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Ethics, wilful blindness and temptations: government lawyers' professional responsibilities in sticky situations

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"*How does it happen that high-profile government employees end up facing allegations of unethical conduct and at worst, criminal charges. What are the common denominators present in cases where public officials misuse or abuse their position of trust. Are lawyers immune to the temptation to cover up or turn a blind eye to the indiscretions of those they work for or with? What causes a respected public servant, including lawyers, to lose their judgement and travel down an unethical path? This session will address these issues frankly by reference to examples and provide guidance on how to recognise when the line between ethical and unethical is starting to blur.*"

I. Introduction

1. The *Public Administration Act* 2004 defines a number of public sector values. Among them is **integrity**, which includes reporting improper conduct, and avoiding any real or apparent conflicts of interest.[1]

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[1] *Public Administration Act* 2004 sub-s 7(1)(b)(iii)-(iv)

2. For the government lawyers, at least, these are not bumper stickers for the Departmental car.

3. As a subset of in-house/corporate counsel, less attention than is desirable is paid by legal ethicists to the practical conundrums which government lawyers may face.

4. This is not to say that government lawyers exist in an ethical void – far from it, there is an abundance of quite general guidance, including in the ethics textbooks – only that what is written is not of a practical nature, instead addressing the broad character of government lawyers' ethical duties.

5. Of the literature I reviewed in preparing this paper, the most practical had to be Selway, former Solicitor-General for South Australia, who examined government lawyers' ethical obligations from a constitutional perspective.[2] He identified the following accepted traits:

   (a) ***Selflessness**: Decisions should be made solely in terms of the public interest. Decisions should not be based upon any financial gain to the decision-maker, his or her family or friends.*

   (b) ***Integrity**: Officials should not be under any financial or other obligations to outside individuals or organisations that might influence them in the performance of their official duties.*

   (c) ***Objectivity**: Officials should make choices on merit.*

   (d) ***Honesty**: Officials have a duty to disclose any conflict of interest and to take steps to resolve the conflict in a way that protects the public interest.*

   (e) ***Legality**: Officials have a duty to comply with the law and with any lawful directions given to them.*[3]

   As their wording reflects, these principles apply both to the lawyers, and the officials they advise. And as Selway reflects:[4]

   > *So considered, the obligation of a government lawyer not only to comply with these ethical duties, but also to advise and warn in respect of these "core" ethical issues can be justified in terms of the legal obligation upon the Executive to comply with the rule of law* (my underline).

[2] Bradley Selway QC, 'The duties of lawyers acting for government' (1999) 10 *Public Law Review* 114
[3] Ibid. 122
[4] Ibid.

6. While a government lawyer may be a decision-maker (other than in the sense of a Tribunal), more commonly, he or she will be an adviser to a public authority, or quasi-autonomous non-governmental organisation (made famous in *Yes Minister* through the shorthand acronym 'QUANGO'). In other words, the lawyer is responsible for advising other public officials on matters of probity and proper procedure according to law.

7. It is when their non-lawyer colleagues do not exhibit those traits that the lawyers face ethical conundrums. What is problematic is that, as a matter of practice, the appropriate protocols for reporting such behaviour (which is internal) do not guarantee a remedy.

8. That has led to serious public sector corruption.

9. Which does beg the question: **what is the government lawyer to do**? Not least because government lawyers are in an employment relationship with their sole client (incorporating applicable codes of conduct), but also because ordinary notions of privilege and confidentiality cause discomfort at the thought of reporting possible misconduct (particularly because lawyers' may feel those duties extend to their colleagues, despite the fact they are technical not a client).

10. To this mix can be added the protected disclosure provisions (formerly called whistleblower protections) under the *Protected Disclosure Act* 2012, one of the suite of laws that, amongst other things, established the Independent Broad-Based Anti-Corruption Commissioner (IBAC), and increased the powers of the Victorian Ombudsman.

11. This paper uses the confronting examples of Operations Ord and Dunham, conducted by the IBAC into the Victorian Department of Education. Those considered, respectively, exploitation of the 'banker school' system by the departmental leadership ('**the Napoli investigation**'), and corruption of the tender process relating to the "Ultranet" online teaching and learning portal ('**the Ultranet investigation**').

12. Neither example involved lawyers – fortunately for the lawyers, unfortunately for our discussion – participating in what IBAC alleges was the corrupt conduct.[5] However, I would suggest they illustrate why lawyers require more than just knowledge of High Court authority to know if unethical conduct is happening right under their nose.

