

Essentials for Government Lawyers
Australian Government Solicitors
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Canberra

What Makes a Good Government Lawyer
The Hon Justice ML Barker
Federal Court of Australia

Introduction

In public law terms, my standing to address you on this topic may be questioned. After all, I have never been a government lawyer, strictly defined. However, I have always maintained a strong interest in the area of government and the law. Public law, particularly administrative law, has held a particular fascination for me for a long time. I have served on a number of boards and tribunals and the like. I saw a good number of government lawyers in action in the course of my practice as a barrister and solicitor. I also acted for organisations closely aligned with the state government in Western Australia, and advised some government departments. For many years I also advised and represented local governments. In 1991-92 I was one of the counsel who assisted the WA Inc Royal Commission where I had the rare opportunity to closely observe, albeit after the events, an interesting period of state government. In the State Administrative Tribunal in Western Australia, many government lawyers appeared before me. As a judge of the Supreme Court of Western Australia I also regularly saw government lawyers, or lawyers acting on behalf of government on state matters. Now as a judge of the Federal Court of Australia, I frequently see government lawyers in connection with federal matters. While I don't claim any expertise on the topic of what makes a good government lawyer, I hope at least I have satisfied you that I have a sufficient interest to explore the topic with you!

What distinguishes government lawyers?

The group of lawyers who are ordinarily classed as "government lawyers", on the face of it, appear to have a unique distinction. They are the frontline legal advisers, representatives and sometimes agents of governments. In Australia, these governments, of course, include the Commonwealth, State and Territory governments. For present purposes, I think local governments perhaps fall into a separate, although related category of government lawyers.

Nowadays government lawyers are to be found in all the obvious places, where they traditionally always were – in offices of attorneys-general, offices of solicitors-general, and government solicitors' offices – but also in an array of departments and other agencies. They are also to be found in quite independent government agencies – and here I have in mind some of the major regulatory agencies at all levels of government. They are of course nowadays also to be found in the offices of directors of public prosecutions – the DPPs – where once the criminal and civil lawyers were all grouped together in a single set of government law offices.

The growth of government, the array of tasks that governments today set lawyers, the impact of specialisation and a range of other factors no doubt, have encouraged this clear division of government lawyers over the course of the last 40 years or so – perhaps longer in the Commonwealth. These lawyers do a range of things, often quite different from one to the other. Some advise on what may be called the high policy of state. Others advise in relation to general departmental or agency policy. Others draft commercial and property documents for

government. Others again conduct a range of proceedings in courts and tribunals on behalf of government. I have already mentioned the DPPs who prosecute breaches of the criminal law. Then there are those who draft legislation, who I think demand a status all of their own. I apologise if I have failed to include some more refined categories.

Whether the growth and division of government lawyers in these ways was and is inevitable, I am not sure. I accept though that there are core areas of government where one expects government to have its own band of experienced lawyers to advise from one government to the next. I am also inclined to think that the growth of specialist or in-house departmental and agency advisers is not a surprising development. As to the limits of the core areas, they perhaps tend to fluctuate according to fashion. From the outside the limits seem to be driven from time to time by efficiency concerns, the perceived quality and cost of legal services, and ideology. Having mentioned the issue I will say no more of it.

I should say at the outset I have a high regard for government lawyers. If to tell a citizen that you are 'from the government' isn't always the best opening line, I expect saying you are a 'lawyer from the government' is even less so. In my estimation government lawyers are, as a group, talented lawyers with a deep understanding of the public interest role they perform as advisers and representatives of government. Sometimes I am sure they feel under-appreciated for the work they do, even misunderstood! They have a demanding client – the government – who perhaps doesn't always remember to say 'Thank you' for a job well done. On other occasions the client may even wish to deflect public criticism of their actions by reference to what the lawyers advised them to do, or to not do. The one area in which the government lawyer knows, from years of trial and error, they need to tread very carefully, is the policy/politics area.

Government lawyers often have to straddle the law/policy and sometimes the law/raw politics divide when they advise government and its agencies. If the High Court, for example, invalidates the process by which 'an unlawful non-citizen' has had their case dealt with by the responsible Minister (as the High Court recently did in *Plaintiff M61/2010E*), the government lawyer's advice as to the implications of the decision for Australian immigration control no doubt will be called for and relied upon. It may well become public on a later occasion.

