

Russell Kennedy

Ethics in practice for government lawyers

Simon Libbis, Head of Ethics and Practitioner Support

Michael Dolan, Special Counsel Ethics, Law Institute of Victoria

Lawyers must have an ethical mind

“There can be no higher or stricter requirement of a lawyer than that she or he behave honourably and ethically. And that requires that the values and principles which inform legal ethics are so well understood that they may be said to have shaped the professional lawyer's mind.”

Shaping Legal Minds - The Ethical Mind

The Hon Susan Kiefel AC, Chief Justice of Australia

Queensland Law Society Annual Symposium. 19 March 2021

Ethics are the hallmark of a profession

“The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skillful evasion.”

High Court of Australia Chief Justice Sir Gerard Brennan AC KBE QC in describing the importance of ethics to a meeting of the Queensland Bar Association in 1992.

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.

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, 7th edition Thomson Reuters [13.80]

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.

Ethical Guidance for government clients

GUIDE TO ETHICAL OBLIGATIONS OF GOVERNMENT LAWYERS – FOR NON-LAWYER COLLEAGUES

- Lawyers' Ethics Statement
- Role of government lawyers
- Duties of lawyers
- Common issues government lawyers face
- Key takeaways

Government Solicitor's Committee, The Law Society of NSW, March 2021

Ethics issues we will discuss today

- Paramount duty to the court and the administration of justice
- Duty of client confidentiality and to protect client LPP
- The dilemma of inadvertent disclosure of confidential material
- Duty of professional independence
- Duty to act in our client's best interests

**Your ethical
compass**

The affidavit was urgent

You are a principal solicitor in a State government department. One of your junior solicitors was asked to assist a more senior solicitor with the preparation of an affidavit in one of your litigation matters. The junior solicitor was very busy and did not have a lot of time, but wanted to assist as the filing of the affidavit was urgent. The junior lawyer decided to use ChatGPT to expedite the preparation of the affidavit. Because the affidavit was urgent, the more senior solicitor sent the draft affidavit to counsel to settle without a thorough review. Counsel approved the draft affidavit which was then sworn and filed with the court. Counsel had assumed that it had been reviewed by the more senior solicitor. It has now become apparent the affidavit is littered with errors and does not correctly set out and support the client's case.

What are your ethical obligations?

I didn't expect to see that in the file!

You are an in-house solicitor in a State government agency prosecuting a person with breaching two statutory regulations administered by your agency. The basis of the charges is founded in a statement provided to you by one of your agency's internal investigators in which a witness stated that she saw the defendant carry out the acts which constitute the offences. The witness will be the key to a successful prosecution and she has indicated a willingness to give evidence. The day before the hearing you are looking through your agency's investigation file and see an earlier draft statement made by the witness the contents of which throw doubt on her veracity.

What do you do?

LIV Ethics Committee Ruling: R4991 (10/12/20)

We got a shock at the law conference...

You are employed as a solicitor in a government department which is administering certain welfare payments to those people who are entitled to receive them. The government has decided to take steps to ensure that only those people who qualify for assistance receive the benefits and has instituted a process whereby “debts” owing by people who were not eligible to receive the benefits are being sent to them with a demand for payment. You and two of your legal colleagues from the department attend a national law conference at which a highly qualified and experienced senior counsel expresses the firm view in a speech that the method of calculation of the “debts” being used by the government is illegal.

1. What is your ethical position and what should you do?
2. You raise this with your supervising/principal lawyer, and they advise you that this is accepted departmental practice. What do you do?

Our client has suffered a major cyber-attack

You are general counsel in a federal government agency which has suffered a significant cyber-attack resulting in a massive data breach of private and confidential customer information. You have received an urgent call from your CEO seeking your advice on a course of action as your client believes that it may now become the subject of significant audit investigation and civil class action lawsuits. Your client wants to commission an urgent forensic and root cause expert investigation to assist in its response to customers and also audit and media investigations and civil lawsuits. Your client is very concerned to keep the forensic report private and confidential and seeks your advice as to how it should proceed.

What are the ethical issues which you will need to address?

The use of inadvertently disclosed material

You are in-house counsel in a statutory body which regulates an industry. In the course of litigation in the SCV between your client and a regulated company several legally privileged documents have been disclosed by your office in the course of compliance with an order for discovery made by the trial judge. The disclosure was inadvertent. Your counsel has advised that the contents of some of these documents may give rise to a claim against your client for malfeasance in public office and it appears that the other party is desirous of pursuing that claim. The other party maintains that it is not obliged to return the documents to you without copying them and you seek an undertaking that it will not make use of them in the litigation.

