THINKING ABOUT THE BIGGER PICTURE: GOVERNMENT LAWYERS AND AUSTRALIAN DEMOCRACY

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Introduction

1. Thank you for the invitation to speak today.

2. To start, I will explain my perspective on what it is to be a government lawyer. That perspective is a little unusual in that I spent six years as a member of the Australian Public Service after practising as a solicitor and then a barrister for about a decade: roughly half of that time as General Counsel for the Australian Broadcasting Authority and the other half as a Senior Executive Lawyer at AGS. In both roles, I was based in Sydney. My memories of working as a government lawyer are overwhelmingly positive, with only brief instances of frustration. I very much hope that you

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share my positive feelings towards your practice as government lawyers, although I don't presume that those feelings are universal.

3. Joining the Australian Public Service was quite a change for me. I had gone to the Bar early, at the age of 25, and so had little experience of working in organisations. An early and very pleasant surprise was a call from a man who introduced himself as Tony Blunn and invited me to come to Canberra for a coffee. In my ignorance, I did not know that Mr Blunn AO was a former Secretary of the Attorney-General's Department. When I arrived at the Kurrajong Hotel in Canberra, I realised that I was in the presence of greatness. Mr Blunn asked me how I was going in the new role as a member of the Senior Executive Service, and we quickly worked out that my lack of management experience was doing me no favours. He offered me practical advice and, if I recall correctly, pointed me in the direction of some APS management courses. As a recently retired senior public servant, Mr Blunn had reached out to mentor a new recruit.

4. What I took from that experience was that I was part of a much larger organisation than the ABA, and that larger organisation was willing to invest significant resources in my success. Subsequently, not only did the Commonwealth government pay for me to do several courses about management and the role of the APS, but it also substantially subsidised a masters' degree in law that I started while I was at the ABA. I was able to use that latter

opportunity to develop my knowledge of administrative law and other areas that were relevant to the practice of a government lawyer. When I returned to the Bar in 2007, I had accumulated significant experience in the workings of the Commonwealth, and in the practice of administrative law.

5. As part of studying public sector management, I delved a little into the question of my personality. Myers-Briggs revealed me to be an ISTJ (or was it an INTJ? But in any event, a common personality type for lawyers, although I now understand that at least one of my associates is an INFJ). Another test divided people into slices of a pie chart with creative and imaginative types broadly at the top and worker bees at the bottom. I was at the bottom and, for a while, quite happily self-identified as a technician: a person who got jobs done, who solved legal problems by applying the known law to the facts, and who did not indulge herself (as I then defensively saw it) by sitting around musing over questions of policy. In fact, I remember during the early days at the ABA being quite anxious about the nature of policy and about how policy might be developed, and whether I might be expected to make a contribution. That anxiety persisted until well after I joined the Federal Court in 2014. I remember a conversation with Chief Justice Allsop, when I told him that I was not a "policy-wallah". His response was that I should start being one.

6. I would hasten to say that I definitely do not consider myself as a policy-wallah. However, it would be a very strange person who found themselves in my current position without reflecting upon questions of policy, among other bigger picture questions. In hindsight, I would also say that a government lawyer who considers herself to be nothing more than a technician may lack self-insight. Very few of us are indifferent to the justice of the laws that we seek to apply as government lawyers, or to the justice of the legal cases that we prosecute or defend as government lawyers. Nor are most of us indifferent to the qualities of our clients, our colleagues, our adversaries and our judiciary as we go about our day-to-day work. Reflection upon these matters can – and should – lead to broader reflection about what is good, bad and indifferent in Australian society and our own contributions, for better and for worse.

