NSW LAW REFORM COMMISSION

REPORT 86 (1998) - CIRCULATION OF LEGAL ADVICE TO GOVERNMENT

TABLE OF CONTENTS

NEW SOUTH WALES LAW REFORM COMMISSION

To the Honourable Jeff Shaw QC MLC

Attorney General for New South Wales

Dear Attorney

Circulation of Legal Advice to Government

We make this final Report pursuant to the reference to this Commission dated 25 November 1996.

Mr Michael Adams QC	The Hon Jerrold Cripps QC
Chairman	Commissioner
The Hon Justice John Dowd	His Honour Judge John Goldring
Deputy Chairman	Commissioner
The Hon Justice David Hodgson	Mr Craig Kelly
Commissioner	Commissioner

March 1998

TERMS OF REFERENCE

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, requested, by letter dated 25 November 1996, the Law Reform Commission to inquire into the following matter:

Whether, and in what circumstances, arrangements should be made for the circulation of legal advice received by agencies representing the Crown to other agencies.

PARTICIPANTS

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967* (NSW). For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

Mr Michael Adams QC

The Hon Jerrold Cripps QC

The Hon Justice John Dowd

His Honour Judge John Goldring*

The Hon Justice David Hodgson

Mr Craig Kelly

(* denotes Commissioner-in-Charge)

Officers of the Commission

Executive Director

Mr Peter Hennessy

Research and Writing

Ms Catherine Gray

Ms Donna Hayward

Ms Jennifer Lock

Librarians

Ms Beverley Caska

Ms Aferdita Kryeziu

Administrative assistance

Ms Wendy King

Honorary consultant

The Hon Justice Keith Mason

1. INTRODUCTION

1.1 On 25 November 1996, the Attorney General, the Hon Jeff Shaw, QC, MLC, referred to the Law Reform Commission the question of whether, and in what circumstances, legal advice received by government agencies should be circulated to a broader audience. The reference arose directly from a recommendation made by the Independent Commission Against Corruption (ICAC) during its inquiry into a parliamentary pension paid to Mr Phillip Smiles ("the Smiles case"). The facts of that case, and any wider implications for the circulation of legal advice, are discussed in Chapter 2.

1.2 In Australia, it is a fundamental principle that government should be according to law. Governments may make and carry out law, but in doing so they must themselves act according to law. Modern government has become increasingly complex and functions through many different agencies. As well as having its own area of responsibility, each agency is also part of the network that comprises the three branches of government: the legislature, the executive and the judiciary. While the doctrine of separation of powers dictates that each of these three branches must remain distinct, the reality is that the way in which one government agency interprets and carries out its functions may have an impact on the way other agencies operate, and on the delivery of services to the public. Government bodies may, and often do, seek the advice of lawyers on matters within their areas of administration. A government agency may have its own division which provides it with legal advice, or it may seek the advice of Crown Law Officers, such as the Crown Solicitor, the Solicitor General and the Crown Advocate, or may request the legal opinion of a private lawyer. That advice, for example, may be in relation to specific litigation, or may be more general advice concerning the operation of a statute administered by that agency or under which that agency operates.

1.3 It is conceivable that advice obtained by one government agency may be relevant to other agencies, especially if it concerns the interpretation of a general law, such as the Constitution. There is, however, no legal obligation on the agency receiving the advice to

circulate it, although the Crown Solicitor's Office has a policy regarding advice which affects more than one government agency.[1] Legal advice is usually distributed on a request basis. If an agency wishes to obtain a copy of the advice provided to another agency, it can ask the recipient of the advice for a copy, or approach the author who will seek the permission of the recipient of the advice.

1.4 In past years, virtually all legal advice obtained by government agencies was provided by the Crown Solicitor or the Law Officers. In recent times, however, changes in government policy have increased the opportunity for government departments and agencies to receive legal advice from a wider range of sources, including government legal advisers and private practitioners.[2] This expanding category of legal advisers to government agencies could result in different agencies receiving legal advice on the same matters from separate advisers.

1.5 In this Report, the Commission considers whether rules should be introduced governing if, and when, legal advice received by government agencies should be circulated, and by whom, and to whom, it should be distributed. The Commission makes a recommendation aimed at addressing two problems caused by the current arrangements for seeking legal advice. First, there is the danger that, without any central bank of information on legal advice requested by and provided to government, one government agency may act in ignorance of advice obtained by another agency that is relevant to the first agency. Secondly, agencies may obtain and act on conflicting advice provided by different legal practitioners without realising that such conflicting advice exists.[3]

CONSULTATION PROCESS

1.6 The Commission released an Issues Paper in June 1997 (IP 13), which canvassed a number of issues relevant to the circulation of legal advice to government. The Paper asked a series of questions and invited public comment. The Commission also held seminars in May, in conjunction with the Institute of Public Administration Australia (NSW Branch), and in

---

1. The Crown Solicitor has advised the Commission that his Office has a policy whereby it will not accept instructions to advise one government agency on a legal matter which affects another agency, unless the advice is to be provided to, and input invited from, both agencies: Ian Knight, Crown Solicitor *Memorandum* (27 November 1997).
2. This is discussed further at paras 3.13-3.15.
3. See para 3.15 for hypothetical examples.

August, in conjunction with the Australian Institute of Administrative Law. Several people involved with the provision and receipt of government legal advice attended and contributed to the discussion at each seminar.

ISSUES FOR CONSIDERATION

1.7 In IP 13, the Commission identified the negative consequences which may result from legal advice received by one agency not being distributed to other relevant agencies or to the public generally. Those consequences include the possibility that:

- government officials will be left to act without the benefit of legal advice and so may not act in accordance with the law;

- government agencies will each obtain their own legal advice from different people on the same matter, which raises the likelihood of inconsistent advice;

- government agencies, and thereby the taxpayer, may incur unnecessary cost by

- obtaining legal advice on substantially the same issues more than once; and

- resolving differences over interpretation and application of the law between different organs of government by litigation; and

- public access to government information may be undesirably restricted.

RESPONSES TO SUBMISSIONS

1.8 The Commission suggested in IP 13 that the problems referred to above could be overcome by introducing a requirement that all legal advice obtained by a government agency on an issue which has ramifications for other agencies, or is of interest generally to other agencies or to the public, should be circulated. While a number of people making submissions agreed in theory that greater disclosure may be beneficial, the following practical difficulties in requiring advice to be circulated were raised:

- the sheer volume of legal advice generated and received by government agencies would make it impossible for all advice to be distributed to all other agencies and to the public;

- some agencies saw no need to receive advice relevant to other agencies;
- there would be difficulty in determining what criteria should be used to decide which advice should be circulated and by whom it should be circulated;
- the amount of time and resources that would be necessary to assess which advice should be distributed and to whom would be prohibitive and outweigh any perceived benefits of circulation;
- it is not always possible to distinguish between specific advice and advice of general application, or to know every agency to which particular advice may be relevant;
- advice circulated in isolation without details of the circumstances which gave rise to it is liable to be misunderstood and misapplied;
- legal advice, even advice provided by the same person, can change over time as accepted attitudes change, and so should not be circulated as definitive legal statements;
- devising any guidelines on the circulation of advice would be difficult as they would necessarily have to be broad and flexible to accommodate the vast range of advice produced;
- if the guidelines were broad and flexible, advice could easily be drafted to get around the requirement to circulate it, thereby rendering the guidelines useless;
- if advice were drafted deliberately to avoid having to circulate it, this may restrict the frankness between lawyer and client;
- unforeseen conflicts may arise between agencies engaging in current, pending or anticipated litigation, if advice is mistakenly circulated to the wrong people; and
- the co-operative approach currently operating, whereby agencies circulate the advice on request, is working well.

OPTIONS FOR THE COMMISSION

No change to the existing arrangements

1.9 The Terms of Reference require the Commission to consider *whether* arrangements should be made for the circulation of legal advice. In recommending any sort of change, the Commission must be satisfied that it will solve the problems identified. The concerns raised in submissions and consultations indicate that introducing any requirement that government agencies circulate legal advice to other agencies or to the public, would be difficult and expensive at best and, at worst, unworkable.

1.10 Apart from the problems raised in submissions and consultations, there are significant difficulties in determining the best method of introducing such a requirement. A legislative approach would, in the Commission's view, not be appropriate for two reasons. First, the issues are concerned more with government efficiency and administrative practice than with law. Secondly, a legislative approach would give rise to the issue of penalties for breach, which seems to be out of proportion to the perceived problems any legislation would be designed to address, and would be impractical to enforce.