13. I also address, albeit briefly, the fallout from Operation Elbrus, the joint Australian Federal Police-Australian Tax Office investigation into Plutus Payroll, which has been attributed to the resignation of ATO Deputy Commissioner Michael Cranston. While it is alleged Cranston behaved improperly, it has not stopped his colleagues – including Chief Commissioner Chris Jordan – lamenting the events.[6]

14. What is alleged against Cranston is relatively minor, although the apparent cause of his lapse in judgment (a motivation to protect his son) illustrates the need for public officials, including government lawyers, to seek clear counsel when placed in circumstances, not of their own making, that make compromising their independence a *fait accompli*.

15. This paper then ends with some lessons, such as they are, on what the government lawyer is to do.

II. Corrupt Conduct in the Victorian Department of Education

A. The Napoli investigation

16. Nino Napoli, a Certified Practicing Accountant, started work at the Department in 1974, taking up the position of Director, School Resource Allocation Branch (in the Financial Services Division) in 1992, which he held until his dismissal in 2015.[7]

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[5] The matters are or will be before the courts.

[6] Jordan is quoted as telling the National Press Club, '*The charges against Michael Cranston too have been equally hard to believe and at the ATO we are dismayed at the events that have unfolded in this regard. The connection with and alleged actions because of his son have ruined his career and his reputation and have compromised our standing and raised questions about the integrity of others within the ATO'*; see Nick Hansen, 'Michael Cranston ruined by son Adam's alleged fraud, ATO boss tells National Press Club' (5 July 2017) *The Daily Telegraph* <http://www.dailytelegraph.com.au/news/nsw/michael-cranston-ruined-by-son-adams-alleged-fraud-ato-boss-tells-national-press-club/news-story/24f34905df6ec3adfb2dc21589ad3782>

[7] Operation Ord report, page 53

17. Of the $11 billion budget of the Victorian Department of Education, Napoli was responsible for approximately $5.5 billion.[8] Operation Ord only covered the period of 2007 to 2014 (based on availability of records), and identified $1.9 million in benefits obtained for Napoli and his associates. Partial records for preceding years (commencing in the 1990s) included suspicious or problematic transactions, of over $4m.[9]

18. Another actor, Jeffrey Rosewarne, Deputy Secretary of the Department, is alleged to have exploited the system in a similar fashion, as well as impeding action on a 2010 audit which identified problems with the banker school system, and misused department entitlements.[10]

19. I will focus on Napoli, although Rosewarne is also a player (as well as in the Ultranet investigation)

20. The allegations against Napoli concern the so-called 'banker school' system (other allegations, concerning improper expenses, are less interesting for our purposes).[11] The system came about following reforms to the Victorian public education system (in or about the 1990s), which saw schools receive more responsibility for their own financial management.

21. A designated 'banker school' would accept funds from the Department (or the Commonwealth, or a local government), usually for a specific program, and would administer them to a group or cluster of schools.[12]

[8] Operation Ord report, page 53
[9] Operation Ord report, page 8
[10] Operation Ord report, pages 39, 101
[11] Operation Ord report, page 12
[12] Operation Ord report, page 27

22. But absent from this decentralisation were appropriate governance and accountability structures at a departmental level to prevent exploitation,[13] a fact department officers (including Napoli) were aware of. As one official explained, having banker schools was '*very much about giving flexibility to the person requesting the expenditure of those funds, and that flexibility went around compliance guidelines of the Department. Money was taken out of central funds to hide it from government processes.*'[14]

23. It was not difficult to divert funds from the Department into banker schools.[15] The investigation disclosed, in essence, a mutual 'scratching of backs' was occurring between Napoli and those that he co-opted at the schools (business managers or principals) appointed as bankers.

24. Napoli's candidates were not chosen on a whim. Through his time with the Department, Napoli was acquainted with many school principals (for example, who served on committees with him).[16] If funds were to be transferred, Napoli expected some benefit.