What is the other party's ethical position?

EPA Victoria v 82M Pty Ltd (No. 3) (2022) VSC 504

I really think there is a better way to do it

You are employed as a senior legal officer in a Victorian State government department. You are acting for the department in obtaining the advice of a large private law firm on how a proposal to alter certain rights over the use of water flowing through certain rural properties might be implemented. The law firm has done a lot of work for the government. You are happy to work closely with their lawyers, but you cannot be present at all of the discussions they have amongst themselves as they develop their legal advice. When the advice arrives you think the firm's scheme is far too complicated, and, that it would be far simpler and practical to introduce legislation to bring about the required changes. You show it to a colleague and she agrees with you.

What should you do in these circumstances?

Meeting a very tight media deadline

You are a senior solicitor in your agency's legal services division. The agency and its work has come under close media scrutiny in recent months resulting in an announcement by the government of an inquiry into an aspect of the agency's work. The media pressure is increasing and your CEO has agreed to be interviewed by Sarah Ferguson on 7:30 this evening. You have been instructed by the agency's communications director to prepare a comprehensive briefing paper for your CEO with suggested answers to several potentially difficult legal questions. Time is very short and you know you cannot do justice to the brief within the deadline requested.

How should you respond to the request for the briefing paper?

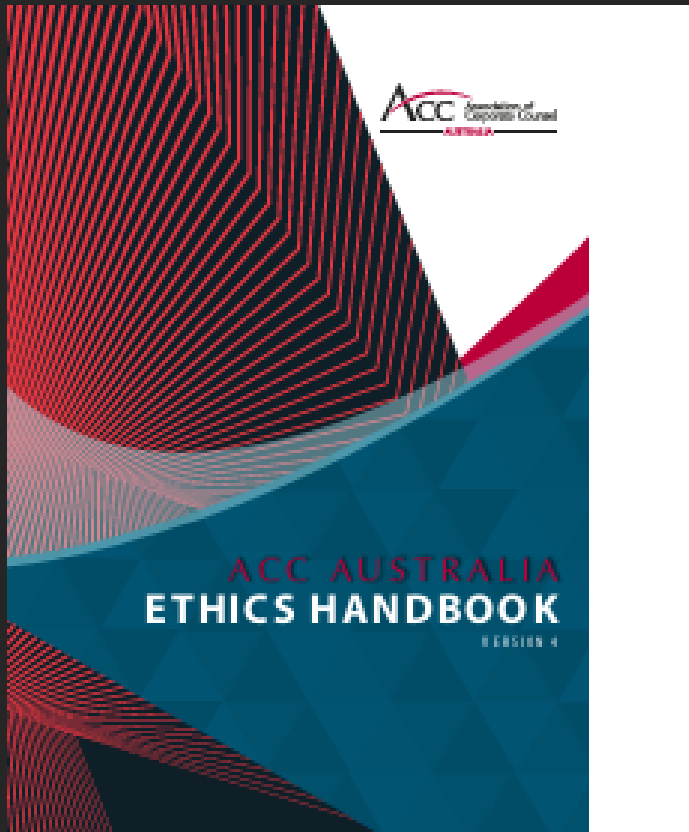
I'm watching our barrister budget....

The specialised legal work in your department is very remote from the experience of many barristers, and you would like to brief a small number of counsel, to build up their experience in our legal work, and foster their acquaintance with non-legal officers in the department. It would save you a lot of time, not having to keep explaining things to a new barrister. Yet it worries you that some of the barristers are beginning to move into a price range that is bringing in some large bills to the department.

What ethical issues does this raise for you?

A GUIDE TO ETHICAL ISSUES FOR GOVERNMENT LAWYERS THIRD EDITION 2015
The Law Society of NSW

[Guide to Ethical Issues for Government Lawyers, Third Edition 2015 \(lawsociety.com.au\)](http://lawsociety.com.au)