1.11 This Reference did not result from any overwhelming need to reform government practices in this regard. The Smiles case is not a particularly effective example of the failure of a government agency to circulate legal advice, since other factors were relevant, perhaps to a greater extent. It is purely speculative to suggest that the situation leading to the inappropriate payment of a parliamentary pension to Mr Smiles would have been averted if there had been a legislative or policy requirement that the advice in that case should have been circulated. The Smiles case can be distinguished on the ground that it had as much to do with the failure of the Trustees to obtain independent legal advice after they had been put on notice of a potential problem, and with the separation of powers between the legislature and the executive government, as with the failure to circulate legal advice. The facts of the Smiles case alone do not justify introducing procedures for the distribution of legal advice across government as a whole which may be costly, ineffective and unnecessary.

1.12 It is possible to defend a position of recommending no change to the current legal requirements regarding the circulation of legal advice on the grounds that:

- there is no satisfactory way of implementing or enforcing a requirement to circulate government legal advice;
- there is no reason to believe that such a system would improve government efficiency and accountability, in fact it could well have a negative effect;
- there would be great difficulty in assessing which advices should be circulated and which should be kept confidential;
- the cost and resources involved would be enormous;
- there is no evidence that there are any overwhelming problems with the current arrangements of providing advice on request; and
- if problems currently do exist, there may be better ways to overcome them, such as improving lines of communication and working relationships between government agencies.

Improving circulation arrangements

1.13 For the reasons outlined in this chapter, the Commission considers that no change to the law is necessary in relation to government legal advice. The effectiveness and efficiency of government could, however, be enhanced by greater co-operation and a more effective flow of information between government agencies. To this end, the Commission recommends a change to government administrative arrangements aimed at achieving more effective and accountable government.[4]

OUTLINE OF REPORT

1.14 Chapter 2 of this Report examines the issues which gave rise to the reference. It outlines the facts and circumstances of the 1994 investigation by the Independent Commission Against Corruption (ICAC) into the payment of parliamentary benefits to Mr Smiles, and the implications, if any, that case has for the circulation of legal advice requested by, and

provided to, government agencies. Chapter 3 describes the organisation of government, the major sources of government legal advice and the intellectual property issues that arise in relation to legal advice provided to government by private legal practitioners. Chapter 4 examines the arguments in favour of and against circulating government legal advice, both within government agencies and to the public generally. It also addresses the issue of legal professional privilege. Chapter 5 culminates in the Commission's conclusions and recommendation for improving the circulation of government legal advice.

---

4. See paras 5.6-5.7.

2. BACKGROUND

INTRODUCTION

2.1 Government functions through a disparate network of separate agencies and departments. In the context of such complex bureaucracy, government agencies are required to apply and interpret the law and act in accordance with it. This is a simple and self-evident statement which should, theoretically, be easy to put into practice as there is, after all, only one body of law. A problem may arise, however, if different government agencies each seek their own legal advice and interpret the law differently from each other. It is also easy to imagine two government agencies grappling with the same or a similar legal question. One agency may have the benefit of access to legal advice, while the other agency may not have obtained such advice and, not having access to the advice obtained by the first agency, may act unlawfully. An example of what may occur when advice obtained by one government agency is not circulated to another, can be found in the Independent Commission Against Corruption (ICAC) inquiry into the case of Mr Smiles.[1] The following detail is provided to outline the circumstances from which the Commission's reference arose.

THE SMILES CASE

Background to the reference

2.2 This Reference is the direct result of a recommendation of ICAC, arising from its consideration of the case of Mr Smiles. In 1994, ICAC was asked by the Auditor-General of New South Wales to investigate the circumstances surrounding the payment of parliamentary pension benefits to Mr Smiles, who was the Member of the Legislative Assembly for the seat of North Shore until December 1993. ICAC was also asked to look at the conduct and functions of the Trustees of the Parliamentary Contributory Superannuation Fund ("the Fund"), who were responsible for paying Mr Smiles his pension. Also under review by ICAC were the relevant laws, practices or conventions, if any, which govern the relationship between the New South Wales Cabinet, its members, and the Trustees of the Fund. In delivering its report to Parliament, ICAC declined to consider the broader issue of whether,

and in what circumstances, legal advice provided to agencies representing the Crown should be circulated to other agencies. It recommended, and the government agreed, that this question should be referred to the New South Wales Law Reform Commission. The Terms of Reference for this inquiry are set out at the beginning of this Report.

Facts of the Smiles case

2.3 The Commission is not concerned in this Report with the merits or otherwise of Mr Smiles's particular case, but rather with the more general principles pertaining to the circulation of legal advice. The facts of the case do, however, provide the necessary context for this Report. Mr Smiles' case began in 1992, when he was charged with certain offences under the *Taxation Administration Act 1953* (Cth) and the *Crimes Act 1914* (Cth).[2] The *Constitution Act 1902* (NSW) ("the Constitution Act") provides that:

> [i]f a Member of either House of Parliament … is attainted of treason or convicted of felony or any infamous crime, his seat as a Member of that House shall thereby become vacant.[3]

2.4 The Clerk of the House sought advice from the Crown Solicitor as to whether Mr Smiles' seat would be vacated if he were convicted. The Crown Solicitor advised that:

- the offences under the *Taxation Administration Act 1953* (NSW) were "infamous crimes" within the meaning of s 13A(e) of the Constitution Act;
- if Mr Smiles were convicted, the seat would be vacated;
- if convicted, Mr Smiles would lose his entitlement to a parliamentary pension; and
- various consequences would arise if Mr Smiles, having been convicted, appealed successfully against the conviction.

2.5 That advice was forwarded to the Speaker on 8 February 1993 and to the Table Officers of the House on 9 February 1993, with a note to them requesting that the advice be kept confidential. This request was complied with. ICAC noted that:

> [t]he Clerk was advised that … it [the advice] was provided for the benefit of the Clerk and should not be relied upon by any other person, although the possibility of its release to Members of the House was recognised. This is not unusual. *Legal advice is usually prepared for the specific purpose of the particular client. That is one reason why such statements, as well as disclaimers, are commonplace in legal advice*.[4]

2.6 Mr Smiles was convicted of the offences on 21 December 1993. Later that day he wrote to the Speaker tendering his resignation, at the same time maintaining his innocence and

---

1. The Commission acknowledges, however, that the failure to circulate legal advice may not have been the major factor contributing to the error made by the Trustees in the Smiles case: see para 1.11.
2. The following account is a summary of the facts as set out in New South Wales, Independent Commission Against Corruption, *Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles* (February 1995) ("ICAC Report") at 1-10.
3. *Constitution Act 1902* (NSW) s 13A(e).

stating his intention to appeal. The Speaker received the letter the same day. The next day, 22 December, Mr Smiles applied for a pension under the *Parliamentary Contributory Superannuation Act 1971* (NSW). Normally such applications are handled by the NSW Superannuation Office under a delegation from the Trustees of the Fund established under that Act. In this case the Superannuation Office decided, because of the public interest, to refer the matter to the Trustees for decision. On 25 January 1994, the Trustees (all of whom were Members of Parliament) resolved unanimously to approve payment of a pension to Mr Smiles. The *Parliamentary Contributory Superannuation Act 1971* (NSW) gives the Trustees a discretion to approve the payment of some pensions in a lump sum. In April 1994, they agreed, unanimously, to exercise this discretion and give approval to Mr Smiles being paid a lump sum.

2.7 In a covering letter to his application, Mr Smiles advised the Chairman of the Trustees that he had tendered his resignation to the Speaker. He did not mention his conviction, although this was widely publicised at the time. If Mr Smiles had ceased to be a Member of Parliament by virtue of his letter of resignation, he would have been entitled to payment of a parliamentary pension. If, however, he had ceased to be a Member on his conviction by operation of s 13A of the Constitution Act, he would have been entitled only to the contributions he had made to the superannuation fund.