7. Fundamentally, the project of a government lawyer is to facilitate and promote good government to the benefit of the Australian community, in a country that is fortunate to be a functioning liberal democracy. Although the bombing of the World Trade Centre occurred during my first year at the ABA, Australian liberal democracy was a matter that I then took entirely for granted. Like many Australians who watch events overseas, I am no longer so complacent. According to the 2021 Democracy Index created by the Economist Intelligence Unit, only 6.4% of the world's population

lives in a "full democracy"[1]. One of the five categories on which the Index is based is the functioning of government. Through your impact upon the functioning of the Commonwealth government, as government lawyers you are crucially placed to sustain Australia's democratic health.

8. Justice Gageler has described the sense of purpose of the good government lawyer as involving "adherence to a concept of a continuing polity, the fabric of which is held together by enduring principles and values consistently recognised and acted upon"[2]. That sense of purpose is derived from the particular relationship of government lawyers to and within government; in which government lawyers uphold the rule of law as a pillar of our liberal democracy.

Law, democracy and the profession

9. Our system of democracy has many vital parts. Without any one of them, the system could not be sustained. In the broader community, there must subsist a liberal political culture, and a diffuse commitment to tolerance and civic duty[3]. Our electoral laws expect a relatively high degree of community participation, with

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1 Economist Intelligence Unit, *Democracy Index 2021: The China Challenge* (2021) at 4.

2 Gageler, "What it is to be a Government Lawyer" (2016) 1 *Australian Government Solicitor Magazine* 4 at 5.

3 cf Hand, "The Spirit of Liberty" in Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1952).

federal elections on a three-year cycle and compulsory voting. In the Parliaments, elected representatives must at least generally, and over time, express in their laws and actions the same spirit of liberty and tolerance. Then, state administrations must deliver democratically enacted policies with reasonable efficacy and efficiency[4].

10. Another vital part of our democracy is substantially within the domain of judges and lawyers: the rule of law[5]. To regard the rule of law as one of several pillars of democracy is to avoid overstating the role of lawyers and judges within our system of government. But there is an equal risk of understating the legal system's importance and, indeed, our own significance. Self-deprecation risks an unhealthy fatalism and a failure fully to acknowledge our true capacity and responsibility to make a difference.

11. Without the independent and impartial application of prospective laws, governing subjects and the government alike, a democracy cannot live by its core value of political equality[6]. That is a value realised as much by equality before the law as it is by an

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[4] Fukayama, "Democracy and the Quality of the State" (2013) 24 *Journal of Democracy* 5.

[5] Ginsburg, "Democratic Backsliding and the Rule of Law" (2018) 44 *Ohio Northern University Law Review* 351 at 351 (describing the rule of law and courts as "crucial institutions that can help protect democracy").

[6] Dahl, *On Political Equality* (Yale University Press, 2006) at iv ("the existence of political equality is a fundamental premise of democracy").

equal right to vote. Then, if the Parliament's laws are not fully and impartially applied, the democratic process fails at the last hurdle. The will of the polity, transmuted through electoral and then parliamentary procedures, is not given final effect by the enforcement of the terms of our laws[7].

12. There is also evidence of a more practical relationship between the rule of law and democracy. We presently see, in countries like Poland, Russia, Turkey, and other places now under the watch of political scientists, that the undoing of the rule of law is an essential part of the undoing of democracy[8]. Thus, in *The Constitutional Balance,* Sir John Laws, the UK Lord Justice of Appeal, suggested that "[w]ithout the rule of law, democratic government will swiftly be corrupted"[9].

13. Judges and government lawyers, among other segments of the profession, have special responsibilities in the upkeep of the rule of

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[7] Eskridge Jr, "Norms, Empiricism, and Canons in Statutory Interpretation" (1999) 66 *University of Chicago Law Review* 671 at 675.

[8] Diamond, "Democracy's Arc: From Resurgent to Imperilled" (2022) 33 *Journal of Democracy* 163; Haggard and Kaufman, "The Anatomy of Democratic Backsliding" (2021) 32 *Journal of Democracy* 27 at 36, referring to a "collapse of the separation of powers". See also at 38: "The integrity of elections depends on horizontal checks and the robust protection of rights. Rights, in turn, depend on independent judiciaries, the rule of law, and the accountability provided by elections. Weakening any of these institutions or procedures reduces the constraints on executive power and thus creates opportunities for an autocrat to grab more".

