thomson Reuters
- *Lawyer Discipline*, 1<sup>st</sup> edition, G E Dal Pont, Lexis Nexis
- *Handy Hints on Legal Practice*, 4<sup>th</sup> edition, G Lewis, E Kyrou, N Dias, Thomson Reuters

# Thank you for listening.



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