25. While some school officials derived personal benefit, others cooperated because of the perceived financial benefit to their schools.[17]

26. Many schools, on his instructions, approved dubious invoices – usually printing, or some general job description – to entities under the control of Napoli's network (including relatives with various degrees of knowledge of what Napoli was doing).[18] But some specific examples included:

[13] Operation Ord report, page 28
[14] Operation Ord report, page 34
[15] Operation Ord report, page 34
[16] Operation Ord report, pages 53-4
[17] Operation Ord report, page 36
[18] Operation Ord report, pages 65-70

- A school ostensibly paid a recruitment agency (operated by a Napoli relative) for personnel. However, the invoices did not name staff, or include a record of hours worked. Instead, the funds paid Napoli's sons an effective salary.[19]
- A young relative of Napoli – as a condition of receiving Department work for his multimedia services business – was invoiced by a printing business belonging to his brother, Robert Napoli. This allowed Napoli to funnel payments to his brother, without disclosing the conflict of interest (in the event, no printing occurred).[20]

27. In general, Napoli did not disclose the relationships between himself and the entities he was contracting to the Department and schools (the process, on the face of the report, does not seem to ever have been anything that could be described as an 'open tender.')

28. How could this all occur?

29. The investigation report identified numerous structural flaws, including that:
    - The schools and Department used different accounting systems.
    - Payments at school level were not referenced back to those at Department-level. If a grant, described generically as 'Partnership Program' was made (and not covered in the recurrent school budget) the funds were invisible to the Department.[21]
    - Despite schools reacting positively to their autonomy, they did not necessarily have the in-house skills to govern themselves to the standard expected of public servants (for example, not recruiting family, or engaging in inappropriate purchases).[22]
    - School council financial audits, occurring every four years, failed to detect the misuse of the banker school system, although that could be attributed to false transactions and poor financial management practices.[23]

[19] Operation Ord report, pages 72-5
[20] Operation Ord report, page 80
[21] Operation Ord report, page 93
[22] Operation Ord report, page 94
[23] Operation Ord report, page 98

30. One school principal (speaking of an invoice he approved on Rosewarne's instructions) adequately summed up his conundrum:

'*[The request was unusual but] because of his position as Deputy Secretary, in charge of finance and administration, even if I had any query about it I thought "who would I go to"?*'[24]

31. In another example, a manager reporting to Napoli told IBAC that despite her concerns, 'she did not countenance reporting her concerns' to her superior, because she feared retribution.[25]

32. Bullying was overt. Gail Hart, the General Manager (Corporate Services) was pressured by Rosewarne, when she chaired the Accredited Purchasing Unit, who told her other executives were complaining that she was being pedantic by not letting things through and suggested she be 'more flexible' and look for ways around the processes.[26]

33. The Manager of Governance and Improvement, by contrast, tried to take his concerns higher, but felt Rosewarne (then acting Secretary) was '*creating roadblocks to the progress of the audit*.' The investigation report notes, however, that this was because he did not understand he could go directly to the Victorian Auditor-General's Office.[27]

B. The Ultranet investigation

I. The Tender Process

34. Ultranet is less a story of conspiracies, lies, and deceit than it is footage of a failed crash test that demonstrated the inexplicably poor governance standards of the Department of Education. Unlike the Napoli investigation, lawyers were involved, and they were ignored.

[24] Operation Ord report, page 11; see also at page 36
[25] Operation Ord report, page 57
[26] Operation Ord report, page 102
[27] Operation Ord report, page 99

35. In 2009, the contract to deliver the Ultranet teaching and learning portal was awarded to CSG Services Pty Ltd (a subsidiary of CSG Limited), as prime contractor, with Oracle Corporation Australia Pty Ltd and Hewlett Packard as subcontractors.

36. From a budget of $60.5 million, the Ultranet ended up costing Victoria between $127 and $240 million,[28] because of a tender process corrupted by public servants tied to the tender participants, and frankly, with no understanding of public service values. This includes a million dollars made available to CSG through a third party, Alliance Recruitment, so that CSG had cash flow to deliver the project.[29]

37. Ultranet began life as a pet project of former Glen Waverley Secondary College (GWSC) school principal, Darrell Fraser, subsequently Deputy Secretary of the Department's Office for School Education.[30] In 1995, the Department selected GWSC as a 'navigator school' to lead the integration of new technology into teaching and school administration.[31] This saw the birth of the GWSC Intranet, on which several teachers worked in school hours.

38. The first instance of impropriety was when Fraser encouraged the teachers to establish a company (called Cortecnica) to commercially market it.[32] In 2002, he encouraged them to personally contribute $2,000.00 to hire an overseas business consultant to seek $5m in seed capital (which proved unsuccessful).[33] Nothing was disclosed to the Department.[34]

[28] Operation Dunham report, page 7
[29] Operation Dunham report, page 9
[30] Operation Dunham report, page 7
[31] Operation Dunham report, page 19
[32] Operation Dunham report, page 21
[33] Operation Dunham report, page 22
[34] Operation Dunham report, page 23

39. Commercial interest in the GWSC Intranet saw an Oracle senior consultant (Martin) visit GWSC in 2003,[35] beginning that company's relationship with Fraser; it sold a product called L360.