If a state law purporting to confer jurisdiction on a state court, in relation to the outlawing of the association of members of certain organisations considered by the state attorney to be criminal, is declared invalid by the High Court (as the High Court also recently did in *South Australia v Totani*), the government lawyer's advice no doubt will also be called for to see if the ship of state can be righted in some patched up form.

This type of legal work is of high constitutional importance. Not many lawyers get to do it, though academic lawyers may later delight in picking over the entrails. It is both interesting and challenging work. It calls for high levels of legal knowledge as well as a deep knowledge of the way government, including the executive, parliamentary and judicial systems, work. I admire those who have the skill, judgment and maturity to do it. In saying that, I deliberately begin to identify what I think are some of the essential characteristics of the lawyers who undertake the task of advising and acting for government: independence, detachment, and a deep grounding in the law, especially that relating to government and the workings of government.

However, what I think distinguishes the broad category or class of government lawyers from other categories or classes of lawyers, is not so much the content of the work they do – for sometimes it can be quite similar to that done by other lawyers - but the responsibilities that come from advising and representing governments which, by constitutional or legal theory,

putting it generally, are obliged to act in the public interest and to treat fairly those with whom they deal.

The constitutional theory, I would apprehend, is derived from the old concept that the “King can do no wrong”. To the extent that this concept may have depended at some point in our inherited British constitutional history on a related theory of the ‘divine right’ of the Crown, it was always outmoded – or certainly has been the since the time of the colonisation of Australia commencing in the late 18th century. But to the extent it depended on the notion that rulers are, by definition, just, wise and virtuous, I think it is of continuing importance. For in a democracy such as ours, we the citizens expect our rulers to act justly, wisely and virtuously – at least I do! This then becomes the weather vane by which, again speaking generally, we measure the validity and propriety of official behaviour.

Consequently, in relation to the manner in which governments conduct themselves in relation to the observance of the law and the administration of justice, courts assume that executive governments, government agencies and public officials will always respect the rule of law and will always conduct themselves as model litigants. The government lawyer assumes a special responsibility of ensuring their client stays on the straight and narrow and conforms to these expectations. It is that responsibility which adds a dimension to the job of a government lawyer that is not usually present in the life of a private lawyer.

In many other respects, however, I wonder whether any attempt to draw a sharp distinction between government lawyers, on the one hand, and other categories or classes of lawyers, principally those in private practice, on the other, is helpful or wise. I say this because obviously all lawyers are subject broadly to the same sets of ethical requirements, conduct rules reflecting them and so on. Lawyers are an integral part of the overall system of administration of justice by which, in our democratic community, the rule of law is upheld. It is not open to them to subvert the rule of law or act in ways that are calculated to bring dishonour to the profession and undermine the confidence of the public in it. If they do, their right to practice law, whether as a government lawyer or as a lawyer in some other category or class, will be removed by the ultimate accrediting authority, the courts in which they are admitted to practise. In this respect all lawyers should be model lawyers.

What makes a good lawyer?

I am therefore interested to focus a little on what, as a general proposition, makes a good lawyer, before returning to consider the mark of a good government lawyer. What I have found interesting to do in considering this, is to look both backwards and forwards. Looking backwards I picked up and re-read my 1963 edition of Glanville Williams’ successful primer for law students in Britain, *Learning the Law* (Williams 1963) – which did not then have an Australian counterpart - to see what advice he provided about practising law. His focus was on the barrister. The solicitor, while not exactly portrayed as a second class legal citizen, was certainly identified someone who served the barrister, on whom the future of the law depended. In that respect I suppose you might think nothing has changed – at least from the barrister’s perspective. The barrister needed to be bright, with an agile mind, quick on his feet and possessed of a melodious voice and a commanding appearance. He also needed stamina. The solicitor needed to be a dependable fellow. Glanville Williams assumed that each would be a man, although he devotes a small section to women in the law. Without being what he terms “ungallant”, he warns women against a career at the bar because of the conditions and the fact that the male solicitors won’t brief them. He saw much greater prospects for women in the higher echelons of the administrative service, but not in local government. The advice in the 1963 edition was the same as that in the 1946 edition (Williams 1946). This is all consistent with Australian experience. Things have developed but only slowly so far as women are

concerned in the past 60 years. Nonetheless, today all employers say they are equal opportunity employers, and I think it is fair to say the public, including government lawyers, have led the way. The challenges for women barristers is perhaps still beset by the mindset represented in Williams' comments. However, many of the attributes of the good barrister he lists continue to have validity – although one may debate how important the melodious voice and the commanding appearance is in the day of the written submission. Perhaps it is more so in crime.