[9] Laws, *The Constitutional Balance* (Hart, 2021) at 1.

law. But the starting point is to observe that the general responsibility falls more widely across the legal profession.

14. This conception of "the profession" as the keeper of the rule of law is an old one. One ancient and famed statement of the idea was made in 1686, by the then Chief Justice of the Common Pleas, Sir Thomas Jones. When pressured by the King to uphold the validity of an executive action that in effect suspended the rule of law – and this while the King was also packing the Court – the Chief Justice said to the King:

> Your Majesty may find twelve judges of your mind, but hardly twelve lawyers[10].

15. In his inaugural address as Chief Justice of the High Court, Sir Owen Dixon wrote of "[t]he court and the legal profession stand[ing] as the necessary foundation of any community"[11]. For Dixon, the profession (as distinct from the courts) played a particularly essential role. Dixon wrote of non-judicial members of the profession

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[10] Firth (ed), *Macauley, The History of England from the Accession of James II* (1914 ed), vol II at 735, quoted in Laws, *The Constitutional Balance* (Hart, 2021) at 17. The power that the King wished to exercise – the so-called 'dispensing power' – "was the power to allow exceptions to the law, to permit what otherwise would be illegal, to grant a subject license to act as if the law dispensed did not exist": Edie, "Revolution and the Rule of Law: The End of the Dispensing Power, 1689" (1977) 10 *Eighteenth Century Studies* 434 at 435.

[11] Inaugural address as Chief Justice of the High Court (1952) 85 CLR xi at xv.

"mak[ing] a greater contribution to justice than the judge himself"[12]. His conception was not one of the legal profession being a tempering force upon democracy – or as the political philosopher, Alexis De Tocqueville put it, "the most powerful existing security against the excesses of democracy"[13]. Rather, Dixon viewed lawyers as maintaining the foundations of the democratic system: what he called the "the foundation and the steel framework of the community"[14].

16. The uniqueness of the role of government lawyers in upholding the rule of law has to do, firstly, with the nature of the government lawyer's client. And it has to do, secondly, with the government

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[12] Dixon, *Jesting Pilate* (The Law Book Company Ltd, Melbourne, 1965) at 245-246. Justice Dixon was there speaking about members of the bar. Previously in the same address, however, he spoke also of '[the work of solicitors in the administration of justice' as having 'the greatest possible importance': at 245.

[13] De Tocqueville, *Democracy in America* (Penguin Books, 1956, Heffner (ed)) at 123.

[14] Inaugural address as Chief Justice of the High Court (1952) 85 CLR xi at xv. A similar image was conjured by Justice Walsh when, upon being sworn onto the High Court Bench, he said that "[t]here are... other professions which minister nobly to the needs of men, but in the end the rock upon which the whole edifice of our civilized society stands is the maintenance within it of a system of law by which order is preserved and the rights and liberties of its members are protected": "Appointments, Retirements and Honours" (1970) *Australian Bar Gazette* 3 at 11. See also Elias, "The Life in Law of George Paterson Barton QC" (2012) 43(1) *Victoria University of Wellington Law Review* 3 at 4 ("The rule of law is fragile. It depends especially upon an independent and fearless profession").

lawyer's place as a locus, within government, of a culture of legality. I will address these two matters in turn.

The government lawyer: Between the Commonwealth and the subject

17. Judges and barristers are often described as standing between citizens and the immense practical powers of government[15]. The government lawyer occupies a similar position. They do so with unparalleled constancy, theirs being a practice where the client is always the government. It is mostly with the assistance of government lawyers that the Commonwealth exercises public power[16], and it is due to those lawyers' work that the exercise of power will be both legally justifiable and justified.