40. A short time later, Fraser was appointed Deputy Secretary, and introduced a 'Research and Development initiative' called 'Students@Centre,' which was to develop a product called the Ultranet, based on the GWSC Intranet and Oracle's L360. No other private company was invited to participate.[36]

41. The alarm bells sounded early.

42. Anne Dalton, a lawyer and then private law firm partner, was appointed as probity adviser to the project.[37] In 2004, while advising the-then value did not require a tender, she identified significant risks:[38]

> *The fundamental difficulty with the way the public tender is intended to proceed is that Oracle will have already invested a significant amount in the development of the prototype ($1.5 million) by the time the project goes to public tender and will have developed the specifications that will form the basis for the RFT...*
>
> *If Oracle has already invested $1.5 million, gained information, and established close ties with the DET, it is likely to be at a competitive advantage to other bidders and other bidders may be justifiably sceptical of their being successful in a public tender process. Even though DET intends to make public disclosures during the Agreement, it may be difficult to convince the market that anyone other than Oracle will be successful in the public tender...*

43. This advice was provided to Rosewarne, but not acted on.[39] Indeed, Fraser expressed the view that Oracle was the only company with a product that could be used (market

[35] Operation Dunham report, page 24
[36] Operation Dunham report, page 25
[37] Operation Dunham report, page 26
[38] Operation Dunham report, page 26
[39] Operation Dunham report, page 26

review, if undertaken, would have shown this was wrong).[40] He also selected the public schools to test the prototype.[41]

44. After Ultranet was announced, the Department in December 2006 approved a Ultranet Board to steer the public tender process. Fraser had a strong say in its composition, and many of the Board members had close ties to himself and Rosewarne (for example, two of the six other members were principals of navigator schools).[42]

45. In the event, the project was required to go to a second tender, so that it would fit within the $60.5m budget.[43]

46. Some days before the tender deadline, Oracle requested permission to tender with a strategic partner as prime contractor, with Oracle as a subcontractor. The Ultranet Board was advised not to, but that if it did, it should give all bidders that opportunity.[44]

47. During this time, IBAC found evidence of covert communications between Fraser, Martin (of Oracle) and Aloisio (an ex-GWSC teacher consulting to CSG), through Fraser's daughter's email account.[45] This was not disclosed to the probity adviser.[46]

48. Oracle proceeded to bid, as a subcontractor (CSG as prime subcontractor). The tender was not rejected as non-conforming,[47] but other bidders were not given that same opportunity.

49. The tender evaluation was overseen by a board comprising Rosewarne (as chair), Fraser, Bennett (an IT consultant from PwC), and Dalton as probity adviser, with three

[40] Operation Dunham report, page 27
[41] Operation Dunham report, page 27
[42] Operation Dunham report, page 31
[43] Operation Dunham report, page 35
[44] Operation Dunham report, page 35
[45] Operation Dunham report, page 43; at page 33, there is discussion of a $400,00.00 payment from ASG to Aloisio for securing Oracle as a tender partner.
[46] Operation Dunham report, page 46
[47] Operation Dunham report, page 36

teams to evaluate each component. The 'teaching and learning evaluation team,' however, included two individuals who worked closely with Fraser at GWSC and the Department.[48]

50. The CSG bid was scored extremely highly by that team, and identified as their 'preferred solution.' The scores were considered extraordinary, and Bladon (who had significant experience in tender assessment) asked the team to rescore, but the team declined.[49]

51. The commercial evaluation team subsequently identified CSG's bid as 'very high risk,' based on three factors:[50]

- CSG was small and relatively inexperienced, with no previous experience as a major systems integrator, which would need to 'skill up';
- The value of software development proposed was extraordinarily high ($12.5 million alone in customised software development). This was considered 'out of whack' given the proposal to use Oracle's 'off-the-shelf' L360 product;
- CSG, as prime contractor, would have an arm's length relationship with the key contractor, meaning Oracle would be unaccountable contractually for delivering the Ultranet project.

52. Both CSG and RM Asia Pacific were listed, leading to an 'explosive' reaction from Fraser. The Board, led by Fraser, subsequently did not accept the shortlisting of RM Asia Pacific, and passed a resolution (against advice) of listing CSG/Oracle as the preferred consortium.[51]

53. At the beginning of March 2009, it was revealed CSG (along with Alosio and others) had been sued by ASG Group, based on an agreement that Alosio would provide ASG

[48] Operation Dunham report, page 36
[49] Operation Dunham report, page 37
[50] Operation Dunham report, page 37
[51] Operation Dunham report, page 38

with exclusive services;[52] ASG had partnered with Oracle in the first tender. The litigation was not disclosed to the Department, and led to the suspension of the tender.