2.8 The Trustees did not ask the Speaker or the Clerk if they had any advice concerning the situation of Mr Smiles and his entitlement to a pension. Neither the Speaker nor the Clerk volunteered that they had such advice, nor did they seek to make this advice available to the Trustees. The Trustees sought the advice of the Crown Solicitor regarding Mr Smiles' entitlements on 22 December 1993. The Crown Solicitor declined to advise (presumably because he had provided earlier advice to another client on the same issue) and suggested that advice be sought from an appropriate Queen's Counsel. ICAC found that the Trustees might have sought independent legal advice but decided not to do so, due to the expense involved.[5]

2.9 The situation was further complicated by the fact that other public officials and bodies had received legal advice concerning the effects and consequences of Mr Smiles' conviction. The Solicitor General had provided a number of opinions to the Director General of the Attorney General's Department and the Director General of the Cabinet Office, both before and after the advice provided by the Crown Solicitor to the Clerk of the Legislative Assembly, in which loss of entitlement to a parliamentary pension was clearly stated as a possible

4. ICAC Report at 4 (emphasis added).
5. ICAC Report at 34-35.

consequence of conviction for an "infamous crime". ICAC found that both the Premier and the Chairman of the Trustees of the superannuation fund (who was a Cabinet Minister at all relevant times) were aware, at least, of the existence of these advisings, if not of the detail of their contents, at the time the Trustees considered Mr Smiles' application, because the general questions had been the subject of Cabinet briefing papers. However, it was accepted by ICAC that the Chairman took seriously the need to distinguish his functions as a Cabinet Minister from those as a Trustee, and that there was no dishonesty or corrupt conduct in the way he acted.[6]

IMPLICATIONS OF THE SMILES CASE FOR OTHER GOVERNMENT LEGAL ADVICE

2.10 On one interpretation, wider circulation of the legal advice given to the Clerk of the Legislative Assembly may have influenced the course of events in the Smiles case. If the Trustees of the Superannuation Fund had access to that advice it may, for example, have alerted them to the possible need to enquire further into the issue of whether Mr Smiles ceased to be a Member of Parliament because of his resignation or because of the conviction, and the impact of the manner in which the seat was vacated on Mr Smiles's pension entitlements.

2.11 There are some distinguishing factors concerning the Smiles case, however, that should be highlighted when considering whether or not the case should be used as an argument for imposing on government agencies an obligation to circulate more broadly the legal advice which they receive. First, the special constitutional position held by Parliament and its officers differentiates it, and them, from other government agencies. Secondly, the Chairman of Trustees had the opportunity to disseminate the advice, since he had learned of its existence in the role of Cabinet Minister, but considered that such action would be improper.[7]

6. ICAC Report at 8.
7. See also para 1.11.

3. GOVERNMENT AS THE RECIPIENT OF LEGAL ADVICE

THE ORGANISATION OF GOVERNMENTS

The Crown and the rule of law

3.1 It is a fundamental principle operating in Australia that all governments must conduct business according to law. This is regardless of the specific policies which any particular government follows and implements. In order to fulfil this duty, Ministers, who are responsible through Parliament to the people for their actions, must know what the law is, and they seek and receive legal advice for this purpose.[1] In *Eastern Trust Co v McKenzie, Mann & Co*[2] the Privy Council said:

> It is the duty of the Crown and of every branch of the Executive to abide by and obey the law … it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

Ministers and other organs of government cannot escape their duty to observe and maintain the rule of law by compartmentalising government for the purposes of receiving legal advice. Politically and legally, the government is a single entity. However, this concept of unity of government for legal purposes does not preclude restructuring government, if it is consistent with constitutional rules, for the purpose of achieving policy objectives, such as achieving greater efficiency in government operations.

3.2 The administrative changes introduced in recent times have seen flatter institutional structures and "privatisation" or "corporatisation" of many parts of the executive government, in the interests of competitiveness and efficiency. Further, the shedding or "outsourcing" of many functions of government has meant that activities which were formerly carried out by government departments or agencies are now undertaken by private contractors in return for payment by the government. Under the *State Owned Corporations Act 1989* (NSW), provision is made for government-owned trading or business enterprises to be incorporated, and to become largely independent of the formal structures of the executive government. For the purpose of litigation, these State-owned corporations are not part of the State,[3] yet many are still represented and advised by the Crown Solicitor. When State-owned corporations have

1. See *Waterford v The Commonwealth* (1987) 163 CLR 54 at 62-68, per Mason and Wilson JJ.
2. [1915] AC 750 at 759.
3. See, for example, *State Owned Corporations Act 1989* (NSW) s 9(c) and 20F.

an independent legal personality, an argument can be maintained that the advice they receive belongs specifically to that legal entity. Even though it is likely that the structure of government institutions may continue to change in this way, a large core of government activity will remain, and those engaged in this activity will, from time to time, require legal advice on a range of matters, and certainly not just on matters related to litigation.

3.3 To some extent, government today maintains a degree of unity in practice. Despite the existence at times of inter-personal or inter-departmental rivalry, Ministers discuss matters of common or mutual concern in Cabinet, party meetings and informally. Political reality dictates that Ministers and their officials will generally pass on to their colleagues information they receive which is of common interest, although there is no legal obligation on them to do so. Where a department or agency believes that information, including legal advice, on an issue of mutual interest is held by another department or agency, a simple request is usually enough to obtain a copy of that information.[4]

3.4 Despite this semblance of unity, however, government is no longer monolithic. Government statutory bodies have their own legal personality and have the legal capacity to sue and to be sued by each other. The position is less clear in relation to a Minister, a department, an official or a statutory authority which does not have an independent legal personality. Although notions persist that "the government" or "the Crown" is a single entity, there are cases of departments or agencies being prosecuted for offences. Civil actions are brought, from time to time, by one governmental entity against another.[5]

3.5 Traditionally, different branches of the executive government did not settle their disputes in this way. Rather, in the last resort they relied on the balance of political power between the Ministers responsible for the different agencies. If they sought legal advice, both sides to the dispute would probably first approach the Crown Solicitor[6] or, through their Ministers, the Attorney General. When Byers and Gill considered the provision of legal services to government, they took the view that the government was an entity and that it was not in the public interest that different branches of the government should be involved in litigation against each other.[7] As a matter of law, this is the correct view. Where a difference of opinion arises between government bodies, Byers and Gill recommended that the matter

4. NSW Health Department, *Submission* (2 September 1997).
5. Legal Aid Commission of New South Wales, *Submission* (20 August 1997); NSW Health Department, *Submission* (2 September 1997).
6. See para 1.3 for the Crown Solicitor's policy when advising more than one government agency on the same matter.
7. M Byers and M Gill, *Review of Legal Services to Government* (1993) at 15-16 ("the Byers and Gill Report").

should be referred to the Attorney General, whose opinion should be conclusive.[8] The government of the day did not accept this recommendation. In fact, litigation between different organs of government, including both criminal prosecutions and civil actions, appears to have become more common. In October 1997, the Premier issued a Directive about the matter.[9] The Directive states that wherever possible, government agencies should attempt to resolve their differences without resorting to litigation. The Directive also sets out Guidelines to be followed by government agencies in situations where litigation, either civil or criminal, is unavoidable. The Guidelines emphasise consultation between disputing agencies.

Western Australia v Watson

3.6 A recent judicial authority on the nature of the Crown in Australia is *Western Australia v Watson*.[10] In that case, the respondent suffered from asbestosis. For a period of about a year, almost 30 years before the action commenced, he was employed by the State Department of Harbour and Lights. It was conceded that the Department had no legal identity, and that Mr Watson's employer was the State. In the course of his employment he acted as a tally clerk and as a loader in a shed where bags of asbestos were loaded and unloaded. The trial judge found that, in the course of his employment by the State, he had been exposed to asbestos dust, and that this exposure had caused his affliction. This action was based on negligent failure to provide a safe system of work. The trial judge found that the presence of the asbestos dust in the places where the respondent was required to work constituted a serious hazard to health, and, further, that the State knew, or ought to have known, of the risk, with the consequence that it was reasonably foreseeable that the respondent and persons in the same class as the respondent, might suffer damage as a result of the working conditions. There was evidence that the Minister for Health and the Minister for Mines, and senior officials of the Western Australian Health Department and the Department of Mines, were aware of the dangers of asbestos dust at the time the respondent was employed by the State, but there was no evidence that the Minister for Harbour and Lights or senior officials of that Department had such knowledge.

3.7 The issue for the Court (which dismissed the appeal) was, therefore, whether the knowledge of any Ministers could be attributed to the State, even though those Ministers were not directly responsible for the acts or omissions that gave rise to the respondent's claim. The

8. The Byers and Gill Report at 15-16.
9. Premier of New South Wales, *Memorandum No 97-26: Litigation Involving Government Authorities* (8 October 1997).
10. [1990] WAR 248 (Full Court, Supreme Court of Western Australia).