Looking forward, I find it interesting, even fascinating, to see how lawyers of different categories or classes actually project themselves to their target client communities in the 21st century. In this regard, much has changed over the past 25 years of legal practice, and lawyers today truly do project themselves, even government lawyers – well, to some extent, as we shall see. From these projections one can I think begin to discern what at least some lawyers today consider to be the mark of a good lawyer.

Without naming names – you can do your own google search later and try to match organisations to the projections – here are some sample projections to be found on the websites of a range of national and international legal firms and organisations. I do not mean to represent they are indicative of the usual either in Australia or their countries of origin. As I mention them you I am sure you will begin to reflect on how appropriately, if at all, they match up against your own ideas of the values and aims of a government lawyers' firm or organisation.

One large Australian private law firm identifies its “Values” as:

- Excellence
- Integrity
- Respect
- Performance
- One firm

It says that what makes it different from its competitors is:

“Its technical excellence combined with commercial insight. It's the ability to take the most complex questions and provide the clearest answers. Our lawyers unashamedly love the law. But we understand clients don't want pages on what legislation says. They want succinct answers that achieve their commercial aims. To achieve this, we use our intellectual creativity to distil complexity and provide clear-cut solutions.”

In Canada, one large law firm strongly emphasises that they have a “relentless focus on client success”. They also mention values of “passion” and “excellence”.

One large United States law firm, which advertises itself as a “global law firm” - with some justification given that it appears to have offices on nearly every continent – prides itself on its capacity to:

“Move quickly, efficiently and with substantial knowledge of the differing terrains to complete deals, mitigate problems, obtain information and resolve complexities simultaneously in many places and across numerous dimensions.”

This I imagine will have a particular resonance with some larger government law organisations.

Another high-tiered US law firm, also with a global presence, lists its “core values” as:

- Excellence and Integrity
- Cooperation and Individual Respect
- Enthusiasm and Pursuit of Improvement.

It also states that the firm’s core purpose is to help clients to achieve their goals and solve their problems by performing effective, challenging and innovative legal work on their behalf, with – and I quote – “financial results that will permit the firm to advance and flourish”- an interesting rider to which I will return.

A large United Kingdom law firm, also in the “global law firm” category, projects that:

“We are committed to helping our clients achieve their goals by providing commercially focussed legal advice of the highest quality that will consistently exceed their expectations.”

It also emphasises that the strength of the firm comes from a “one firm” approach and “partnership ethos”. These are said to underpin the firm’s ability “to deliver excellent client service and to create a working environment where talented people can succeed”.

Before moving closer to home, and this time I should name a name, it is interesting to note what TSol, the UK department formerly known as ‘The Treasury Solicitor’s Department’ and surely the worst name or acronym you have ever heard for a business, even a government-owned one in this post-corporatised and privatised world, says about itself:

“TSol strives to be the best for its clients, the best in the business and the best for its people.”

TSol is the largest provider of legal services across government in the UK, working with over 180 government departments and agencies. This projection is, just the same, I think, not all that far away from many of the private law firm statements I have just identified. I wonder what its clients think of its projection. I also wonder what the industry experts on The Gruen Transfer would make of it.

By comparison to the projections of these national and international private law firms and the UK government law organisation, the Australian Government Solicitor (AGS) on their website are much more conservative in identifying “Who we are” and “What we offer”. The single nod to something approaching a vision statement comes from this statement:

“The Australian Government Solicitor has been providing legal advice on government for government since Federation. No law firm understands the legal issues effecting government and the legislation under which government operates better than we do”.

They also note their “experience in government legal matters is unmatched” and promise “prompt and personalised service, wherever our clients need us”. I have to say that the AGS website and visionary statements pale almost into insignificance by comparison with the other websites I have taken you to.

I should add that all these organisations make a special point of emphasising, one way or the other, they are equal opportunity employers, and the private firms emphasise their pro bono programs and community contribution programs.