54. However, by the end of the month, the claim settled, and the Ultranet Board unsuspended the tender. However, it was not disclosed that CSG agreed to conditionally pay ASG $4.2 million, should it win the Ultranet contract.[53]

55. During this period, Fraser openly communicated with CSG and Oracle.[54]

56. At or about this time, Dalton sought to raise her probity to the Departmental Secretary, Professor Dawkins, IBAC finding he was '*left in no doubt*' about what those concerns were.[55] This was a step, IBAC say, which took courage, and was highly unusual for a probity adviser. It was then arranged for Dalton to meet with Minister Bronwyn Pike, who agreed to remove Fraser from the chair, but allowed him to remain on the Board.[56]

57. Despite the complaint, it was addressed with little formality, with no record made, and no formal or independent investigation of the matter arranged.[57]

58. Lex Gebert, a legal adviser to the Ultranet Board on procurement, was also concerned about the tender process.[58]

59. When in a formal presentation, he raised his concerns with the Board, a Board member (not Fraser) reacted angrily, shouting and waiving arms, and accusing him of questioning the member's integrity.

[52] Operation Dunham report, page 39
[53] Operation Dunham report, page 40
[54] Operation Dunham report, page 47
[55] Operation Dunham report, page 48
[56] Operation Dunham report, page 48
[57] Operation Dunham report, page 48
[58] Operation Dunham report, pages 49-50

60. While another member took to shouting at Gebart at subsequent meetings, rather than take it as a 'go away' message and ending his contract, Gebert chose to remain.[59] In his evidence, he highlights the dilemma faced by someone in his position–[60]

> *So the discussions would go along the lines of, well, what's the motivating factor for what's occurring here? It's either something like sheer stupidity, it's either – or incompetence, it's alternatively – it might just be wilful blindness toward something that they really wanted or the third option was it had something to do with corruption. And I indicated to Anne Dalton that, you know, probity was her gig, procurement was mine, I was going to standup for what I believed was the correct – was the correct approach to the situation from a commercial perspective although I obviously had no evidence of any corruption and it would be a big step to go down that path. The more I thought about it, the more I thought that could be the only thing that really explained the sort of behaviour that – that we experienced...I couldn't arrive at an explanation other than corruption that made all the things hang together.*

61. Contracts were signed by the Department and CSG on 29 June 2009.[61]

62. In July 2011, Fraser resigned from the Department to take up employment with CSG.[62]

63. Among the factors that permit the corruption to occur, IBAC squarely indicate that there was a failure to deal with Fraser's behaviour:[63]

> *[I]t appears [his] seniority, charisma, 'larger than life' demeanour, work ethic and passion gave rise to an acceptance of his behaviour – or perhaps even blinded some of his subordinates, peers and superiors to the inappropriateness of that behaviour.*

64. IBAC also observed that senior executives had no appreciation of, or wilfully ignored, conflicts of interest, noting the lack of a register as a significant problem (in addition to Fraser's close relations with Oracle).[64]

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[59] Operation Dunham report, page 50
[60] Operation Dunham report, page 50
[61] Operation Dunham report, page 40
[62] Operation Dunham report, page 16
[63] Operation Dunham report, page 83
[64] Operation Dunham report, page 87

II. The Little Project

65. The second aspect of the Ultranet investigation was the so-called $1 million 'Little Project.' The Ultranet had failed at its official launch, leading to poor uptake among schools. CSG encountered difficulties, and made overtures to Fraser in early 2011 for further funding.[65]

66. This was around the same time that the Ultranet project manager began to suspect CSG was taking crucial staff off the project, and sought assurances that CSG would continue to resource it.[66]

67. Fraser then devised a strategy (in collaboration with Kerin of CSG) to use a consultancy firm to funnel an extra million dollars into CSG, and chose Alliance Recruitment (who were already on a Departmental panel, unlike CSG, and to whom Fraser could thus authorise expenditure up to that amount).[67] The project was formally called the Learning Technologies Quality Assurance Project (LTQAP), despite Alliance only providing recruitment and payroll (not quality assurance, or work in the information technology field generally).[68]