Court drew an analogy between the State and a corporation. The cases of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,[11] *"The Truculent"*[12] and *HL Bolton (Engineering) Co Ltd v Graham & Sons Ltd*[13] were considered. Those cases deal with the "state of mind" of a corporation and establish that the corporation's state of mind is taken to be the state of mind of those who control it or who are its "directing mind and will".[14] The Court concluded in *Western Australia v Watson* that:

> [i]n our opinion, where, as here, two Ministers of the Crown have acquired relevant knowledge in their capacities as Ministers, the Government and the State must be taken to have acquired that knowledge. . . Such knowledge constitutes actual knowledge.
>
> Furthermore, in our opinion the directing mind and will of the State or the Government may extend beyond Ministers of the Crown and that in the particular circumstances of this case, the knowledge of successive Commissioners of Public Health was, relevantly, the actual knowledge of the Government.[15]

3.8 The Court then considered the arguments put forward on behalf of Western Australia based on the proposition that as government departments had no separate corporate existence, they were agents of the Crown. It was argued that because a principal is taken to have the knowledge of his or her agent, where the knowledge is of a fact material to the agency, there is a duty on the agent to communicate the knowledge to the principal. Accordingly, it was argued, unless it could be shown that the Health Department had a duty to communicate the knowledge of the dangerous properties of asbestos dust to the Department of Harbour and Light, the respondent could not succeed. There was no evidence that the Health Department knew that the State's activities at the place where the respondent worked exposed workers to the danger of dust inhalation, and in the absence of such knowledge, it was argued that there was no duty to communicate. The Court rejected the agency argument:

> We are unable to accept this argument. First, it overlooks the position of Ministers as representatives of the Government (in the sense that they are delegates of the Crown). Their knowledge is that of principals rather than that of agents. In any event, they have a duty to communicate knowledge to one another. Secondly, the argument overlooks the point that, given that the Cabinet is part of the directing mind and will of the Government, that does not prevent each Department from having a directing mind and will which is taken also to act as the Crown.[16]

3.9 These passages, which authoritatively state the current law, may be summarised as follows:

---

11. [1915] AC 705.
12. *Admiralty Commissioners v Owners of the Steamship Divina ("The Truculent")* [1951] P 1.
13. [1957] 1 QB 159.
14. *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 per Viscount Haldane, LC.
15. [1990] WAR 248 at 273-274.

- Each Minister, and in many cases, the senior officials of each government department or agency, may be taken to constitute “the Crown”.
- Knowledge acquired by any Minister or senior official may, at least in some situations, be taken to be the knowledge of the Government as a whole.
- Every Minister or senior official has a duty to communicate relevant knowledge to the Government as a whole.

The Commission considers that the law, as so stated, is satisfactory and that no changes are called for.

The Crown as symbol

3.10 The Crown is a notional entity created by the law for particular purposes. "The Crown" is the symbol of legitimate authority:[17]

> The term 'the Crown' is frequently used to refer to the executive governments in Australia, as it is in the United Kingdom. Each of these governments is treated by the law as a legal person, enjoying rights and affected by liabilities under the common law and legislation, capable of suing and being sued and bound by decisions of courts and tribunals. *However, these rights, liabilities, and susceptibilities are not identical to those of other legal persons,* whether individuals or corporations. The law recognises a number of important distinctions between the legal status of the government and that of subjects.
>
> The legal personality of the executive government is represented by the Crown, by the Queen: that is, *the law regards the government as a legal person* and that person is the Queen. However, in this context the terms 'the Crown' and 'the Queen' have become depersonalised ... *When we talk of 'the Crown' in the context of Australian government in the late 20th century, we refer to a complex system* of which the formal head is the monarch … We do not refer to a replica of 16th century English government.[18]

It has also been said that:

> [t]he Crown is in many ways like a corporation. It is governed in Australia in each jurisdiction by a written constitution, it has perpetual succession, it must necessarily act through natural persons and it takes on a legal status independent from those natural persons.[19]

3.11 At one time, the symbolic Crown was represented as being one and indivisible. This was useful in the context of an imperial power seeking to control a world-wide empire, although the development of colonial self-government made it clear that the executive

---

16. [1990] WAR 248 at 281.
17. For example, G Marshall, *Constitutional Theory* (Oxford University Press, London, 1971) at 20-24.
18. P Hanks, *Constitutional Law in Australia* (2nd ed, Butterworths, Australia, 1996) at 159-160 (emphasis added); see also G Winterton, "The Constitutional Position of Australian State Governors" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, Sydney, 1992) 274 at 274.
19. N Seddon, *Government Contracts: Federal, State and Local* (Federation Press, Sydney, 1995) at 96.

government of New South Wales was quite distinct from that of, say, South Africa or the province of Ontario, as well as from that of the United Kingdom, even when all might symbolically be represented by the same Crown. For the purpose of regarding the Crown or government as a legal person, in terms of property or litigation rights, and in terms of being a recipient of advice, the indivisible nature of government remains important.

3.12 At common law, the Crown enjoyed a range of privileges and immunities in relation to litigation,[20] most of which are not relevant to this discussion. No matter what part of the executive branch of government might be concerned in the litigation, it enjoyed those privileges and immunities, so long as it could be brought within the "shield of the Crown". The common law rule was that the sovereign in person could not be a defendant in his or her own courts, and the Attorney General (at common law) or a nominal defendant (in NSW) represented the Crown. Statutes such as the *Judiciary Act 1903* (Cth) were necessary before the Commonwealth or Ministers could be sued in tort.[21]

3.13 When the party to actual or potential litigation was "the Crown", this party could also be regarded almost automatically as the client of the Attorney General, or the Attorney General as represented by the Solicitor General, Crown Advocate or Crown Solicitor.[22] This was the case even though the instructions were received from, and the advice delivered to, particular individual persons who held office within the executive government.

3.14 No problems arose so long as the advice was relevant only to the particular Minister or official seeking it. However, some advice given by the Attorney General, the Solicitor General or the Crown Solicitor may be of general application throughout the public sector. For example, advice given on the interpretation of a provision of a statute applying to all parts of the public sector (for example, the *Public Finance and Audit Act 1983* (NSW) or the *Freedom of Information Act 1989* (NSW)) would apply in the same way to many, if not all, government departments and agencies. Other advice, such as that given by the Solicitor General in the Smiles case can be seen, in retrospect, to have been relevant not only to the Clerk of the Legislative Assembly who requested it, but also to the Premier, the Trustees of the Parliamentary Contributory Superannuation Fund, and possibly to the officers of the Treasury responsible for the administration of the funds invested by the Trustees.

3.15 It follows that legal advice given to "the Crown", or to any department, agency or official that falls within the "shield of the Crown" is the property of the Crown. The effect of

---

20. P W Hogg, *Liability of the Crown* (2nd ed, Carswell Co Ltd, Ontario, 1989) at 9.
21. The current position is set out in *Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1132-1136, per Gummow and Kirby JJ.

this is that the government as a whole, rather than any department, agency or official, has the property in the advice, and has the right to disclose it or to withhold disclosure, as the case may be. Decisions about whether or not advice should or should not be disclosed are decisions for the government, not for individual organs of government. This may be important where, for example, a legal adviser is asked to advise Department A on its liability to children attacked by dogs, after the children have entered land occupied by the Department which is unfenced. If the advice is that the Department is liable to compensate the children, it should be apparent, if not to the legal adviser, then to senior officials in the Department, that other government departments and agencies may be subject to similar liabilities. The government as a whole has an interest in such advice, as the potential liability of the Crown is not limited to Department A. Similarly, assume that in the course of providing advice to Agency B, a legal adviser finds that certain procedures for dealing with licences or benefits are unlawful, and that, as a consequence, Agency B is liable to refund fees and pay damages to members of the public. Officials of Agency B may know that Agency C and Department D have similar processes. Because there is a common liability of government agencies, the government as a whole has an interest in rectifying the processes and containing the compensation claims upon public revenues.

SOURCES OF LEGAL ADVICE

3.16 For the purposes of this Report, the Commission takes "legal advice to government" to mean advice given to government by a legal practitioner on a legal issue, including the interpretation or application of legislation or in relation to litigation. In IP 13, the Commission set out in some detail the sources from which government may receive legal advice.[23] These include the Attorney General and the Solicitor General, the Crown Advocate, the Crown Solicitor and his Office ("CSO"), legal staff employed in departments and agencies, and barristers and solicitors in private practice.

3.17 The Attorney General, as the first law officer of the Crown, is primarily responsible for provision of legal advice to government.[24] At common law, the Attorney General was, in formal terms, the sole source of legal advice to government.[25] Other legal advisers act on the instructions (often implied) of the Attorney General who represents the Crown. This is so

22. The Byers and Gill Report at 7 emphasises the unity of the Crown for this purpose.
23. See New South Wales Law Reform Commission, *Circulation of Legal Advice to Government* (IP 13) Ch 2.
24. B M Selway, *The Constitution of South Australia* (Federation Press, Sydney, 1997) at 81.
25. Selway at 81.

even when the advice is requested by, or delivered to, a department, agency, or official. In the past, most formal legal advice to government departments and agencies was given by the CSO, or by barristers instructed by that office, including the Attorney General or the Solicitor General. The arrangement whereby most legal advice to government came from the CSO had an additional dimension. Crown Law Officers have a responsibility not only to advise competently on the law, but also, to a higher degree than practitioners in private practice, to advise in ways that assists the government to uphold the rule of law.[26]

3.18 Since 1995, government departments and agencies in certain cases have been free, if they wish, to obtain legal advice from private solicitors. Legal advice on matters falling within "core" areas of government must be referred to the Crown Solicitor. The Premier has directed that:

> legal matters of this nature include those which:
> (a) have implications for Government beyond an individual Minister's portfolio;
> (b) involve the constitutional powers and privileges of the State and/or the Commonwealth;
> (c) raise issues which are fundamental to the responsibilities of Government; or
> (d) arise from, or relate to, matters falling within the Attorney General's area of responsibility.[27]

While the CSO retains a central role in these core matters, the increasing reliance on private legal practitioners to provide advice on non-core matters, weakens the position of the CSO as the central provider and monitor of legal advice to government. The possibility has increased that government departments and agencies may seek and receive advice on the same or similar matters from different sources. This raises the potential for conflict between different parts of government.