So what, for my present purposes, may be drawn from all this so far as identification of the marks of a good lawyer is concerned? Leaving aside Glanville Williams' assessment of the good barrister for the moment, I think it may reasonably be said that all projections impliedly, if not expressly represent the good lawyer as one who is:

- bright,
- has a superb knowledge of the law,
- has complete integrity,
- has a capacity to communicate well both orally and in writing,
- is dedicated to working hard,
- is a team player,
- will convey good, practical advice that a client can understand and confidently act on.
- will want to work in an equal opportunity environment,
- and will want to give back to the community.

Issues around the “good government lawyer”.

I don't have any hesitation endorsing these marks as those that all good lawyers, including those in a government law office or setting should have or aspire to. The former Secretary of the Attorney-General's Department has also emphasised these attributes (Cornall 2007).

As to the rider added to the aim articulated by the second of the US firm's I mentioned – to help the clients achieve their goals “with financial results that will permit the firm to advance and flourish”- this more than hints that the good lawyer should also have a strong profit motivation. I suspect many would instinctively think it is this that helps to distinguish a good private lawyer from a good government lawyer – that the good government lawyer will either not have this motivation, or will be much less affected by it. For myself, I have never had any difficulty in using financial performance as a measure of general performance, where it is relevant. It may not tell the whole story but it gets you thinking. Of course it is not easily adapted to all government law settings. But where the government law organisation espouses a business model, and is intended to pay its own way, and pays competitive salaries to attract good lawyers, then I expect it will always be a relevant factor in the assessment of a good government lawyer as it obviously is of a good private lawyer. Of course for many good lawyers the attraction of a particular position may not only the remuneration, but also the nature of the work on offer and the work/life balance about which so much is spoken these days – especially by women lawyers.

As I say the general attributes of a good lawyer I have just identified are I think relevant marks of a good government lawyer as well. But they obviously are tempered by an understanding that the government is an unusual client made up of many parts, and government lawyers work in all the parts. As I mentioned at the outset, the government lawyers who work at the face of the policy/politics divide have a most challenging task. It is usual to note that these lawyers are required to provide legal advice only and to not allow their own sense of policy or morality to intrude into the content of their legal advice. The late Justice Brad Selway, when Solicitor General of South Australia, has emphasised this (Selway 1999):

“even if a government lawyer can properly advise on ethical issues, considerable care needs to be taken to ensure that any role of lawyers in relation to the ethical behaviour of governments, their agencies and employees does not become an excuse for the involvement of lawyers in moral and policy issues for which they may have no particular expertise and certainly have no authority.”

I have sympathy for this view, which is, I think, the traditional position taken by experienced government lawyers. Governments come and go. They are keen to achieve a variety of things. However if the lawyer becomes embroiled in the minutiae of the government's desired policy platform, and becomes too closely associated with its achievement, their personal reputation for independence and detachment and quality legal advice may be questioned and the reputation of the office of the government lawyer put at risk of being diminished. The same point is true generally of course across the public services of our country. What governments are entitled to expect from good government lawyers is frank legal advice that responds, not always positively, to their policy ambitions. The good government lawyer understands this and will always be cautious not to be seduced by what sometimes may appear to be a more interesting policy side-issue.

One real danger is that the good government lawyer, like the highly experienced lawyer in other areas of law, will so impress the client or the representatives of the client, that the client, or its representatives, may come to depend unduly upon the advice of the lawyer. They may even unwittingly press the lawyer to contribute more than the lawyer should to the making of policy or political decisions. In private law, the lawyer who becomes too closely involved in the affairs of a client may find themselves making business decisions, something they are not engaged to do. This can have its own liability problems at a later point. The same point should be made in government law circles. In the area of government law it is obviously imperative that the good government lawyer knows where to draw the line between providing appropriate legal advice and giving purely policy advice

However, I do have a slightly uneasy feeling that sometimes this traditional understanding is taken to mean that government lawyers can never or should never contribute to policy development and implementation. This I don't agree with. This is because ultimately law is the expression of policy and laws are the business of lawyers. Statutory interpretation is particularly the stuff of government lawyers. Lawyers are expert in identifying pitfalls if particular approaches are taken in legislation. Unless the government lawyers engage with the detail of a policy proposal, a technically bad law may be produced.