68. A process was then undertaken so that the Accredited Purchasing Unit committee would approve the engagement of Alliance without a competitive tender process. Documentation did not reveal that it was proposed CSG personnel would do the work, let alone that the proposed audit related to its own work on the Ultranet![69]

69. The proposal was subsequently changed from a consultancy to a contract, as unlike consultancies, the details of a contract did not have to be included in the Department's annual report.[70]

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[65] Operation Dunham report, page 55
[66] Operation Dunham report, page 57
[67] Operation Dunham report, page 57
[68] Operation Dunham report, page 57
[69] Operation Dunham report, page 58
[70] Operation Dunham report, page 59

70. Alliance was subsequently given information to provide to the Department (by CSG), including a draft letter listing all proposed Alliance personnel (all of whom, bar one, came from CSG).[71] This is but one of the many deceptions that came about during the process.

71. Indeed, the project manager of the LTQAP (who came from CSG), had no previous quality assurance experience, with much of the work undertaken done by undergraduate students.[72]

72. The final draft of CSG's LTQAP report, on the evidence before IBAC, was largely written by those students, and Fraser, when asked what the Department should have paid for it, indicated he 'probably wouldn't pay anything for it.'[73] He admitted to IBAC, however, that the LTQAP was intended to give legitimacy to the $1 million transfer.

III. Working in Government, and Temptations

A. The Importance of Disclosures

73. It is hard to dispute that, on most occasions when it is alleged that an individual has engaged in unethical conduct, **conflicts of interest** exist; self-interest, leading to an abuse of position, is what brings officials off the rails.

74. The reference in the precis, however, to '**wilful blindness**,' reflects another observation: that unethical conduct is often aided and abetted, by silence or complicity, by others who choose to ignore it, who stand to benefit from the misconduct, or perhaps more likely, feel unable to take matters further; this last factor is the most important, in my view, for the lawyer.

[71] Operation Dunham report, page 61
[72] Operation Dunham report, page 61
[73] Operation Dunham report, page 63

75. Alternatively – as seen in the Napoli investigation – those allegedly complicit trust their superiors, assuming everything was 'above board.'

76. It should be observed, at first instance, that with responsibility and decision-making authority, employees and directors are required to declare interests (pecuniary or otherwise) which may conflict with their professional duties.

77. For example, the Victorian Secretaries Board has released the Model Conflict of Interest policy for government departments,[74] setting out a protocol for officials to declare their private interests.

78. The following three conflicts are defined:[75]

- **Actual**: there is a real conflict between an employee's public duties and private interests.
- **Potential**: an employee has private interests that could conflict with their public duties. This refers to circumstances where it is foreseeable that a conflict may arise in future and steps should be taken now to mitigate that future risk.
- **Perceived**: the public or a third party could form the view that an employee's private interests could improperly influence their decisions or actions, now or in the future.

79. A private interest is defined as 'anything that can influence an employee.' It may include '***direct*** *interests, such as an employee's own personal, family, professional or business interests, as well as* ***indirect interests****, such as the personal, family, professional or business interests of individuals or groups with whom the employee is, or was recently, closely associated.*'

80. A distinction is also drawn between **pecuniary** (financial) interests, '*which includes any actual, potential or perceived financial gain or loss*,' and **non-pecuniary interests**, '*which includes*

[74] Available from the Victorian Public Sector Commission website, <http://vpsc.vic.gov.au/resources/conflict-of-interest-guidance-for-organisations/>
[75] Ibid. section 4

any tendency toward favour or prejudice resulting from personal or family relationships, such as friendships, enemies or sporting, cultural or social activities.'

81. Distinct disclosure protocols also exist for gifts, benefits, and hospitality.[76] In particular, the Model Policy states that public officials '*will not accept gifts, benefits or hospitality that could raise a perception of, or actual, bias or preferential treatment*.'

82. However, the issue of '**perceived**' conflicts is not necessarily a matter for the relevant official.

83. For example, when the Australian Accounting Standards Board (AASB) standard *AASB 124 Related Party Disclosures* was extended, for financial year 2016-7, to cover public sector entities, departments and other bodies (including, as I experienced, local governments), they became required to detail related parties of their 'Key Management Personnel' (KMPs) in their annual financial statements. This includes not only disclosing entities 'controlled' by KMPs, but also 'close family members' of that KMP – being those '*who may be expected to influence or be influenced*' by the KMP – and other entities controlled by those KMPs.

84. The AASB standards, while perhaps cumbersome (and involving a more subjective element), do highlight something that lawyers may not, given our training, necessarily appreciate: **conflicts are as much about perception as they are about actual or apprehended bias**.

