

RULES OF PROFESSIONAL CONDUCT AND PRACTICE – A PUBLIC/GOVERNMENT LAWYER’S PERSPECTIVE

by

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INTRODUCTION

The establishment of a law school at the University of the South Pacific has led to a marked increase in number of students taking up the study of law, and in the number of graduates being admitted to the Bar every year. Competition for a limited number of legal positions in the Government is now much more intense. The number of applications for vacancies in the Office of the Solicitor General continues to multiply every year, with law graduates and legal practitioners from the private sector seeking a legal career in the Government legal service. A legal career in the Government offers a wide range of options – ranging from civil and commercial litigation, a diverse range of advisory work in all areas of law & legislative drafting at the Attorney General’s Chambers; legal aid with the Legal Aid Commission; specialist legal services as in-house lawyers based at various Government Ministries and Departments; in-depth research at the Fiji Law Reform Commission or developing new skills as a member of the Law Revision Team.

Whilst Government legal service does provide diverse career options to Government lawyers, the obligations and

responsibilities on Government lawyers as legal practitioners are significantly greater. In addition to being subject to the Rules of Professional Conduct contained in the Legal Practitioners Act 1997, Government lawyers are required to comply with many other regulatory requirements as public servants. Hence, Government lawyers in the public service are required to uphold the Public Service Values and are subject to the Public Service Code of Conduct. Disciplinary proceedings against Government lawyers can be initiated for breaches of the Public Service Code of Conduct. As public servants, Government lawyers are also subject to an elaborate system of public accountability. Hence, Government lawyers are liable to audit query by the Auditor General. The Ombudsman is also empowered to make enquiries against Government lawyers in the exercise of his constitutional and statutory functions. In this paper, I propose to highlight some particular areas on the rules of professional conduct and practice for a Government lawyer and the many challenges that Government lawyers face in the twenty-first century.

GOVERNMENT AS THE CLIENT

Although the only “client” for a Government lawyer is the Government itself acting through Ministers and public officials, there does arise various ethical issues for Government lawyers when representing Government.

Of particular relevance is the issue of conflict of interest, in dealing with legal disputes and issues which may arise between ministries and departments of the Government. The Government lawyer must in such cases be extremely vigilant to ensure that he/she does not get himself/herself in a situation of conflict. This issue has arisen on a number of occasions. As an example, the Public Service Commission and the Ministry of Labour have often sought advice and representation of the Solicitor General against each other in industrial relations matters. In such cases, the practice of my office has always been that both the ministries and departments are advised to seek independent legal advice and if necessary, representation in Court. A similar position was taken by the Office in relation to the civil proceedings between the Auditor General and the Commander of Fiji Military Forces over the audit of regimental funds.

This issue is particularly relevant to legal officers who are based at respective ministries and departments. Although these officers are appointed as in-house legal officers, they remain legal officers under the responsibility of the Solicitor General. These legal officers are often required to provide advice on inter-departmental matters which would be likely to result in litigation. Sometimes matters could give rise to potential conflict of interest for the Office of the Solicitor General, and it is therefore important for in-house legal officers to be particularly vigilant. Where the officer detects

the slightest potential for conflict, it is incumbent on the officer to consult the Attorney General's Chambers for guidance.

CONFIDENTIALITY OF GOVERNMENT MATTERS

The Rules of Professional Conduct under the Legal Practitioners Act 1997 on client confidentiality applies to Government lawyers in the same manner as it applies to private practitioners. As such, all information provided to a legal officer for the purposes of legal advice, or representation must be kept confidential, and disclosures to other entities should only be made when authorised.

One issue that has arisen in the past for Government legal officer is whether the contents of legal advice prepared for one ministry or department can be disclosed to another ministry or department. Several overseas jurisdictions, including New South Wales, have adopted the position that legal advice given by a Government lawyer to any department, ministry or official is the property of the State, and as such, could be disclosed to other ministries and department if it is considered that the advice was on a question likely to be of importance to them generally. Our Office has adopted a similar practice. Legal officers do need to consider the nature of the legal advice to a ministry or a department, and determine whether it is of importance to another ministry or department. If it is, then a copy of the opinion should be sent to the other ministry or department.