THE POWER TO DECIDE ISSUES OF DISCLOSURE

3.19 If it is accepted that the Attorney General is the notional recipient of the advice on behalf of the government as a whole,[28] then the Attorney General would, theoretically, have the power to make decisions regarding the disclosure and circulation of any legal advice to government. As a matter of practice, however, it would be impossible for the Attorney General to be aware of all the legal advice given to government. In this respect, the government is not like any other client of a solicitor or barrister. A private client may disclose legal advice or waive privilege in it as he or she wishes. The government, however, receives advice from officials who may also be part of government and, notionally, departments,

---

26. John Tait, "The Public Lawyer, Service to the Client and the Rule of Law" (1997) 8 *The Commonwealth Lawyer* 58 at 59-60.
27. Premier of New South Wales, *Memorandum No 95-39: Arrangements for seeking legal advice from the Crown Solicitor's Office* (12 October 1995). This Memorandum was reproduced as Appendix A to IP 13.
28. As put forward in Selway at 81, and Tait at 59-60.

agencies and officials receive this advice through the Attorney General as the representative of government as a whole. If the information contained in the legal advice is to be disclosed, in theory, the disclosure should be by the Attorney General, or with his or her knowledge and consent.

3.20 There are strong policy reasons, to be considered in more detail below, supporting the view that a single authority within the government, preferably the Attorney General, should be able, in the last resort, to publish or disclose any legal advice received by any organ of government. It is important, therefore, that it should be understood throughout government that the Attorney General is the notional recipient of all legal advice to government and controls its disclosure. The Commission's recommendation for achieving this is outlined in Chapter 5.

INTELLECTUAL PROPERTY

3.21 The increasing amount of legal advice to government provided by private solicitors also raises the question of intellectual property in the legal advice. This was raised in IP 13, but no submissions received by the Commission addressed it. Where legal advice is given to government by a private legal practitioner, the law of copyright may restrict the range of possibilities for wider circulation of the advice. Copyright is the exclusive right, among other things, to reproduce, publish or make an adaptation of "works", including literary works.[29] Legal advice from a barrister or solicitor is almost certainly a "literary work" under the *Copyright Act 1968* (Cth) ("the Copyright Act"), even though it is not published, if the author was an Australian citizen or resident when the work was made.[30] The copyright is in the manner of presentation of the work, rather than its content. The Copyright Act does not define "literary work" other than to say that it includes a table or compilation expressed in words, figures or symbols and a computer program.[31]

3.22 The copyright vests in the author unless either:

- the work was created by or under the direction or control of the Crown, in which case copyright is vested in the Crown;[32] or
- the copyright is assigned to the client.[33]

29. *Copyright Act 1968* (Cth) s 31(1)(a).
30. This means that they are a "qualified person" for the purposes of the section: *Copyright Act 1968* (Cth) s 32.
31. *Copyright Act 1968* (Cth) s 10.
32. *Copyright Act 1968* (Cth) s 176.

It would seem that the first exception does not apply to legal advice as barristers and solicitors in private practice are for most purposes not subject to the direction or control of their client. They are independent professional advisers rather than employees. Many employees agree, either expressly or impliedly, in their contract of employment that the copyright in any work they produce in the course of their employment vests in the employer, and this is likely to apply to solicitors employed by private firms, so that the firm, rather than the individual, is the author.

3.23 Copyright is infringed when a literary work is reproduced, published or adapted without the licence of the copyright owner.[34] However, copyright is not infringed by anything done for the purposes of a judicial proceeding.[35] Fair dealing with a literary work for the purpose of giving professional advice by a legal practitioner or patent attorney does not infringe copyright in the work. If a government legal officer distributed among departments advice provided by a private legal practitioner, this would probably not infringe the copyright laws, even if no judicial proceedings related to the advice were actually on foot. Since, for reasons advanced earlier, the client is the Crown rather than the department, agency, or individual officer, disclosure of a document by one Crown servant to another would not constitute a breach of copyright. However, distribution of the advice to persons outside the government might amount to infringement of copyright.

3.24 It would be possible for a retainer agreement between a client and a lawyer to provide that the copyright in any advice provided be vested in the client, or alternatively for the retainer agreement to include an express or implied licence for the client to use the advice as he or she thought fit. Such provisions seem to be used rarely in New South Wales in instances where government retains private legal advisers. If such a licence or assignment is not now part of the retainer agreements used by government departments or agencies, they may wish to consider seriously including such arrangements in future, as there are strong policy reasons why advice produced at public expense for the purposes of a public body should not be subject to any restriction at the hands of a private party.

3.25 The Crown is bound by the Copyright Act, but cannot be prosecuted for an offence under it.[36] The Copyright Act does not affect any right or privilege of the Crown.[37] However,

---

33. The *Copyright Act 1968* (Cth) is silent on assignment, so that the common law governing assignment of choses in action applies to copyright. The *Conveyancing Act 1919* (NSW) s 12 requires that legal rights in a chose in action be assigned by express notice in writing.
34. *Copyright Act 1968* (Cth) s 36(1).
35. *Copyright Act 1968* (Cth) s 43(1).
36. *Copyright Act 1968* (Cth) s 8.
37. *Copyright Act 1968* (Cth) s 8A(1).

these rights or privileges do not extend any further than those of an owner of copyright in a work. Generally, copyright in a literary work is not infringed by the Commonwealth or a State performing any acts carried out for the services of the Commonwealth or State.[38] This would seem to allow the publication and reproduction of legal advice to government relating to matters of government, even if provided by a private legal practitioner. The Commonwealth or State is obliged to inform the owner of the copyright of the doing of the act, as well as such information as is required, as soon as possible, unless contrary to public interest.[39] However, in order to remove all doubt concerning the government's rights in relation to advice provided by practitioners, the Commission recommends that a term should be included in the retainer agreement assigning copyright in the advice to the Crown.

Recommendation 1
The Commission recommends that the government should consider introducing a non-excludable term in every contract with a private practitioner under which copyright in any legal advice provided to the Crown is assigned to the Crown.

38. *Copyright Act 1968* (Cth) s 183(1).
39. *Copyright Act 1968* (Cth) s 183(4).

4. CIRCULATION OF GOVERNMENT LEGAL ADVICE

4.1 There are arguments for restricting to particular people the distribution of certain categories of legal advice provided to government. For instance, advice which is particularly sensitive might be circulated within government, or among Senior Executive Service officials, but not circulated to the general public. This chapter examines some of the existing restrictions on the circulation of legal advice and whether or not there are grounds to restrict circulation further.

ACCESS TO GOVERNMENT INFORMATION

4.2 Two important Acts give enforceable rights to access a great deal of government information: the *Freedom of Information Act 1989* (NSW) provides that persons may have access to documents created by or in the possession of government departments and agencies, subject to certain important exceptions; and the *Administrative Decisions Tribunal Act 1997* (NSW),[1] requires administrators who take decisions to which the Act applies to give reasons for those decisions on request.

4.3 Two public officials, the Ombudsman and the Auditor-General, have access to most government documents, except cabinet documents, for the purposes of carrying out their functions.[2] The Ombudsman investigates the way in which government power is exercised while the Auditor-General oversees government finance and spending. There are, however, restrictions on access by the Ombudsman and the Auditor-General to information held by government agencies that is subject to legal professional privilege. The *Ombudsman Act 1974* (NSW)[3] and the *Public Finance and Audit Act 1983* (NSW)[4] restrict the entitlement of the Ombudsman and the Auditor-General, respectively, to require access to documents that are subject to legal professional privilege, unless that privilege has been waived.

---

1. *Administrative Decisions Tribunal Act 1997* (NSW) s 49. This Act received Royal Assent on 10 July 1997, but has not yet come into operation.
2. Audit Office of New South Wales, *Submission* (17 June 1997) at 1-2.
3. *Ombudsman Act 1974* (NSW) s 21(3)(b). The Ombudsman may, however, require production of documents held by a public authority that are subject to legal professional privilege, if the Ombudsman's request is made in relation to a determination by that public authority under the *Freedom of Information Act 1989* (NSW), and the documents are claimed to be exempt under that Act on the ground of legal professional privilege: *Ombudsman Act 1974* (NSW) s 21B.
4. *Public Finance and Audit Act 1983* (NSW) s 36(5)(b). See also New South Wales Parliament, *Report of the Auditor-General of 1994*, Volume 2 (28 November 1994) at 407 and 409.

