Submissions by the Office of the Legal Services Commissioner on the Law Society of New South Wales Government Solicitors' Committee's draft paper entitled "Ethical Guidelines for Government Lawyers"

Thank you for inviting the Office of the Legal Services Commissioner (OLSC) to comment on the Law Society of New South Wales Government Solicitors' Committee's ("the Committee") draft paper entitled "Ethical Guidelines for Government Lawyers" ("ethical guidelines paper").

I set out below our response to the ethical guidelines paper. You will note that our preferred position is one in which there is no formalised statement of ethical principles. We have however, in the second section, also addressed an alternative and intermediate ground in which we express the view that any statement of ethical principles should avoid duplication with obligations arising under other written documents by which government lawyers are bound. The final section addresses specifically the ethical guidelines paper.

1. **No formalised statement of ethical guidelines**

    - The OLSC recognises that government is a special client. The government has powers and obligations, which exceed those of the normal citizen. We acknowledge that this has a direct impact on the duties and responsibilities of the lawyer instructed to act for government.

    - It is contended by the OLSC that the core ethical principles of government lawyers are to a significant extent similar to the ethical duties owed by any lawyer to their client. To the extent that differences arise, it is submitted, they are as a result of the different attributes and nature of the client rather than the ethical duties owed.

    - Accordingly the OLSC is unable to understand why a statement of ethics which differentiates government lawyers from others is of assistance.

    - The OLSC submits that providing ethical guidelines for government lawyers in a form of written propositions could be seen to be regulatory, prescriptive and inflexible.

1. **Ethical Guidelines with Limited Content**

    - "Ethics" is values based and should not be a prescriptive statement setting out rules whose meanings are open to legal scrutiny but rather should be conveyed as an overarching statement of principles from which individual government lawyers can derive guidance when faced with an inimitable ethical dilemma.

- The OLSC submits that ethical guidelines intended for government lawyers should identify and specifically address the unique role of government lawyers. It should not simply be a duplication of professional conduct rules, Public Sector Management Act obligations, Public Service Act obligations and Departmental guidelines.

1. Ethical Guidelines Paper – current draft

A statement of general ethical principles is preferable to a series of propositions. Comment and examples can be confusing in a statement of ethical guidelines. Quotes from individuals are also inappropriate.

Fiduciary Status of the Legal Officer and application of the Legal Profession Act 1987 and Rules

- Clearly the Legal Profession Act and the Rules apply to all lawyers by force of law. A statement to that effect is redundant.

- In terms of fiduciary duty, it is submitted that it may not be in the best interest of the profession to differentiate between government lawyers and other lawyers.

Who is the Client?

- Within Australia, subject to statute, the client of government lawyers is the Crown.

- Constitutional conventions define who has authority to instruct lawyers on behalf of the Crown. The constitutional functions of the office of the Attorney General provide that government lawyers in New South Wales act upon the instructions, whether expressed or implied, of the Attorney General.

- The distribution of advice between agencies is not in breach of any duty owed to the client agency, since the client is notionally the Crown, with the Attorney General acting as the representative of the Crown.

- The OLSC further submits that the ethical guidelines paper is silent on its advice for lawyers working in statutory bodies such as the Office of the Director of Public Prosecution, whom for the purpose of receiving instructions, the Director of Public Prosecutions could be considered the client in that he or she has statutory authority to perform various functions, including the instruction of lawyers acting for the Crown. Lawyers working for the Legal Aid Commission have members of the public as their clients.

Standard and independence of advice

- Those matters which effect government lawyers specifically are matters that are addressed in Departmental codes of conduct

Duty of Confidentiality

- The Crown is the ultimate client. The government as a whole, rather than individual agencies or officials, has the property in the advice and thus the right to disclose or withhold as the case may be.

- The ethical guidelines should include disclosure between agencies subject to relevant restrictions.

- The OLSC refers the Committee to the Law Reform Commission's Report 86, which provides comprehensive discussion with respect to circulation of legal advice to government.

- The OLSC submits that most of the comment is about interpretation of statute rather than ethics. It deals mainly with lawyers' obligations under the law.

Model Litigant

- The OLSC submits that the model litigant policy is primarily about the behaviour of government in the conduct of litigation. The core responsibility of government lawyers is to discern how these requirements are relevant in particular instances and to bring them to the attention of the relevant Departmental Head or Minister.

- The OLSC notes the generous interpretation by the Committee of the Victorian Court of Appeal's judgment in *British American Tobacco Australia Services Ltd v Cowell* [December 2002]. Further the OLSC is unaware of any serious legal dimension that has been added to "misconduct" related to the destruction of documents since this decision was handed down.

Overriding responsibility to the courts

- The OLSC agrees that a government lawyer like any other lawyer has an overriding responsibility to the courts and that duty overrides any illegal/unethical interests of the client. Accordingly, a statement to that effect is redundant.

Conflict of interest

- The OLSC notes that relevant law and codes of conduct provide guidance with respect to conflict of interest situations.

- Premier's Memorandum 92-26 addresses specifically the issue of potential conflicts of interest.

The involvement of legal officers in giving policy advice

- The OLSC notes the difficulty in separating out legal advice from policy advice on a day-to-day basis.

- It is often within a government lawyer's job description to provide policy advice as well as legal advice.

- The OLSC further notes that on the issue of policy the majority of the High Court in *Waterford v Commonwealth of Australia* determined that legal professional privilege could still apply to a document containing policy or administrative advice, provided that the "sole/dominant purpose" was the provision of legal advice.

- In the "example" discussed the OLSC submits that risk is not in any client's interest. It is contended that the issue of risk is a client/practitioner issue not one of policy as argued in the example.

Selecting and dealing with external legal services

- There is a tendering process within the New South Wales Public Sector which provides guidelines to all Government Departments seeking external services.

- The OLSC contends that this chapter is more about government policy rather than ethics.

Steve Mark
Commissioner

23 May 2003