Government lawyers also need to be particularly cautious to refrain from making public statements on any legal matter that is sent to them. The Office has adopted a policy that where a public statement is necessary, any such statement must be endorsed first by me as the Solicitor General.

INDEPENDENCE & IMPARTIALITY

In providing legal opinions to the Government, Government lawyers, as a general rule, must act with due regard to the legal position of the Government, and without any fear that the advice may incur displeasure. It is often the case that the advice of legal officers in the Government is not accepted by the Ministry or Department, who may opt for a course of action contrary to the advice given by legal officers. On such occasions, it is only proper that the client be requested to seek an independent legal opinion.

Legal officers must provide their legal advice in an impartial and independent manner, with full acknowledgment that the client may not approve of the opinion. You should be uninfluenced by the fact that the advice may be sought in the context of a specific policy imperative which a particular ministry or department is anxious to see supported by legal advice from a Government legal officer. As legal practitioners, you must always be careful of the likelihood of pressure being placed on you to rubber-stamp proposals. The ability of Government lawyers to exercise independent thought and judgment is an enormous asset for any

Government. Government lawyers must ensure that your opinions are not influenced by political considerations.

There are circumstances where Government lawyers are called upon by the Courts to represent the "Public Interest" in a civil litigation. The rationale for such an approach is that the Government is a composite of the people, and the Government lawyer represents the "public as a whole". Thus, you have a special role to play in cases involving constitutional redress, judicial reviews, habeas corpus, and extradition proceedings to name a few. Under the Constitution and the High Court (Constitutional) Redress Rules, the Attorney General (who is always represented by a Government lawyer) is entitled to appear and be heard in constitutional redress matters.

The Office of the Solicitor General is often called upon to provide legal advice and opinion to the Office of the President and the Speaker of the House of Representatives. The Chief Justice and the President of the Court of Appeal have at times written and sought the opinion of the Solicitor General. The Office of the Solicitor General is a constitutional office under section 113 of the Constitution. The Solicitor General is a public servant, and is also the Chief Accounting Officer and the Chief Executive Officer of the Ministry.

On the other hand, the Attorney General as a Minister in the Government is responsible for providing legal advice to the Prime Minister, Ministers, Cabinet and Government generally.

The Attorney General is usually a politician and a member of the Cabinet, who also holds other portfolios as a Minister in Government. The Constitution does not clearly specify the roles and functions of the Solicitor General, except in section 113(4) which states that if the Attorney General is unable to perform the functions of that office, then the Solicitor General may perform all the duties and exercise all the powers imposed or conferred on the Attorney General. In other words, the Solicitor General can exercise all statutory powers of the Attorney General. This is indeed a unique feature of the 1997 Constitution. The Solicitor General is the only public officer empowered by the Constitution to perform a Minister's statutory functions. This scenario can sometimes be confused and can give rise to a potential conflict. I am happy to say that in my time as Solicitor General thus far, we have not had a conflict.

In order to avoid a conflict of interest and to ensure that the opinions of the Solicitor General and Government lawyers are impartial and free of political influence, there is in my view a need for clear guidelines. I am aware that many countries have enacted laws, in order to clarify the role, functions, privileges and obligations of the Attorney General, Solicitor General and legal officers of Government. Some examples of these laws include the Law Officers Act 1964 of Australia, Attorney General's Act 1989 of Papua New Guinea, Law Officer Act of Vanuatu, Legal Officers

Ordinance of Hong Kong, and the Attorney General Act 1999 and Solicitor General Act 1985 of Queensland, Australia. I therefore pose a simple question. Do we need a similar legislation in Fiji? I leave you to ponder and debate this further.