4.4 Some information in government documents need not be disclosed, even in court proceedings. Two important grounds on which government departments or agencies may refuse to provide information, namely public interest immunity and legal professional privilege, are discussed at paragraphs 4.7-4.21. While it may be said generally that citizens now have certain rights of access to government information, government legal advice will often fall into classes of information which remain confidential and to which the public are denied access.

4.5 Apart from the public right of access to government information, there is also the issue of government access to information held by other government agencies. In practice, different sections of the government often do not have access to information held by other government departments or agencies. While there are arguments in theory that the government is a single entity, in practice it may not be easy, efficient or even desirable for one part of government to have access to the legal advice given to others.

LIMITS ON CIRCULATION OF ADVICE

Privilege

4.6 When the law refers to "privilege" it refers to a situation where a person may be excused or prevented from doing something which others are required to do. A court can require a person to surrender relevant documents to the court unless the documents are subject to privilege. This section discusses two types of privilege that are particularly relevant to this Report.

Public interest immunity

4.7 Public interest immunity is the subject of s 130 of the *Evidence Act 1995* (NSW) which codifies and clarifies the common law as laid down in *Sankey v Whitlam*.[5] In that case the High Court decided that if the government claims that certain documents or information are privileged from being given in evidence on the grounds of a countervailing public interest ("public interest privilege"), the court itself may examine the material to see whether there are reasonable grounds for claiming that privilege.[6]

4.8 Since that case, both State and Federal governments have enacted Freedom of Information laws. The general public policy now expressly embodied in those Acts is openness of government. In particular, the Acts create, and provide means of enforcing,

5. (1978) 142 CLR 1.

citizens' rights of access to government information. However, the law generally recognises that, at times, the courts must balance the public interest in access to government information with a competing public interest in confidentiality of that information to ensure the efficient and effective working of government. The advice given by Crown Law Officers may be included in this privileged government information.

4.9 The courts have also recognised that there may be cases in which documents or other information created for the purpose of policy-making, government administration, or other government operations, should be protected from public scrutiny. It has been suggested that this type of privilege is of recent origin and should be confined to material created in the course of government business which is conducted in the public interest and may not extend to all functions of the modern welfare state.[7]

Legal professional privilege

4.10 When a document is created by a person for the purpose of giving or obtaining legal advice that document is privileged from production in court.[8] When a private individual seeks the advice of a lawyer, especially in relation to actual or potential litigation, the law has always maintained that communication between the client and the lawyer is such that the communication should not be required to be part of the evidence that a court subsequently uses to make its decision. In *Grant v Downs* the reason for this was given:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.[9]

4.11 It may be argued that, because the Crown represents the whole of the people, when the Crown is a litigant, any documents or information belonging to or in the possession of the Crown are common property and ought not to be kept secret. While this view has some merit,

---

6. See T M Gault, "Public Interest Privileges and Immunities" in P D Finn (ed), *Essays in Law and Government: the Citizen and the State in the Courts* (2nd ed, Law Book Co, Sydney 1996) Vol 2 at 243.
7. T G Cooper, *Crown Privilege* (Canada Law Book Inc, Ontario, 1990) at 8-14.
8. This is the effect of the *Evidence Act 1995* (NSW) s 118-119 which codifies and somewhat modifies the common law.
9. (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

and the public interest in having access to such information has been recognised by Parliament in the *Freedom of Information Act 1989* (NSW), there is also a public interest, when the government is a litigant, that it should not be at any disadvantage in the conduct of its litigation, and that it should be entitled to the same professional privilege as its opponents. The argument against privilege ought therefore to be directed at "public interest" privilege rather than at professional privilege.

4.12 To the extent that a legal adviser to government gives information to, or receives information from, a client (the Crown) for the purpose of preparing legal advice, or for the purpose of litigation, the *Evidence Act 1995* (NSW)[10] precludes that document from being required to be given in evidence in court. It is clear that the courts give a very wide meaning to the expression "legal advice".[11] The advice need not be directed at actual or impending litigation.

Salaried legal practitioners

4.13 In *Waterford v Commonwealth of Australia*[12] it was suggested (on the basis of comments made in *Attorney General (Northern Territory) v Kearney*[13]) that legally qualified people employed on a salary, for example lawyers employed in a government department and "in-house" lawyers, were not legal practitioners for the purpose of the rules relating to legal professional privilege. It was argued that such lawyers' employee relationship compromises their ability to act as independent legal advisers. The majority of the court had no difficulty in holding that "salaried" lawyers employed in government departments, especially the Crown Solicitor's Office, were in the same position as solicitors or barristers in private practice, and as such their communications were subject to privilege if they contained legal advice. Justice Brennan (dissenting on this point) took the view that, generally speaking, salaried lawyers were not lawyers for the purpose of these rules, with the exception of lawyers employed on the staff of the Attorney General of the Commonwealth or the State.

Distinguishing legal advice from policy advice

4.14 There is an obvious argument that documents prepared in the course of advising the government and its agencies on the conduct of specific litigation, either current or pending, should be protected on the same grounds that a private person enjoys privilege of confidential

10. Sections 118-119.
11. For example, *Baker v Campbell* (1983) 153 CLR 52 at 95 per Wilson J; at 114 per Deane J.
12. (1987) 163 CLR 54. See also *Austin v Attorney-General's Department* (1986) 12 FLR 22.
13. (1985) 158 CLR 500.

communication with his or her legal adviser. The policy underlying this rule of legal professional privilege is that fair operation of the legal process requires candour of communication between clients and their legal advisers. The government is in no different position to other litigants.

4.15 The government, when represented before the courts, is (or ought to be) in the same position as any client who employs the services of a lawyer. Some documents prepared by legal advisers to government may relate specifically to questions which are being litigated or which may potentially be the subject of specific litigation. At other times, the advice may be of general application, for example, relating to the scope or interpretation of legislation or a rule of common law without any immediate prospect of specific litigation. All this advice could be considered legal advice and may attract legal professional privilege. Crown Law Officers may also be called on to advise on ways of giving effect to various policy options. The distinction between legal advice and policy advice was considered in *Waterford's* case. The Court found that it was difficult to distinguish documents produced for the purpose of litigation from those which gave general legal advice. The majority concluded that legal professional privilege, so far as it applied to government legal advice, was not restricted to documents relating to actual or possible legal proceedings. The majority view on this point might be put in the words of Justice Brennan:

> In any event, I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Provided the sole purpose for which a document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory power or the performance of a statutory function or duty, there is no reason why it should not be the subject of legal professional privilege.[14]

14. *Waterford v Commonwealth of Australia* at 74-75.

4.16 On the issue of policy advice, the majority of the Court determined that legal professional privilege could still apply to a document containing policy or administrative advice, provided the "sole purpose" (according to the test laid down in *Grant v Downs*[15]) of bringing the document into existence was the provision of legal advice. Justices Mason and Wilson stated that:

> [m]atters of policy and legal advice may be intermingled in the one document ... The appellant's submission fails to appreciate that the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege.[16]

Even though the Commonwealth and NSW *Evidence Acts* have replaced the "sole purpose" test laid down in *Grant v Downs*[17] with a "dominant purpose" test, the majority decision in *Waterford's* case concerning the purpose for which the advice was created would still apply. Legal professional privilege covers documents which are brought into existence for the *dominant* purpose of giving and receiving legal advice. Such advice, in the case of private clients, is not confined to litigation.

4.17 Nevertheless, a wide range of legal advice is provided to the various branches and departments of government on matters such as the scope of powers and discretions and as to the way in which those powers and discretions might best be exercised. At times the exercise of those powers and discretions may result in litigation, but in other cases it will not. Indeed, the function of such advice may specifically be to avoid the possibility of litigation. It could be asserted that the public has an interest in the way laws are interpreted and implemented by the executive branch of government, as those laws are made by Parliament on behalf of the public, and the legal advice ought to be in the public domain as much as the texts of the laws. Therefore, it could be argued that legal advice on such matters is qualitatively different from legal advice to private clients which the Australian courts find subject to legal professional privilege. This was the argument favoured by Justice Dawson in *Waterford's* case,[18] but rejected by the majority of the Court. Justice Dawson[19] developed an idea which he had advanced in *Kearney's* case, namely, that there was a distinction between documents produced by government in the normal course of its operation and policy-making, on the one hand, and those produced for litigation. He said:

---

15. (1976) 135 CLR 674.
16. *Waterford v Commonwealth of Australia* at 65.
17. (1976) 135 CLR 674.
18. *Waterford* at 101 per Dawson J.
19. *Waterford* at 100 - 103.