18. The Commonwealth, as a client, is quite different from a commercial client, or an individual client. The Commonwealth is a

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[15] See e.g. in *R v Vine Street Police Station Superintendent* [1915] KB 279 ("...this Court is specially charged as between the Crown and subject to exercise the greatest care in safeguarding the subjects' liberty..."); Dixon, *Jesting Pilate* (The Law Book Company Ltd, Melbourne, 1965) at 245 ("it is the duty of the barrister to stand between the subject and the Crown").

[16] Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1 at 18. Stephenson describes a "transmission belt" conception of the (American) bureaucracy, whereby bureaucrats translate policy decisions or priorities of elected representatives into "concrete regulations, rulings, and enforcement decisions": Stephenson, "The Qualities of Public Servants Determine the Quality of Public Service" (2019) *Michigan State Law Review* 1177 at 1183-1184.

social construct[17] that stands in a relationship of service to the general public[18]. The Commonwealth's interest in a matter, and instructions, may only be determined and given by the human public official who has the requisite authority[19].

19. The Commonwealth is a well-resourced[20],"repeat player"[21] in litigation and, especially as a prosecutor, has a unique and grave potential to affect the liberty of its citizens. The actions of the Commonwealth, sanctioned and shaped by the independent and impartial advice of government lawyers, reach every corner of the country and beyond. Chief Justice Warren of Victoria has observed that government clients will have "policies and practices they wish to see implemented" across the government's jurisdiction[22]. In my experience, "wish" is an understatement of the passion and determination that can be exhibited by some government clients,

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17 Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1 at 12.

18 Compare Finn, "A Sovereign People, A Public Trust" in *Essays on Law and Government* (1995), Vol 1 at 5-21.

19 MacNair, "In the service of the Crown: Are ethical obligations different for government counsel?" (2005) 84 *Canadian Bar Review* 501 at 516.

20 *Thomas v Mowbray* (2007) 233 CLR 307 at 399 [260].

21 Appleby, "The government as litigant" (2017) 37 *UNSW Law Journal* 94 at 98. See also Cameron and Taylor-Sands, "'Playing Fair': Government as Litigants" at 502; Basten, "Disputes Involving the Commonwealth: Observations from the Outside" (1999) 92 *Canberra Bulletin of Judicial Administration* 38.

22 Warren, "Being a government lawyer" (Remarks to the Government Lawyers Conference, 23 June 2017) at 10.

both for better and for worse. These clients can resist conscientiously legal advice given conscientiously and deciding how to proceed in those circumstances can involve very difficult questions of judgment. It is important that the tensions between internal and external government lawyers, that arise inevitably from their different situations, be acknowledged so that they may be worked through constructively.

20. Government lawyers are tasked with upholding the rule of law over the entity with more power than any other. The government lawyer's client, being the Commonwealth or its instrumentalities[23], has been described as the "source and fountain of justice"[24]. But, of course, that proposition has a chequered history, the Crown also being the historic source of threats to the rule of law.

21. Understood in this light, the government lawyer's role is integral to the health of Australian democracy. The advice a government lawyer provides their client will often "define[] the law as understood by the government" and so, in that sense, may

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[23] See the discussion of the proper identification of the government lawyer's client in Australia, by comparison to the United States, in Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 114-118.

[24] *Aspassin v Queen in right of Canada* (1993) 100 DLR 504 at 529; *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409 at 413; *Cain v Doyle* (1946) 72 CLR 409 at 425; *Dyson v Attorney-General* [1911] 1 KB 410 at 421; *Deare v Attorney-General* (1835) 160 ER 80 at 85; *Pawlett v Attorney-General* (1667) 145 ER 550 at 550. See also Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 115.