DEFENDING BOARDS & TRIBUNALS

In so far as representation in courts is concerned, Government lawyers must always take particular note of the special role that they play as lawyers for the State. There are numerous instances where a Government lawyer would be expected by the Court to play a neutral role or to act in the public interest. As an example, the role of Government lawyers in representing statutory tribunals was discussed by the Fiji Court of Appeal in **Akbar Buses Limited v Transport Control Board & Fiji Transport Company** (Fiji Court of Appeal Civil Appeal No. 9 of 1984), wherein the Court of Appeal said:

"... we wish to mention a comment which was made as to the role of the Attorney General or his counsel in such proceedings. There is much authority to support the view that the tribunal under review should take a neutral stance in these matters and counsel appearing on its behalf should not urge the views of one party or another. ... It may be otherwise where only one party is contesting the correctness of a tribunal's decision, and the reviewing court asks for assistance from the amicus curiae ..."

Similarly, in *K. R. Latchan Bros. v Sunbeam Transport* (Fiji Court of Appeal, March 1984), the Court of Appeal said:

“where the complaint relates to proceedings where no other parties are involved, such as a criminal case before a magistrate (or a dismissal by the PSC), then the burden falls on the party who obtained leave, albeit the proceedings are nominally in the name of the Crown. Neither the Attorney General nor any Law Officer should appear for the Crown nor for the respondent tribunal, which however should brief counsel to assist the Court and participate to a greater or less degree as circumstances require.”

The Court of Appeal further elaborated that:

“Although inferior Courts and Tribunals are in one sense appointed by the Crown, they are independent of the Crown in the discharge of their judicial, quasi-judicial and executive functions – as too with Ministers – so Law officers should not appear for them but other counsel should be briefed. In some circumstances however the Judge granting leave may consider that the public interest should be represented, and in such circumstances may think it proper to add the Attorney General as a party for such purpose and he will arrange appropriate representation.”

GOVERNMENT LAWYERS & CONTEMPT PROCEEDINGS

The impartiality of the Attorney General's Chambers in certain legal proceedings is further evident in contempt proceedings instituted by the Attorney General to defend the judiciary against scandalous political criticisms. The Attorney General has traditionally defended the judiciary

against unwarranted criticism by instituting proceedings for contempt. Two well-known cases in which the Attorney General instituted contempt proceedings for scandalising the courts are *Parmanandam v Attorney General* (1972) 18 FLR 90; and *Mahendra Chaudhary v Attorney General of Fiji* (Court of Appeal Civil Appeal No. AAU0009 of 1998).

The role of the Attorney General (and indeed Government lawyers acting for and on behalf of the Attorney General) in defending the judiciary from political attacks has often been questioned. A former Attorney General of Australia, Mr. Daryl Williams QC has strongly argued that given the separation of judicial power and the maintenance of an independent judiciary, it is inappropriate for the Attorney General as a member of the executive to defend the judiciary from political criticism. In his view, the role of defending the judiciary must be performed by the judiciary itself.

In my humble view, the role of the Attorney General in Fiji, in defending the judiciary, stems from the importance in safeguarding the independence of the judiciary and the need to maintain public confidence in the rule of law. This is time honoured British tradition that we have inherited and adopted. Instituting contempt proceedings is one instance where the Attorney General acts with complete impartiality and in the public domain. As Lord Morris elucidated in *Attorney General v Times Newspaper Ltd* [1974] AC 273 at p. 306, " *the Attorney General in deciding whether to institute*

proceedings for contempt of court in the United Kingdom would, with complete impartiality, solely be considering the public interest of maintaining the due administration of justice in all its integrity."