85. The stricter AASB standards, if followed, would have prevented some of the corruption detected by the Napoli investigation (in particular, requiring the disclosure of related entities).

[76] Available from the Victorian Public Sector Commission website, <http://vpsc.vic.gov.au/resources/gifts-benefits-and-hospitality-resource-suite/>

86. While it must be noted that bias (or a reasonable apprehensions of bias) arises in the context of 'decisions,'[77] the importance of public perceptions should not be understated; indeed, we defer already, when considering apprehended bias, to a 'fair minded' and 'objective bystander,' so what that individual considers outside the immediate decision-making context is relevant, given the importance of faith in government.

87. Such a bystander would unlikely find it appropriate for public officials to be responsible for something which could tempt them to break the rules, no matter their integrity.

88. That, as an example, is a theme in the *Local Government Act* 1989 (Vic), in which Part 4.1 excludes councillors from participation in decisions where they have a defined indirect interest (which must be declared).

89. While on the facts, there may be no bias, the Act excludes councillors based on public perception. In my submission, while that can be annoying (it is quite ridiculous to exclude a councillor who trades on a shopping strip from participating in, for example, a planning scheme amendment to the entire strip, given their insight and exposure to the community), stricter rules are better than those which create the potential for corrupt conduct.

90. Such provisions go further, arguably, than the rules against solicitors acting in conflict-of-interest scenarios.[78]

91. But enough of the theory.

92. What the case studies showed, and this led to the abuses of position, was an absence of effective disclosure regimes, together with absent or bypassed safeguards. However, the

[77] Consider generally cases such as *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 on apprehended bias.
[78] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 12

alleged perpetrators also lacked the values required of public servants, determined to misuse their positions.

93. As a practical level, the accused **let their humanity overcome their professionalism**; this is something that full and proper disclosures – thus allowing their colleagues to exclude them from the problem area – could have minimised or prevented.

94. There is, in that respect, a significant difference between those who through weakness cross the line, and those who cross it with the intention of subverting the very system they serve.

95. The Napoli and Ultranet investigations, to different extents, are examples of subversion, of individuals who actively set out to misuse their positions in a sophisticated manner, to the advantage of themselves, their friends, and families.

96. Whether those allegations resulted from greed and selfishness alone, or some warped notion in which the State's interest was distorted to accommodate their profiting, is a matter to be determined.

97. The allegations of misconduct against Cranston, in that respect, are far less sophisticated, and indeed, perhaps warrant some empathy. Profit was not his undoing. It was a desire to protect his own son, Adam, who had gotten himself into trouble (to the fairly significant tune of $144 million, which impressive for a 30-year old).

98. Who can blame a parent for doing what they can to keep their child out of jail?

99. Less deserving of empathy is that Cranston is alleged to have drawn in two ATO assistant commissioners, Tony Poulakis and Scott Burrows,[79] said to have accessed

[79] Nick Hansen, Chris Hook, and Edward Boyd, 'ATO tsar Michael Cranston accused of abusing office, as his children investigated' *The Daily Telegraph* (19 May 2017) <http://www.dailytelegraph.com.au/news/nsw/ato-

confidential information on his direction. Both have since returned to work,[80] but their role serves to highlight how, because of the hierarchy of the public service, lesser officials can inadvertently be drawn into the misdeeds of their superiors.

100. For that same reason, officials may feel obliged to turn a blind eye (a descriptor preferable to the term 'wilful blindness,' because in a hierarchy, it is not necessarily voluntary), because it is not an easy thing to accuse a superior of misconduct, particularly as government often handle such matters internally.

101. You might well ask, of course, how any of this assists you as a lawyer, responsible for ensuring probity. The unfortunate reality is that every case is unique, albeit elucidating the themes I have outlined. In some circumstances, **asking who is not seeking your advice**, or, where they do, **wondering why the advice sought is narrow**, may give rise to a suspicion that requires further steps.

102. Chances are, the lawyer is the least likely to be co-opted – willingly or unwillingly – to misconduct. In the Ultranet investigation, concerns raised by the probity lawyer (concerning the corruption of the tender process) were actively ignored, and despite her efforts to raise them higher in the Department, they fell on deaf ears.

103. In that respect, government lawyers need a comfortable understanding of the interplay of between obligations as public officials (including the employment relationship), and those values they vowed to uphold when they were admitted to the legal profession.