"determine the rights of citizens dealing with the government" in a way which will never be brought before, and adjudicated by, the courts[25]. As Chief Justice Dixon once put it: "Countless people are governed as to their rights and liabilities by the advice they receive"[26]. So, too, might they be governed, albeit indirectly, by the advice received by government from public servants. In that way, government lawyers are the "first check" on any abuse of power, being advisers to government, but not a part of it[27].

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[25] Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 114; Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 *Public Law Review* 196; Fairlie, "Law Departments and Law Officers in American Governments" (1938) 36 *Michigan Law Review* 906 at 909. See also Twomey, "'Constitutional Risk', Disrespect for the Rule of Law and Democratic Decay" (2021) *The Canadian Journal of Comparative and Contemporary Law* 293 at 296.

[26] Dixon, *Jesting Pilate and Other Papers and Addresses* (The Law Book Company Ltd, Sydney, 1965) at 3.

[27] Warren, "Being a government lawyer" (Remarks to the Government Lawyers Conference, 23 June 2017) at 8.

22. Canadian academic Adam Dodek has described government lawyers as "custodians of the rule of law"[28] who stand at the intersection of public law and legal ethics. As Dodek put it[29]:

> In advising the Crown, government lawyers must provide a fair interpretation of the law. Moreover, as custodians of the rule of law, they cannot use the law as a sword to batter their opponents, for the rule of law is intended as a shield against arbitrary government action not as a weapon in the government's arsenal. Thus, unlike private sector lawyers, government lawyers should not exploit loopholes in the law sanctioning government action or rely on technicalities in litigation.

23. This weighty task has gone wrong in the past. In 2002, advice furnished by lawyers in the United States Department of Justice was relied upon to create an entire category of persons, enemy combatants, who would supposedly not be protected by the rule of law when detained at Guantanamo[30]. It was permissible, so the

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[28] Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1.

[29] Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1 at 30.

[30] For a brief history of the "torture memos" scandal, see Creighton, "Bad Vice, Bad Advice: A Call to End Government Lawyers' Abdication of their Ethical Duty as Counselors" (2021) 34 *Georgetown Journal of Legal Ethics* 895.

advice said, for American forces to use "heightened interrogation methods" akin to torture, such as water-boarding, prolonged sleep deprivation and mental torment, on enemy combatants. The so-called and now infamous "torture memos" illustrate in an extreme way how a government lawyer can fail with terrible consequences[31].

The government lawyer, and Australia's culture of legality

24. A second, special function served by government lawyers is their place, within government, as a locus of legality.

25. In Dicey's great work, *The Law of the Constitution*, Dicey referred on a number of occasions to a "spirit of legality", which he described as pervading the English constitution[32]. In that book, Dicey did not describe that spirit. But in a subsequent letter to a friend, Dicey suggested that "what we mean by spirit as applied ... to institutions, or the like is the existence of certain tacit assumptions

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[31] Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1 at 24. See also, e.g., Greenberg, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005); Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, 2009); Vischer, "Legal Advice as Moral Perspective" (2006) 19 *Georgetown Journal of Legal Ethics* 225.

[32] Dicey, *Introduction to the Study of the Law of the Constitution* (3rd ed, Macmillan, 1889) 163 at 248, 338.

... which appear to those who make them to be matters of course"[33].

26. In more contemporary language, this spirit might be called a culture of legality. It involves a kind of 'institutional morality', the most basic principle of which is that the law is to be obeyed, including by government[34]. Australia's public culture of legality involves firstly a commitment to respecting the courts and its decisions. The largest totem of that respect, in our history, is perhaps the way in which the Commonwealth government received and accepted the decision in the *Communist Party Case*[35]. At the start of the Cold War, the *Communist Party Dissolution Act 1950* (Cth) was made to address a perceived geopolitical threat to Australia's security, at a time when peace was, as Chief Justice Latham observed in dissent, "very precarious"[36].

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[33] Letter from AV Dicey to J Bryce (16 March 1897), Oxford, Bodleian Library, Oxford University, quoted in Walters, "Legality as Reason" (2010) 55 *McGill Law Journal* 563 at 581.