The government lawyers, for example, may be aware from experience in other legal or statutory settings or from experience in other jurisdictions that a particular means of implementation is likely to be productive of a range of legal and practical outcomes that could affect the general operation and community acceptance of a proposed law. It seems to me that, in such circumstances, the lawyer would be delinquent if they failed to raise the issues of which they are properly aware as a lawyer. To do so would not seem to me to run the real risk of intruding into the no-go areas suggested by Justice Selway. I also doubt that the government client will thank the lawyer for not raising the issues should they later surface. I have little doubt that the accomplished government lawyer working in policy areas will always find the right way to raise such issues without being thought to have impermissibly crossed the line into policy.

The corollary of the policy rule of course is that the good government lawyer must always be prepared to emphasise the observance of law when required. Governments so often are concerned with implementation of the platform upon which they were elected at the last general election, that the niceties of legal form and process may sometimes elude the more enthusiastic. Attorneys-general and senior government lawyers are of critical importance in ensuring both an adherence to the rule of law within government and also a whole of government approach in such circumstances, so that all parts of the government act as one, and consistently. My own experience as one of the counsel who assisted the WA Inc Royal Commission in the early 1990s taught me that new governments sometimes harbour suspicions about the extent to which established public services, including government lawyers, are there

to help rather than hinder their attempts to introduce enlightened government. The lawyers can be sidelined in these cases, or kept largely in the dark about what the government proposes. The government may even decide to turn to private lawyers for more robust advice. These can be difficult times for government lawyers. It is in such times that they must advise of the strict requirements of the law, record their advice and hold their ground.

Avoiding conflict of interest, and competing advice, within government must be a nightmare at times, especially when, as nowadays, government lawyers are not just to be found in one central government law firm, but throughout the network of the government. The responsibility ultimately of the Attorney General to advise a government of what its responsibilities are is the traditional means of avoiding this complication. However it is important that the government lawyers network operate effectively to ensure all government lawyers understand the importance of their advice in a whole of government context. In particular I suspect there is a need to ensure that the departmental and agency lawyers, for example, remain independent and detached to a sufficient extent to avoid 'capture' by their immediate organisation.

Consistent also with the fundamental understanding that the government is not only a model litigant, but *the* model litigant, the good government lawyer will have a thorough understanding of the propositions involved in this concept (*Scott v Hanley*). Of course in most Australian jurisdictions the obligations of the model litigant have been reduced to writing. That is all well and good, but what I think is really important is for government lawyers to have an instinctive sense of what it means to advise and act for the model litigant. The government lawyer must ensure that they do not unwittingly government breach the obligations of the model litigant in their reasonable quest to do the very best for their client.

In this regard, I do not accept, should it be thought to be the case, that the government lawyer should feel restrained by the model litigant rules, from fighting litigation hard, where litigation is the only realistically available means of dispute resolution. Fair dealing with the citizen and others doesn't mean good points shouldn't be pressed hard, just that the technical points shouldn't be. Winning fairly is what ultimately the obligation emphasises; there is no obligation to lose. The model litigant rules should not therefore be relied up as an excuse for a poorly prepared and presented case in a court or tribunal. After all citizens generally are as interested in seeing the government's lawyers prosecuting cases properly in the interests of the citizenry as a whole as they are in fair dealing. What I do think must be avoided however is any form of zealotry, where the duelling party might be forgiven for thinking that it is the government lawyer's personal rights that are at risk, not the governments!

That is why in my view a person who becomes not just a good government lawyer, but the quintessential government lawyer is typically going to be a person with all the qualities I mentioned earlier but also steeped in the traditions of the practice of government law and possessed of the 'corporate knowledge' of how government always conducts itself.

Experience will teach the government lawyer that consistency in behaviour within government and by government is essential to good government. It will teach them that, in effect, governments come and go. It will teach them that political crises or policy crises will arise from time to time and that, when they do, they will be called upon to give good legal advice. It will teach too that it is not just winning that matters in a government legal contest, but how you win.