> Where, however, a government is engaging, not in the legal process, but in the purely executive function of decision-making, there is no reason connected with the administration of justice which could require that any advice which it may be given to assist it in that process should be kept confidential.[20]

His Honour divided the documents in question in that case into two categories:[21] first, communications relating to general matters of policy; and secondly, documents created in relation to specific, actual or apprehended litigation. While considering that documents in the second category clearly fell within the area of privilege, Justice Dawson suggested that the documents in the first category did not, and that for any particular documents it would be possible to separate the legal advice from more general policy advice.[22]

4.18 However, Justices Mason and Wilson specifically disagreed with Justice Dawson. They said:

> [T]here is no warrant to draw an arbitrary line through the functions of government in order to exclude the [legal professional] privilege from those described as of an administrative nature. All the functions of the executive government may be so described. No distinction can be drawn between a decision to grant a pension and a decision whether to defend a claim in tort or contract. The growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege, as expressed in *Grant v Downs*, increasingly compelling when applied to decision makers in the public sector. The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system. Government officers need that encouragement, albeit, perhaps, for reasons different to those which might be expected to motivate the citizen.[23]

The remarks of Justice Brennan set out at paragraph 4.15 above also relate directly to this question.

4.19 Because of the broad scope of legal professional privilege in Australia, on the basis of the majority judgements in *Waterford's* case, courts are unlikely, without statutory modification of the law, to distinguish between "legal advice" to government relating to actual or possible litigation (which is analogous to the legal advice generally given to private clients) and the more general advice which Justice Dawson calls "policy advice". Therefore, it is likely that any advice produced for the dominant purpose of providing legal advice to government could be subject to legal professional privilege.

4.20 Justice Dawson also pointed out that documents relating to general policy might separately be subject to executive or public interest privilege and that when considering the

---

20. *Waterford* at 100.
21. *Waterford* at 102.
22. *Waterford* at 102-103.
23. *Waterford* at 64.

scope of client legal privilege or legal professional privilege that possibility should be borne in mind. It could be argued that privileged advice should have only limited circulation. For example, advice which is subject to "public interest immunity" might be circulated to other parts of government but no further; and advice which is subject to "legal professional privilege" might not be circulated any further than the immediate client. This view was also specifically rejected by the majority, though it found some support from Justice Deane.

4.21 The Commission considers that, for the reasons advanced by the majority of the High Court in *Waterford's* case, it is not tenable in practice to distinguish between legal advice to government which refers to specific litigation and other legal advice which might be more general. It is preferable to leave the government to decide whether or not to waive any privilege and to release the advice to an audience wider than the original recipient, whether or not confined to the institutions of government.

Arguments for wider circulation

4.22 The wider availability of legal advice to different government departments and agencies may avoid cost, duplication of effort, clashes of policy or embarrassment to other sections of government, such as arose in the Smiles case. It would also assist in upholding "the rule of law" on the assumption that departments and agencies of government will not knowingly contravene clearly advised legal restraints. Wider availability of some legal advice within government might also assist in ensuring consistency in the behaviour of various government departments and agencies, and, therefore, greater public confidence in the machinery of government.

4.23 The decision in *Western Australia v Watson*[24] means that for purposes of civil liability, the knowledge of any Minister will be attributed to government as a whole. That case is also authority for the proposition that Ministers certainly, and probably senior government officials as well, are under a duty to communicate relevant information to each other. It is therefore important, in the interest of protecting government from liability, that legal advice which may be relevant to more than one agency or department be communicated within government.

Circulation to government contractors

4.24 With increasing "corporatisation", "privatisation" and "outsourcing" of activities traditionally regarded as governmental, many private businesses and individuals are now performing functions which are based in legislation. On the one hand, it may be expected that

they can, and should, pay for legal advice which they require in the course of their operations. However, it may be as important for these businesses and individuals to have access to the same type of authoritative advice on such matters as the scope of particular legislation, as it is for officials within government departments and agencies performing similar functions. When similar services are performed for government by a number of different contractors it is essential that they operate consistently, for example, by applying legislation in the same way. Given that legal advice may be essential to the proper functioning of private contractors or state-owned enterprises operating outside the traditional scope of government, these operators should have access to that legal advice if the ethos of competition is to be fully fostered.

4.25 If legal advice is circulated to say, contractors performing functions for government, it is not clear whether in law or in practice it can be confined only to those contractors. It is difficult to envisage policy reasons why any advice which government might wish to circulate to contractors should not be made available to the wider public, as many matters of policy may not constitute commercially sensitive information.

Wider circulation to the public

4.26 It can be argued that if such advice is readily available to the public, the public will have a greater understanding of why powers and discretion of governments are exercised in a particular way. Publication will also afford the public an opportunity to make representations to government to exercise those powers and functions differently. Publication might also ensure that different branches of the government take a similar approach to the exercise of their powers and functions. The *Freedom of Information Act 1989* (NSW) and the *Freedom of Information Act 1982* (Cth) embody the principle that government information is presumed to be publicly available. While some legal advice ought clearly to be kept confidential, in principle legal advice should not be treated differently from other government documents unless a special case is established.

Arguments against wider circulation

Wider circulation within government

4.27 In its submission to ICAC's inquiry into the Smiles case, the Attorney General's Department referred to problems in circulating legal advice when there are conflicts between different departments or trading entities of the government arising out of their commercial activities. Situations were also referred to where there may be policy reasons for keeping legal

24. [1990] WAR 248.

advice to government confidential. The practical difficulties of disseminating advice throughout the various departments, agencies and statutory corporations of government were also raised.[25]

Wider circulation to the public

4.28 The effect of making the legal advice received by government available to the public may inhibit initiatives by departments or agencies of government to explore the limits of their powers and functions. Legal advice tends to be conservative. It may not be in the best interests of the public that, where Parliament has conferred particular powers or functions on a government institution, these powers or functions should be interpreted in a restrictive way. Failure to seek legal advice, for example on the interpretation of legislation, may lead officials to be overly cautious in their approach, thus frustrating the intention of government. It can also be argued that, if departments and agencies know that legal advice may become available, either within government or more widely, they will be inhibited from seeking legal advice at all, especially when relevant officials suspect that the advice may impede, albeit lawful, the course of action they wish to follow. It is a fundamental principle of our system of government that Ministers, and those accountable through them to the people, will observe and maintain the rule of law. No requirement for the wider circulation of advice should have the effect of preventing or inhibiting them from so doing.

4.29 The *Freedom of Information Act 1989* (NSW) and the *Freedom of Information Act 1982* (Cth) recognise that documents used internally are not normally publicly available. Candour of communication within government requires that all opinions be canvassed and, provided that the final policy documents are available to the public, documents used in preparing them, including legal advice, should remain confidential.

Cost and volume

4.30 Most legal advice sought and received by government departments, agencies and officials relates to specific fact situations. In most cases the advice concerns the application of the law to those specific facts and would therefore be neither relevant nor useful to any part of government other than the one which sought the advice.[26] In some situations, circulating advice without information about the context which gave rise to it could result in that advice

25. New South Wales, Independent Commission Against Corruption *Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles: Second Report* (April 1996) at 21.
26. NSW Health Department, *Submission* (2 September 1997).

being misapplied and misinterpreted. A requirement to disclose all legal advice generally to a wider group would involve cost in actually making the advice available, either electronically or in hard copy. More significantly, officials in a large number of departments and agencies would have to spend time reading material which in almost every case would have no relevance to their work.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1 The Commission has concluded that no changes to the law are necessary regarding the circulation and disclosure of legal advice to government The conclusions and recommendations in this chapter are directed therefore to changes in practice rather than to legislative reform. The relevant policy issues are:

- ensuring that government officials seek advice whenever appropriate so that they act in accordance with the law, thus maintaining the rule of law;
- ensuring that no litigant (including a government department, agency or official) is placed at a disadvantage by being required to disclose legal advice received by it at any time;
- the desirability of ensuring public access to government information in defined situations;
- ensuring that government does not incur unnecessary cost by:
  - obtaining legal advice on substantially the same issues more than once; and
  - resolving differences over interpretation and application of law between different organs of government by litigation; and
- ensuring that organs of government do not act in ignorance of legal advice on applicable rules when competent legal advice on relevant issues already exists.

5.2 These interests are balanced to some extent by existing arrangements. For example, the right of a client to protect the candour of communication with his or her lawyer is allowed due to legal professional privilege. This interest is balanced with the right of the public to have access to government information in the *Freedom of Information Act 1989* (NSW). The Commission considers these rights to be balanced appropriately.