[34] Jowell, "The Rule of Law" in Jowell, Oliver and O'Cinneide (eds), *The Changing Constitution* (OUP, 9th ed) Ch 1 at 17; Feldman and Pleming, "Preface" in Laws, *The Constitutional Balance* (Hart, 2021) at xvi.

[35] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

[36] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 155. Compare the American history of conflict between Court and executive recounted in Breyer, *The Authority of the Court and the Peril of Politics* (HUP, 2021) at 13-22.

27. Four days after the Court held the Act invalid, the then Prime Minister, Robert Menzies, said that he had "no legal criticisms to make" of the High Court[37]. That was notwithstanding Menzies' expressed view that the Court's decision caused, he said, "grave concern ... to some millions" of Australians[38]. After the Court's decision, the Commonwealth government sought to obtain constitutional support for its invalidated legislative scheme, at first through a reference of power from the States, and later through the conduct of a referendum in accordance with s 128 of the Constitution[39]. Those initiatives, which ended in failure, were further expressions of the government's acceptance of the Court's decision.

28. What was instantiated powerfully by these events surrounding the *Communist Party Case* is fortunately instantiated every day in the modern workings of Australian government. As a matter of course, the Commonwealth's response to final appellate judicial decisions is one of acceptance and, if necessary, course correction, even if that is to the executive's "frustration"[40].

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[37] Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1951 at 365.

[38] Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1951 at 365.

[39] Winterton, "The Significance of the Communist Party Case" (1992) 18 *Melbourne University Law Review* 630 at 644-645.

[40] Feldman and Pleming, "Preface" in Laws, *The Constitutional Balance* (Hart, 2021) at xvi.

29. Our culture of legality goes beyond a respect for the courts and its decisions, however. More basically, it involves a respect for the law on the part of government officials. This respect founds, most importantly, a commitment to engaging only in executive actions authorised by the law as the executive understands the law, on legal advice (absent any judicial decision of the proposed action's lawfulness).

30. Government lawyers have a uniquely wide and unobstructed view of this culture of legality, and of its wellbeing in government. More than that, the most senior law officer – the Attorney-General – has been said to have a role in "'remind[ing]' other aspects of the Executive of the core values or ethics of government", including those values comprising the rule of law[41]. And as the then Solicitor-General for South Australia, Bradley Selway QC once suggested, something similar might be said about government lawyers generally. The government lawyer has an "obligation ... not only to comply with" certain ethical duties, including the "duty to comply with the law" and the duty to take decisions "solely in terms of the public interest". The government lawyers' obligation is also "to advise and warn in respect of these 'core' ethical issues".[42]

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[41] Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 114 at 122, quoting Tait, "Public Lawyer: Service to the Client and the Rule of Law" (1997) 8 *Commonwealth Lawyer* 58 at 65.

[42] Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 122.

31. Beyond advising on ethical matters relating to the rule of law, government lawyers also help to sustain, in government, the culture of legality in less direct ways. The regular output of government lawyers is one that signals and affirms the tenets of our culture of legality, in communication with the farthest reaches of the administrative state. In the rare case where a lawyer's instructions are not in accordance with the law, an ethical commitment to legality will, in the government lawyer, burn brightly – or that is the profession's experience[43]. The government lawyer must in that situation "take whatever steps may be appropriate" including, potentially, "giv[ing] such advice as may be necessary in order to have the instructions changed or varied"[44].

Supporting government lawyers

32. What, then, is there to ensure that the government lawyer remains, frankly and fearlessly, a custodian of the rule of law and a locus of the culture of legality?

33. Of course, at the Commonwealth level, most public servants are bound by contract and statute to comply with APS Values and the APS Code of Conduct, contained in the *Public Service Act 1999*

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[43] Gageler, "What it is to be a Government Lawyer" (2016) 1 *Australian Government Solicitor Magazine* 4 at 6, recounting a story concerning Dennis Rose QC.