In instituting contempt proceedings, the Attorney General acts on behalf of the State, and not in the exercise of his executive functions as a minister in the executive arm of the State. The role of the Attorney General in contempt proceedings was aptly discussed by Lord Diplock in the House of Lords in **Attorney General v Times Newspaper Ltd** [1974] AC 273. when he stated:

*"My Lords, it will I believe have been apparent from what I have already said that, unlike the Court of Appeal, so far from criticising I commend the practice which has been adopted since 1954 as a result of the observations of Lord Goddard CJ in **R v Hargreaves, ex parte Dill**, whereby the Attorney General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves, but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions."*

The preferred role of the Attorney General in instituting contempt proceedings under Order 52 was acknowledged by the Fiji Court of Appeal in **Charles Gordon v Attorney**

General (Court of Appeal Civil Appeal No. 49 of 1975), when the Court of Appeal agreed that motions under Order 52 are better brought by the Attorney General than by private litigants, in the public interest.

In instituting contempt proceedings and defending the public interest, the Attorney General and Government lawyers must act with complete fairness and independence from the executive. In this role, the Attorney General is not asked to defend the decisions or reasoning of the judiciary, but only the institution, its reputation and the rule of law. The former Chief Justice of Australia, Sir Gerard Brennan, had this to say in opposition to criticisms levelled against the role of the Attorney General in instituting contempt proceedings:

“The Courts do not need an Attorney General to attempt to justify their reasons for decision. That is not the function of an Attorney General. But why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law?”

The Attorney General (and legal officers acting for the Attorney General) have an independent and impartial role to play when acting in the public interest and defending the judiciary from unwarranted political criticism. The role of the Attorney General in this regard is not to defend the judges personally or the reasons expressed in their judgments. It is the institution of the judiciary, the courts, and the processes

by which cases are decided, which require protection from unjustified political criticism.

Judges decide cases according to law, and often their decisions have significant ramifications for the community. Despite the political implications of their decisions, the judiciary must be guarded against political criticism, and public confidence must always be maintained in the rule of law. Legal Officers of the Government should take note of this special duty bestowed upon them to act impartially at all times in the public interest to defend the judiciary and maintain the cherished rule of law.

CLAIMS AGAINST THE STATE AND SETTLEMENT

One of the most important responsibilities and functions of Government lawyers is to handle claims for damages against the State. Such claims are often based on various causes of action, including negligence, nuisance, breach of statutory duty, infringement of constitutional rights and so forth. Government ministries and departments regularly refer these matters to my office for advice and representation. I shall highlight some of the issues arising on the proper handling of these claims in courts and, in appropriate cases, a considered settlement of claims, with the hope of generating further discussion at this forum.

The role of Government lawyers in defending claims against the State and settlement of these claims was subject to very

close scrutiny in the *Commission of Inquiry into the Deed of Settlement* by Sir Ronald Kermode. The lessons learnt from the findings of this Commission of Inquiry and what it means for Government lawyers are vital in any discussion on professional conduct and practice of Government lawyers.

The factual circumstances surrounding this inquiry are well known to most legal practitioners, and need not be discussed at length. For the purposes of this paper, I shall only focus on the findings and discussions by the Commissioner in relation to the third and fourth terms of reference of this Inquiry, which were:

- (a) To consider and report on the procedures adopted in the Attorney General's Chambers for the handling of the original civil actions of Mr. Stephens against the State;*
- (b) To consider and report on the procedures adopted generally in the Attorney General's Chambers for the settlement of civil claims against the State (whether before or after the commencement of proceedings) and make recommendations necessary to ensure the proper constitutional and legal accountability of such procedures.*

The then Solicitor General, making his statement on oath, outlined the following office procedures and practice for handling of claims against the State:

- (1) All claims against the Government are in the first instance referred to the Solicitor General, who in turn allocates the claim and the relevant file to any legal officer, depending on the complexity of the case and issues of law involved.*