Beyond these general admonitions, a question arises as to what particular substantive quality or skill the good government lawyer should possess. I had been toying with the idea of arguing that an ability to harmonise the dictates of happiness with those of the law – a growing area of law and policy interest (see Posner and Sunstein) – is something every government lawyer

should be good at. But in the end I decided to leave this uncertain area for another day! I do think however that no government lawyer can be considered worth their salt unless they have really learned how to read a statute. This involves knowing what is in the statute now, but also knowing what used to be in it and what the explanations are for the changes over time. I can't emphasise enough the importance of a detailed understanding of the legislative history of the statute in play in any policy setting where advice must be given, or where the statute needs to be interpreted in proceedings. Too often novel points of interpretation are raised in courts, especially the Federal Court where our jurisdiction is nearly exclusively statutory, without the court being aided by a detailed legislative history.

A changing legal culture.

I do think that good lawyers bloom if the institutional culture is right. I would like to say a little more about culture. Persons who are not lawyers are apt to make remarks that suggest some lawyers are careless with their ethics and not beyond engaging in trickery and skulduggery on behalf of their clients. Bestsellers, like those of John Grisham, help to perpetuate this reputation. For some, the ultimate proof of the truth of this reputation is that many members of parliament have been lawyers in an earlier life! In the result, one cannot say lawyers, as a group, are well-loved. All of this is emphasised whenever a lawyer joke is told. For example, 'What would you know if you found a lawyer up to his neck in cement? Answer: 'Someone ran out of concrete.' This always gets a good laugh – at least among people who aren't lawyers.

You will note that it is a male lawyer who is up to *his* neck in cement. There are two alternative explanations for this. First, that the joke teller thinks there are no women lawyers – having read Glanville Williams on women in the law and thinking nothing has changed since 1946. Secondly, that the joke teller assumes women lawyers are incapable of earning the reputation implied in the joke – a much more benign interpretation. Now I don't mean to offend any women by suggesting the second possibility. I am sure all women lawyers are quite capable of being all, and more, of what the best - and worst - male lawyers have been and are. But somehow something tells me, from my experience of life, that women bring something to the practice of law that is qualitatively different from what most men bring, and that it has the potential to reduce, if not entirely eradicate, the pejorative tone some use in relation to lawyers. At the very least I consider the continued influx of women into the higher ranks of the legal profession will have a significant and positive effect on the culture of the legal profession. I will say more about this later.

The facts are that, the way law is practiced, and the identity of the persons who practice law, are changing, and are certainly quite different from when I commenced practice in the early 1970s in Western Australia, albeit that the changes have been heralded for some time and are happening it seems but slowly. The Bar around Australia for example is still dominated by men, as indeed is the judiciary. Nonetheless, I think there are real changes and they need to be accounted for in any discussion of what makes for a good lawyer, and a good government lawyer.

The popular idea of the lawyer as the hired gun who will do anything for the client, or who will at least be prepared to walk across hot coals in trying to do so, is borne particularly of litigation lawyers as a class, though I am sure not limited to them. Traditionally, no doubt with many exceptions, lawyers and clients seemed to think that the only way litigation could be conducted was aggressively, at 10 paces with guns or swords or other weapons of choice drawn. History teaches us that this is the way men in particular have responded to each other for centuries in tense situations. My memories, as a young lawyer, are that this was particularly prevalent in the practice of family law. If intimidation or the early infliction of harm didn't quickly lead to

the resolution of a dispute it would be left to the court to resolve it after a furiously contested trial, a trial controlled by the parties both before and during the hearing. While proceedings were settled in days of yore, this usually happened, when it did, at the courtroom door, and not by any sophisticated process of alternative dispute resolution.

But times have changed. The biggest changes to litigation concern the emphasis now placed on the duties parties and their lawyers owe courts to cooperate in the conduct of litigation. This has the effect, in my view, of tending to place parties and their representatives under the same type of 'model litigant' rules that governments and government lawyers have explicitly met in this country for many years. Indeed, I have difficulty in seeing why the so called model litigant rules do not apply across the board. Why should any party, for example, be able to act uncooperatively in the conduct of litigation, take technical points, fail to be other than perfectly frank with the court, take advantage of its own default, fail to act conscientiously in meeting procedural requirements, and so on (see *Scott v Handley* [1999] FCAFC 404 [43] – [45]). The point here is - and so much has now been written and said on the topic that I don't now need to rehearse it all - that courts today are expressly encouraged by their rules, and appeal courts including the High Court, to get on with the job of administering justice bearing in mind the interests of all the parties to the litigation and the resources the community has set aside to support the efficient administration of justice. Parties have to share that responsibility. Lawyers have to understand particularly that justice cannot be administered without their active cooperation. Paying lip service to the duty to cooperate isn't good enough. A positive cultural change to the conduct of litigation is required in the community generally, although it must necessarily be led by courts and lawyers. In short, courts and especially lawyers must learn to think constructively from an early stage of dispute resolution about the real issues in a case, how they might be resolved without resort to expensive and lengthy litigation and if litigation is unavoidable, how it may most conveniently be conducted.