[44] Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 117.

(Cth). By that Act, the public service is committed to service, ethical, respectful, accountable, and impartial[45].

34. For government lawyers, there are also the values and ethical duties which apply to all lawyers under the *Legal Profession Uniform Law*: a solicitor must act in accordance with their paramount duty to the court and the administration of justice[46]; act in the best interests of their client; be honest and courteous; deliver services competently, diligently and promptly; and avoid compromise to their integrity and professional independence[47].

35. There is also the requirement that the Commonwealth act as a model litigant[48]. The model litigant obligation in its current form was first introduced in 1999[49]. However, the expectation that the Commonwealth act as a model litigant emerged long before the Attorney-General was given the power in s 55ZF, and long before the States and Territories followed suit. In 1667, Baron Atkyns stated that "the king is the fountain and the head of justice and equity; and that it shall not be presumed, that he will be defective in

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45 *Public Service Act 1999* (Cth) s 10.

46 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* s 3.

47 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* s 4.

48 cf *Priest v New South Wales* [2007] NSWSC 41 at [34], where Jonson J likened the model litigant obligation to s 56 of the *Civil Procedure Act 2005* (NSW).

49 See *Judiciary Amendment Act 1999* (Cth) Sch 1, cl 5.

either"[50]. In 1912, in *Melbourne Steamship Co Ltd v Moorehead*, Griffith CJ expressed "surprise" at the Crown having taken a "purely technical point of pleading" given "the old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects"[51].

36. The contemporary model litigant obligation has been variously described as reflecting the government's broader obligation to justice[52], as sourced in the government's obligations to the public[53], or as reflecting the significant advantage that government will typically enjoy as a litigant[54]. It is only through the work of its advisers and litigators that the Commonwealth can truly be a "model litigant". At least among the judiciary, the simple idea is that more is

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50 *Pawlett v Attorney-General* (1667) 145 ER 550 at 552.

51 (1912) 15 CLR 333 at 342.

52 See, eg, *Kenny v South Australia* (1987) 46 SASR 268 at 273; Appleby, "The government as litigant" (2017) 37 *UNSW Law Journal* 94 at 96.

53 See, eg, *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 196; cf Appleby, "The government as litigant" (2017) 37 *UNSW Law Journal* 94 at 97-98. See also Parliament of Australia, Joint Committee of Public Accounts, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (1992) at 15.

54 Cameron and Taylor-Sands, "'Playing Fair': Government as Litigants" at 503; Appleby, "The government as litigant" (2017) 37 *UNSW Law Journal* 94 at 98. This is of course not a constant advantage enjoyed by government: consider, for example, the experience of government regulators tasked with pursuing well-resourced, multi-national companies: Cameron and Taylor-Sands, "'Corporate Governments' as Model Litigants" (2007) 10 *Legal Ethics* 154 at 158-159.

expected from government than non-government lawyers[55]. Depending on one's perspective, the obligation might be seen to serve the legitimacy of the judiciary as much as the executive.

37. This notion of government as socially responsible and as an exemplar in the public sphere is reflected in other areas of Commonwealth action. For example, the Australian National Audit Office explains that Commonwealth statutory authorities should hold themselves to high standards of social responsibility in all their dealings[56].

38. Apart from rules and standards, it is critical that government lawyers have each other. Excellent role models, mutual respect, shared assumptions about justice and the rule of law, competence and conscientiousness. A collective respect from the judiciary whose confidence in the expertise and professional ethics of government lawyers has been cultivated over decades. An open door policy, which I understand is alive and well at least within AGS. A shared appreciation of the challenging and frustrating aspects of work as a government lawyer. A sense of humour about rules that inhibit government from spending money on treats or indulgences that might enhance work life or to recognise a job well done in the

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[55] Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1 at 27.