- (2) *The legal officer who is allocated a file involving a claim against the Government is expected to work very closely with the relevant ministry, department or Government body. This process often takes time.*
- (3) *After collating all the evidence, the legal officer may either (1) write an opinion to the Solicitor General discussing the matter, with remarks and recommendations as to how the State should proceed, or (2) verbally discuss the matter with the Solicitor General.*
- (4) *Upon receiving the opinion of the legal officer, the Solicitor General decides how the claim against the State should be handled.*
- (5) *Whilst a claim is pending in court, the legal officer keeps the Solicitor General fully briefed on the proceeding, with re-evaluation of the State's position, if warranted.*
- (6) *As a matter of procedure and practice, the role of the Attorney General in these matters is minimal.*

In response to the allegations of undue delay or complaint about the manner of handling claims, the Commissioner found that, in Mr. Stephens' case, the Solicitor General and his staff had acted promptly in all respects from the commencement of the civil action by Mr. Stephens. However, the Commissioner held that no proper analysis was carried out within time in relation to Mr. Stephens' claim, which would have been of assistance to the Attorney General.

Sir Ronald, in great detail, proposed the procedures for the Attorney General's Chambers in effectively dealing with claims against the State. It is important to set this out in detail:

- (1) *When any claim for damages is made against the State, the Solicitor General's Office must forthwith collect and collate all the relevant information and evidence on the claim from the appropriate Ministry or Department of Government.*
- (2) *Upon receipt of full information, the Solicitor General's office must forthwith proceed to examine and analyse the claim in accordance with legal principles and the applicable laws.*
- (3) *Where a claim does not exceed \$10,000 and is independent of any other claim, the Solicitor General may settle the claim if satisfied that the State is liable. This can be done without prior consultation with the instructing Department or the Ministry of Finance.*
- (4) *For an amount up to \$25,000, the Solicitor General's office may settle the claim after prior consultation with the Instructing Department, if satisfied that the settlement is in accordance with legal principles and practice.*
- (5) *For an amount in excess of \$25,000, the Solicitor General may settle the claim after Cabinet's approval to the settlement.*

On a number of occasions, legal officers are faced with claims in which it is clear that a Court would hold the State liable. However, for one reason or another, settlement cannot be agreed upon. Sir Ronald Kermode outlined the following procedures in such cases:

(1) If the Solicitor General is satisfied that a court would hold the State liable but a settlement cannot be agreed upon, or, despite the probable liability, it would be to the State's advantage either to contest the issue of liability or to let a court assess the quantum of damages, then he will

a) Advise the instructing Department of the legal position and other relevant factors and what course of action he proposes to take; and

b) If the outcome of the claim in court is likely to be in excess of \$25,000, then forward a copy of the advice to the Ministry of Finance.

The Kermode Inquiry provided valuable guidance to my office in so far as professional product and practice is concerned on the handling of civil claims against the State and in dealing with eventual settlement of these claims.

All Government lawyers need to be alert and clear on the procedure when handling claims against the State. It is important that all information and evidence be gathered from the relevant Ministry or Department as soon as possible. All relevant documents must be copied for record, and where possible, witness statements obtained from the officials who are involved. It often happens that by the time a civil action is set down for hearing, many months or even years will have passed. It becomes difficult to locate officials and obtain evidence many years down the road. Not to mention, that our memory often fades with the passage of time.

It is also critically important that a full brief be prepared and discussed with senior officers in the Office, as soon as possible. Where settlement is being considered, the relevant Department or Ministry must be consulted and be kept fully briefed on any development. It is often a good practice to have the settlement endorsed by the Courts, by way of a consent judgment.

Legal officers must act with care and diligence to avoid political pressures, when handling cases on behalf of the State. The Stephen's case is a glaring example where the independence and impartiality of the Office was threatened. It is therefore important to keep the Attorney General fully briefed in relation to claims against the State. I have always followed this advice. As Sir Ronald stated in his report that the Attorney General does not get involved on the merits of the claim, including dealing with issues of liability and quantum. Full and regular briefings to the Attorney General will ensure that the Attorney General is able to appropriately respond to any political pressure for settlement of any civil action.