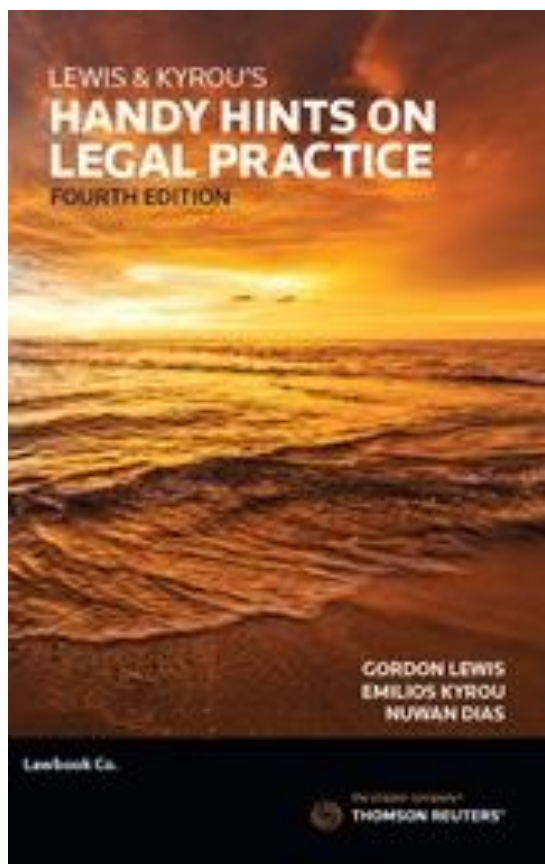
Some useful resources on ethics

- *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, 7th edition, G E Dal Pont, Thomson Reuters*
- *Lawyer Discipline, 1st edition, G E Dal Pont, Lexis Nexis*
- *ACC Australia, Ethics for In-House Counsel Handbook, version 4*
<https://www.acc.com/resource-library/ethics-house-counsel-handbook-v4>
- *The Law Society of New South Wales, Handy Hints for Government Legal Practitioners:*
https://www.lawsociety.com.au/sites/default/files/2019-09/LS3240_Policy_Handy-hints-gov-sol_v3.pdf

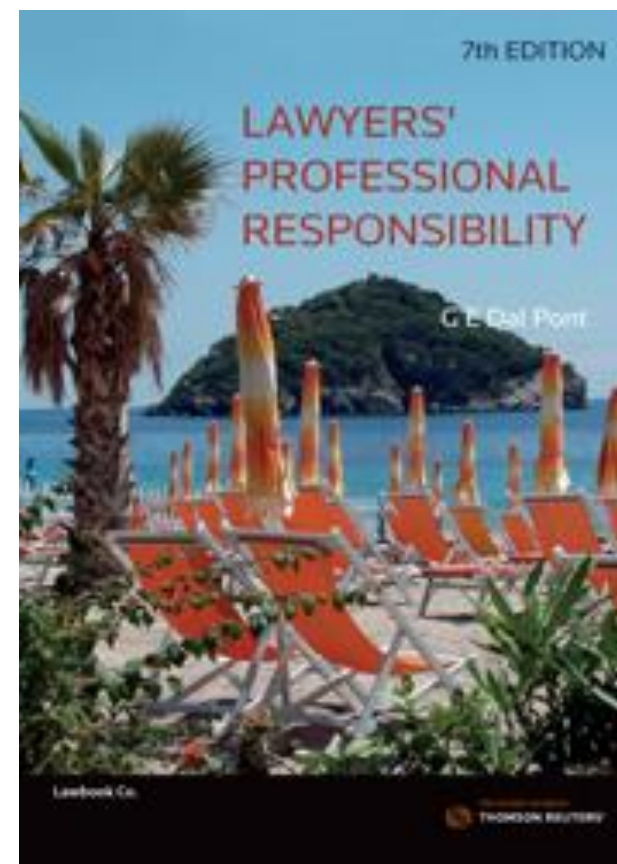


Some useful resources on ethics

- [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#)
- [Law Institute of Victoria Ethics website](#)
- *Lawyers Professional Responsibility*, 7th edition, G E Dal Pont, Thomson Reuters (available at Law Books [here](#))
- *Lawyer Discipline*, 1st edition, G E Dal Pont, Lexis Nexis (available at Law Books [here](#))
- *Handy Hints on Legal Practice*, 4th edition, G Lewis, E Kyrou, N Dias, Thomson Reuters (available at Law Books [here](#))



- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
<https://legislation.nsw.gov.au/view/pdf/asmade/sl-2015-244>
- *Law Institute of Victoria Ethics website: Ethics & Practice Support Services*
[\(liv.asn.au\)](http://liv.asn.au)
- *Lawyers Professional Responsibility, 6th edition*, G E Dal Pont, Thomson Reuters
- *Lawyer Discipline, 1st edition*, G E Dal Pont, Lexis Nexis



Ethics Advice Line:

(03) 9607 9336

ethics@liv.asn.au

Practice Support Line:

(03) 9607 9378

practicesupport@liv.asn.au

[Ethics & Practice Support Services \(liv.asn.au\)](http://liv.asn.au)

Thank you for listening.

Simon Libbis, Head of Ethics and Practitioner Support

Michael Dolan, Special Counsel Ethics, Law Institute of Victoria