Related to this change in the law is the focus on alternative dispute resolution (ADR). ADR is one of the most significant developments in the law of the past 25 years. Mediation, in particular, is now a mainstay of most court procedures throughout Australia today. It is practised in both civil and criminal jurisdictions, although there is a case to be argued that mediation has a much greater role to play yet in criminal proceedings. Mediation is also a mainstay in the decision-making procedures adopted by many administrative and appeals tribunals throughout the country, the tribunal system itself being another significant addition to the justice system over the past 25 years or so since the Commonwealth AAT was established in the late 1970s.

When I established the State Administrative Tribunal in Western Australia in 2005, I made it very plain very quickly that I expected many, if not most, review and original decisions to be arrived at using ADR techniques, particularly mediation. That Tribunal today actively engages in the application of ADR to such an extent that, in some key areas, only a relatively few matters require a final, contested hearing. The same is also true of many of the superior courts of Australia. Again using my home State as an example, very few matters actually go to trial in the Supreme Court of Western Australia in a given year. The same is I believe true generally across all superior courts in Australia.

In the superior courts the persons who help to assist in the resolution of cases through mediation, such as associate judges and registrars of courts, are trained mediators. In tribunals, either the members themselves are trained as mediators (as in the case of SAT) or trained mediators are engaged separately to assist the tribunal (as in the case of the Victorian Civil and Administrative Tribunal or VCAT). I can't emphasise strongly enough the significance for the future of the shift to ADR/mediated outcomes in Australian courts and tribunals.

I highlight the shifts to court controlled litigation and the development of ADR because they signal the need for a new focus on the way we practise law. I suspect that the implications of these shifts, especially in the ADR area, are important throughout the legal profession, but of particular importance to government lawyers. I say this because I have the impression that there was, until recently, a perception in some quarters that governments couldn't engage in mediation as they shouldn't be seen to be 'compromising' proceedings instead of determining them on pure principle. For example, in Western Australia, until recent amendments to state revenue legislation, the Commissioner of State Revenue held the view, no doubt on legal advice, that he couldn't fully participate in the mediation process in SAT review proceedings for this reason.

In this regard I note that, in March 2001, the Lord Chancellor in England announced a pledge by government departments to consider and use ADR to settle disputes in all suitable cases, wherever the other party accepts it. TSol (formerly known as the Treasury Solicitor's Department) notes on its website that it is committed to delivering the Government's pledge on ADR. I assume governments throughout Australia and key government law organisations have a similar commitment. I seem to recall the current Attorney of the Commonwealth stating soon after the election of the Rudd Labor government that he was supportive of a strong emphasis being placed on the use of mediation in proceedings in which the Commonwealth is involved.

Mediation is not, of course, a process of compromise, at least not in some unprincipled way. What mediation and other ADR techniques provide parties with, is the opportunity to engage in a dialogue about, or assessment of a dispute, free of the intimidation of the court room, in good faith, at an early stage of the dispute before significant costs are generated by parties. Many cases do not revolve around a point of pure principle, but depend on matters of fact and degree. The outcomes of many cases are thereby not certain and it behoves parties sensibly to think about reassessing their positions in a rational and sometimes commercial way before hastening forward. Win-win situations can be achieved through sensible decision-making achieved in a mediation context. The advantages of doing so can be significant in terms of saved legal costs and avoidance of delay. Perhaps equally importantly the debilitating effects on and disruption to the lives of individuals and the conduct of businesses can also be minimized. In short, people can get on with their lives.