GOVERNMENT LAWYERS & FIJI LAW SOCIETY

Government lawyers are subject to the Legal Practitioners Act 1997 and must comply with the provisions of the Act in the same manner as private practitioners. Therefore, they must be members of the Fiji Law Society, and are required to apply for and obtain a practising certificate in order to

practice law as Government lawyers. They are subject to the rights and liabilities of legal practitioners contained in the Act.

As far as disciplinary proceedings are concerned, Government lawyers are subject to two Codes, under which disciplinary process could be brought against them. Firstly, as indicated earlier, Government lawyers are subject to the Rules of Professional Conduct and Practice and the disciplinary procedures set out in the Legal Practitioners Act. Secondly, as legal officers in the public service, Government lawyers are subject to the Public Service Code of Conduct under the Public Service Act.

An interesting issue that arises is whether a legal officer could be disciplined twice for a disciplinary offence, and whether the two Codes might give rise to conflicting obligations. The Civil Service Code of United Kingdom provides express recognition to the ethical standards governing particular professions, and expressly states that where a professional in the civil service believes that he or she is being required to act in a way which is in breach of a professional code, then he or she should report the matter in accordance with the procedures laid down, with the option of writing directly to the Civil Service Commissioners. For Government lawyers, the question arises as to whether you should be governed by two Codes of Conduct, or whether the special nature of your

position warrants a separate Code governing Government lawyers, which may be prescribed in a statute.

Whilst Government lawyers make up a substantial number of members of the Fiji Law Society, it is worth noting that the relationship between Government lawyers and the Fiji Law Society has not always been harmonious. In 2000, Government lawyers were subjected to extreme criticism by some members of the private bar, particularly then serving officials of the Fiji Law Society. The then Vice-President of the Fiji Law Society even took the criticism of Attorney General's Chambers and Government lawyers abroad to an overseas conference. In 2000 and its immediate aftermath, there was little, if any, acknowledgment or empathy by the Fiji Law Society about the difficulties and demands placed on Government lawyers during such critical situation for our country as a whole. In spite of this, Government lawyers carried on regardless in the performance of their functions and duties.

It is noticeable that no Government lawyer has served on any of the Boards or Committees of the Fiji Law Society. The leadership of the Fiji Law Society has until 2004 been always made up of private practitioners. In light of this, in my view it is time now that Government lawyers need to consider whether we should establish a Government lawyers Interest Group, or an Association in order to safeguard our particular interests. Similar associations have been established for

Government lawyers in other jurisdictions, including Australia & Canada. Government lawyers will also need to consider whether such an association should be part of the Fiji Law Society, or whether it be a separate entity. The legal officers in the Office of the Director of Public Prosecutions are not required to hold a practising certificate, nor are they required to be members of the Fiji Law Society. They are appointed as State Counsels under the Criminal Procedure Code. The question I pose is whether Government lawyers in the Attorney General's Chambers should also be given a right to practice under a statute, separate from the Legal Practitioners Act 1997. A number of overseas examples come to mind. Section 13 of the Law Officers Act 1964 of Australia; section 3 of the Law Officers Act of Vanuatu, and section 3 of the Legal Officers Ordinance of Hong Kong all deal with Government lawyers practice before the Courts. I am mooting this publicly today. I propose to discuss this with my lawyers in detail, before submitting any proposal to the Attorney General.

CONCLUSION

Ladies and Gentlemen, I have today chosen to speak on a subject which is both relevant and timely for us. We need to take stock, consider our particular needs and re-look at ourselves as public lawyers. Are we comfortable as a group in the way that we are, or do we need to focus and examine our own existence as a group? I have merely provided some

insights. It is for you to pick up the quest and take these issues further.

I thank you all for listening to me, and hope you have a pleasant conference. I also take the opportunity to wish you and your families a merry Christmas and a joyous and happy New Year.

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