5.3 For this reason, the Commission does not recommend any legislative changes. It would be unduly costly, burdensome, and generally unnecessary to require legal advice given to or received by government departments or agencies to be distributed to other organs of government, especially where this relates to specific fact situations.

5.4 The Commission considers, however, that there are cases in which there is a clear public interest in ensuring that such advice is made available to a wider group than the requesting government agency. For instance, advice involving the interpretation or application of the *Constitution Act 1902* (NSW), or legislation of general application,[1] may be relevant to

1. For example, the *Ombudsman Act 1974* (NSW); the *Public Finance and Audit Act 1983* (NSW); the *Freedom of Information Act 1989* (NSW); and the *Public Sector Management Act 1989* (NSW).

all government agencies. Similarly, there may be cases where a principle of common law or the interpretation or application of a word or phrase in legislation may have relevance beyond the immediate circumstances giving rise to the advice. In order to ensure the proper distribution of legal advice of this nature to those with an interest in it, the Commission suggests that any legal practitioner giving advice to the Crown or any official, agency or department of government, should consider whether:

- the advice may have, or may contain a general principle which has an application that is wider than the particular circumstances which gave rise to the request for advice; and
- the potential effect that disclosure of the advice might have on the agency which requested it.

5.5 The legal practitioner providing the advice may consider recommending to the recipient that the advice be distributed to other government agencies, or to the Attorney General, representing the government as a whole, with a suggestion that the advice be distributed more widely to government departments, agencies and officials as may be appropriate in the circumstances. This would not be in breach of any duty owed by the legal practitioner to the client agency, since the client is notionally the Crown, with the Attorney General acting as the representative of the Crown. The power of the Attorney General would not be limited to circulating advice provided by Crown Law Officers, such as the Solicitor General, the Crown Advocate or the Crown Solicitor, but would include advice provided to government by private practitioners.

5.6 The Commission recommends that legal practitioners should not have any substantive obligations placed on them in this respect. As a matter of practice, however, the Commission recommends that all government agencies and departments should forward copies of any written legal advice received from any source which they consider may be relevant to other departments or agencies of government, to those agencies and departments and to the Attorney General's office for information.[2] A requirement to do so might usefully be included in the terms of the employment contracts between the government and more senior officers of the public service, especially heads of departments or agencies.

5.7 It is envisaged that only a few written advices would be disclosed as a result of this recommendation. Heads of agencies and departments could publish any material they choose.

---

2. The Commission was not unanimous in reaching its conclusions and recommendation. The Hon Jerrold Cripps QC, and Mr Kelly, considered that although the current position of government in respect of the circulation of legal advice may be improved upon, this is not an area that requires the attention of the existing law. Accordingly, those Commissioners considered that the Commission should not make any recommendation.

If such publication might be embarrassing to individuals, names and other identifying facts could be deleted. The Attorney General need publish only that advice which had general application, and he or she would choose carefully the audience to which they would be published. In some cases, this might be to the general public. In most cases, the process would simply involve notifying the department or agency concerned of the existence of the advice. To facilitate easy distribution, an electronic database of advice could be maintained. The Commission considers that questions of how the advice should be communicated or stored, and who should be responsible for maintaining it, would more appropriately be addressed by government administrative procedure than by a Commission recommendation. The Commission notes, however, that the Crown Solicitor's Office already maintains a significant database of advice, and the Crown Solicitor or one of the Deputy Crown Solicitors may be an appropriate person to whom the Attorney General might delegate the function of circulating advice and granting access to the data base. This might require a balancing of the interests of confidentiality with the obligation, clearly stated in *Western Australia v Watson,*[3] of senior officials to communicate relevant information to each other.

Recommendation 2

The Commission recommends that all government agencies and departments should forward copies of any written legal advice received from any source which they consider may be relevant to other departments or agencies, to those agencies and departments and to the Attorney General's office for information.

3. [1990] WAR 248.

APPENDIX A: SUBMISSIONS RECEIVED

1. Auditor-General of New South Wales, 17 June 1997
2. Legal Aid Commission of New South Wales, 20 August 1997
3. New South Wales Health Department, 2 September 1997
4. Mr John Fitzgerald, Barrister, 4 September 1997
5. Mr B Selway, Solicitor-General of South Australia, 8 September 1997
6. The Cabinet Office of New South Wales, 20 November 1997
7. Attorney General's Department of New South Wales, 21 November 1997
8. Mr Ian Knight, Crown Solicitor, New South Wales, 27 November 1997
9. Attorney General's Department of New South Wales, 18 December 1997

APPENDIX B: Table of Cases

APPENDIX C: BIBLIOGRAPHY

ARCHER, P *The Role of the Law Officers* (Fabian Research Series 339 Fabian Society, London, November 1978)

ARROWSMITH, S *Civic Liability and Public Authorities* (Earlsgate Press, South Humberside, 1992)

NEW SOUTH WALES ATTORNEY GENERAL'S DEPARTMENT, *A Brief History of the Attorney General's Department* (1996)

BYERS, M and GILL, M *Review of Legal Services to Government* (1993) ("The Byers and Gill Report")

COOPER, T G *Crown Privilege* (Canada Law Book Co, Ontario, 1990)

CULLEN, M "Developments in the Law of Evidence", *The University of Sydney Faculty of Law, Continuing Legal Education* (Australian Government Solicitor's Office, 6 July 1987)

EDWARDS, J L J *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984)

EDWARDS, J L J *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964)

EVATT, H V *The Royal Prerogative* (Law Book Co, Sydney, 1987)

FINN, P D *Essays on Law and Government, Volume 2: The Citizen and the State in the Courts* (LBC Information Services, 1996)

HAILSHAM, The Rt Hon Lord of St Marleybone *The Office of Law Officer of the Crown, and the Office of Lord Chancellor* (The Child & Co Lecture, 1978)

HALL, H D *The British Commonwealth of Nations: A Study of Its Past and Future Development* (Methuen & Co Ltd, London, 1920)

HANKS, P *Constitutional Law in Australia* (2nd ed, Butterworths, Sydney, 1996)

HOGG, P W *Liability of the Crown* (Law Book Co, 1989)

NEW SOUTH WALES, INDEPENDENT COMMISSION AGAINST CORRUPTION, *Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles* (February 1995) ("ICAC Report")

NEW SOUTH WALES, INDEPENDENT COMMISSION AGAINST CORRUPTION, *Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles: Second Report* (April 1996)

KEITH, A B *The King and the Imperial Crown: The Powers and Duties of His Majesty* (Longmans, Green and Co, Great Britain, 1936)

LEE, H P and WINTERTON, G *Australian Constitutional Perspectives* (Law Book Co, Sydney, 1992)

MARSHALL, G *Constitutional Theory* (Clarendon Press, Oxford, 1971)

MASON, K "The Office of Solicitor General for New South Wales", (Autumn 1988) *Bar News* 22-27

NEW SOUTH WALES, *Government Response to the Recommendations of the Review of Legal Services to Government* (1993)

NEW ZEALAND, CROWN LAW OFFICE, *Crown Law Practice in New Zealand* (Crown Law Office, Wellington, 1961)

NEW ZEALAND, SOLICITOR-GENERAL *Role of the Attorney-General, Solicitor General and Crown Law Office and Issues of Importance* (Crown Law Office, Wellington, 1996)

NORTON-KYSHE, J W *The Law and Privileges Relating to the Attorney-General and Solicitor-General of England* (Stevens and Haynes, Hong Kong, 1897)

O'CONNELL, D P "The Crown in the British Commonwealth" (1957) 6 *International and Comparative Law Quarterly* 103-125

ODGERS, S *Uniform Evidence Law* (2nd ed, Federation Press, Sydney 1997)

PALMER, G "New Zealand Office of the Attorney-General" [1987] *Commonwealth Law Bulletin* 248-253

PARLIAMENT OF NEW SOUTH WALES, *Report of the Auditor-General of 1994*, Volume 2 (28 November 1994)

PEIRIS, G L "Legal Professional Privilege in Commonwealth Law"(1982) 31 *International and Comparative Law Quarterly* 609-639

PICKRILL, D A *Ministers of the Crown* (Routledge & Kegan Paul, London, 1981)

SALOKAR, R M *The Solicitor General: The Politics of Law* (Temple University Press, Philadelphia, 1992)

SEDDON, N *Government Contracts: Federal, State and Local* (Federation Press, Sydney, 1995)

SELWAY, B M *The Constitution of South Australia* (Federation Press, Sydney, 1997)

SHAWCROSS, H *The Office of the Attorney-General*, The Law Society (Notes of an address delivered on 18th February, 1953, Chancery Lane, London)

TAIT, J “The Public Lawyer, Service to the Client and the Rule of Law” [1997] *The Commonwealth Lawyer* 58