[56] Quoted in Joint Committee of Public Accounts, Parliament of Australia, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (1992) at 13.

private sector, and generous personal habits that compensate for rules around expenditure of public funds.

Conclusion

39. In conclusion, the safeguards of liberty that Australia has inherited from the liberal democratic constitutions of Victorian England and the United States – the rule of law, the common law and its jealousy of liberty, the separation of powers – require vigilant protection. Government lawyers are central to that never-ending project.

40. Since we are so close by, I will finish by noticing that the High Court building is an important symbol to remind government lawyers of this bigger picture. As with the National Gallery, in which we find ourselves today, the style of the High Court is Brutalist.

41. Brutalism has been called an ethic rather than aesthetic, the ethical concern being honesty in expressing a concept that is metaphorically "necessary" to a particular building in a form that will be "a unique and memorable image"[57]. The honest presentation of structure, materials, services and form is intended to reject eclectic

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[57] Banham, "Brutalism" in Hatje (ed), *Encylopedia of Modern Architecture* (Thames and Hudson, 1963) at 61.

and hedonistic trends associated with earlier twentieth century design[58].

42. In the case of the High Court, its size is intended to reflect its constitutional status. Clearly, its size vastly exceeds its actual work needs. Sir Garfield Barwick, the Chief Justice throughout the development and construction of the High Court building, had strong views about the dignity of the High Court and the importance of the building as a symbol of its importance. According to Barwick's biographer David Marr, Barwick's ambition was that the High Court building would be a "symbolic challenge to parliament"[59].

43. In 2021, Chief Justice Kiefel remarked that the High Court "represents and embodies in a quite astonishing way some central ideas of law, in particular, of the role of this Court in our system of government": it is "intended to be monumental, to reflect the seriousness of its enterprise", but at the same time, "it is awash with light, with openness and transparency"[60].

44. The co-location of the High Court and the National Gallery does not reflect any grand vision of the kinship between law and

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[58] Banham, "Brutalism" in Hatje (ed), *Encylopedia of Modern Architecture* (Thames and Hudson, 1963) at 63.

[59] Marr, *Barwick* (Allen and Unwin, 1992) at 296.

[60] Kiefel, "Launch of the Oral History Podcast and Unveiling of Jude Rae painting" (Remarks at the High Court of Australia, 19 May 2021).

art[61] though, on a good day, I would readily claim a connection. The design architect of both buildings, Colin Madigan, wrote that each structure envisaged a design approach which "reacted strongly against the asphyxiating order of conformity and responded to the halcyon optimistic spirit of the early [19]70s". Mr Madigan concluded that "the buildings hold a demanding asymmetrical balance, in some ways matching, in other ways threatening the illusionary safer symmetry"[62].

45. Needless to say, I have been afforded an exceptional opportunity to contemplate the symbolism of the High Court building. What I once ungratefully regarded as an ugly concrete block, is now a monumental Brutalist expression of honesty, a symbolic challenge to parliament and a physical representation of the "keystone in the federal arch" that is the High Court of Australia[63]. Perhaps this conference will allow time for some of you to consider whether you may also experience the High Court building as an

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[61] Compare Manderson and Martinez, "Justice and Art, Face to Face" (2016) 28 *Yale Journal of Law and the Humanities* 241.

[62] Madigan, "The City as History, and the Canberra Triangle's Part in It" (Walter Burley Griffin Memorial Lecture, 5 October 1983), quoted in GML Heritage, *High Court of Australia and National Gallery of Australia Precinct; Heritage Management Plan Final Draft Report* (June 2017) at 32 (accessible at: https://www.nca.gov.au/sites/default/files/consultation/High%20Court%20National%20Gallery%20FINAL%20HMP.PDF).

[63] See *Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 74 ALJR 405 at [15].

affirming symbolic significance of your important roles as a government lawyer and an actor in Australia's liberal democracy.