Despite these shifts in the way disputes are resolved, I am concerned parties and lawyers have not fully caught up with the new ways of doing business. How many lawyers are trained as mediators? I know that around Australia many barristers equipped themselves as mediators, as indeed I did, in the early 1990s, in the hope that a new line of work open up. I am concerned however that too few lawyers appearing in courts and tribunals are trained in the art of mediation and that, many of those who are, fail to have sufficient regard to their training in mediation. Anecdotal reports from superior courts lead me to believe that mediation is still seen, inappropriately, by many parties and their lawyers in major disputes as a mini-trial or early opportunity to intimidate an opponent, rather than as a means to resolving the dispute or narrowing the issues in dispute; or that they see it as merely an unprincipled exercise in horse trading. Accordingly they bring with them to mediation the worst features of the adversarial lawyer: not listening to what is being said, arguing their client's case contentiously, failing to explore the true range of possible outcomes, and destroying the opportunity for good future communications between the parties.

I am unsure of the extent to which law schools and law firms, including in this context government law institutions, train their people in the ADR art or skill. What I do know, suggests training is patchy and not mainstream. In my view, the art or skill of negotiation and mediation is invaluable in every sphere of life, not just legal work. Indeed its origins are to be found outside law. It is at the base of good communicating. It is how good negotiation and

diplomacy is conducted. It inspires respectful behaviour in relation to others. It looks for constructive, practical solutions to real problems without the use of bombs, missiles and terrorism or their equivalents. But how many lawyers – including government lawyers - are actually trained to exercise these skills, as distinct from trying to pick them up on the job?

My thoughts in this regard are not merely idle. The *Civil Dispute Resolution Bill 2010* (Cth), if enacted, would encourage the resolution of civil disputes outside of the courts and seek to improve access to justice by focussing parties and their lawyers on the early resolution of disputes. The object of the Act is to ensure as far as possible that people take “genuine steps” to resolve their civil disputes before instituting proceedings in a federal court.

The concept of “genuine steps” was recommended by the National Alternative Dispute Resolution Council (NADRAC 2009). It was preferred over formulations such as “good faith” or “genuine effort” which were considered to be more subjective and likely to undermine the confidentiality of ADR processes and, in such situations where there is a power or financial imbalance, could lead to injustice by causing some parties to feel they have to make concessions.

The Explanatory Memorandum that accompanies the Bill explicitly states that the overall aims of the Bill are:

- to change the adversarial culture often associated with disputes;
- to have people turn their minds to resolution before becoming entrenched in a litigious position; and
- where a dispute cannot be resolved, ensuring that if a matter does progress to court the issues are properly identified, ultimately reducing the time required for a court to determine the matter.

I do not wish to use this occasion to adumbrate the details of the Bill. Rather, my point is that the work of NADRAC over a number of years, since its establishment in 1995, has been to encourage the resolution of disputes in the simplest and most cost effective ways. Mediation is the usual term known to the public when we speak about ADR. My point is that mediation and other forms of ADR are here to stay. Legal practice in all its forms must be adapted to fully integrate ADR processes. Lawyers must be trained, in my view from the time they are at law school, and certainly as beginning lawyers, in the ADR art or skill (I am not sure which it is, probably both). In this way an old legal culture can be transformed.

Professor Tania Sourdin notes in the preface to her comprehensive text on ADR (Sourdin), at page x, that the “new paradigm has also had an impact upon the legal system and has the potential to transform the role of lawyers within our society”. I agree. She notes the tension that exists as lawyers act as “advocates, peacemakers and negotiators”. Plainly, barristers and litigation lawyers have been good advocates. Commercial lawyers, and I think a range of family lawyers and industrial lawyers have always been good negotiators. Very few lawyers, however, have actively assumed the peacemaker role. I am not sure that ADR actually requires lawyers to become peacemakers, at least in the sense that they should abandon a rights-based approach to the resolution of conflict. However, in my view, all lawyers need to adopt a new cultural outlook and appreciation that disputes are now to be resolved by a variety of means, apart from a determination by an external, state sanctioned organisation such as a court or tribunal, and that techniques such as mediation constitute a decision-making process in their own right.

Conclusion

The government lawyer will, I am sure, continue to strive to be the type of model lawyer I have attempted to depict in this presentation. The good government lawyer will increasingly absorb the significance of the duty of its client and government lawyers to cooperate in litigation and the pre-eminent need to be skilled in the art of alternative dispute resolution, especially mediation.

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