B. Legal Ethics and the Government Lawyer (including Disclosures and Privilege)

104. Most likely when picking up this paper, your first thought was something along the lines of: **"didn't I learn something back in third year that privilege doesn't attach**

tsar-michael-cranston-accused-of-abusing-office-as-his-children-investigated/news-story/c06c3cbc47693fd0755b0370b5b78b95>

[80] Doug Dingwall, 'ATO assistant commissioner Tony Poulakis returns after being stood down' *The Canberra Times* (28 July 2017) <http://www.canberratimes.com.au/national/public-service/ato-assistant-commissioner-tony-poulakis-returns-after-being-stood-down-20170727-gxjpuh.html>

to advice or information exchanged between lawyer and client for an illegal or improper purpose?"

105. That is indeed correct, although it is one of many considerations that bind a government lawyer aware or suspicious of corrupt behaviour. This aspect of the paper deals with concepts that, at first glance, may seem to conflict, but on further analysis are remarkably harmonious.

106. The starting position for the government lawyer is the employment relationship.

107. For some time, a citizen has been under no obligation to disclose his or her knowledge of a felony or misdemeanour.[81] This is consistent with the general obligation of an employee not to disclose or misuse confidential information, although where the facts to be disclosed indicate a serious crime has been committed, the public interest may override the contract of employment (a dicta that cuts both ways).[82]

108. While an employee is under no general duty to disclose the misconduct of other employees, the duty to act in the best interests of the company may require it (depending on the contract).[83]

109. While other contexts speak of high-level employees having a duty to disclose the misconduct of others to a company board,[84] a lawyer employed as a government legal practitioner has the same duties of honesty and candour as if in private practice, and regardless of their status in the organisation, at least in my view, should make disclosure of what they know.

[81] *A v Hayden (No 2)* (1984) 156 CLR 532, 553 (Mason J)
[82] Ibid. 544-6 (Gibbs CJ)
[83] LexisNexis, *Halsbury's Laws of Australia* (online), [165-260] 'Disclosure of the misconduct of others'
[84] See *Swain v West (Butchers) Ltd* [1936] 3 All ER 261; *Sybron Corporation v Rochem Ltd* [1984] Ch 112

110. While general law does not require an employee to disclose their own misconduct (as opposed to not engage in it in the first instance), *if* a legal practitioner were an active or accidental party to misconduct, I would suggest it may render the person other than 'fit and proper' within the meaning of the Legal Profession Uniform Law (a condition of *both* admission and holding a practicing certificate). In that respect, the affected lawyer should make that disclosure, as non-disclosure could do more damage.

111. It also may be that, because of the duty to act in the best interests of the employer (ie. the State), a disclosure is required, whatever it might be said the interests of a State are.

112. How, then, should the disclosure be made (or rather, the whistle be blown)?

113. The *Protected Disclosures Act* 2012 governs when a natural person wishes to disclose information which shows or tends to show – or they have '*reasonable grounds*' to believe it shows or tends to show – that a '*person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct*.'[85] In most circumstances (excepting when the complaint relates to a Member of Parliament in their capacity as a Member of Parliament),[86] disclosure may occur to the IBAC (among other bodies, such as the Ombudsman, or indeed, the body to whom the disclosure relates).[87]

114. 'Improper conduct' includes **corrupt conduct**, plus other 'specified conduct,' including conduct that adversely affects the performance of a public official in the discharge of public office, breaches public trust, or misuse of material or information acquired in the course of public office.[88]

[85] *Protected Disclosure Act 2012* sub-s 9(1)
[86] Ibid. ss 13-19
[87] Ibid. s 13, in particular sub-s 13(a)
[88] Ibid. s 4

115. The mechanisms in that law are complicated, and beyond the scope of this presentation. It is important, however, to mention the protections available, as found in Part 6.

116. IBAC is responsible for determining if a disclosure is a '*protected disclosure complaint*.'[89] However, whether or not IBAC has determined that the '*protected disclosure*' is, in fact, a '*protected disclosure complaint*' (two different terms defined in the Act),[90] such disclosure attracts immunity from civil or criminal liability,[91] including for 'breach an obligation by… requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter.'[92]

117. A person does not cease to be liable, however, if the disclosure relates to their own conduct.[93]

118. For the lawyer, however, that is not the end of the enquiry, as there are still those specific duties that arise from the retainer, namely, **privilege** and **confidentiality**. Perhaps a short refresher on the distinction.

119. **Confidentiality** arises from the solicitor-client relationship, rooted in contract, equity, and professional rules (meaning your practicing certificate requires it), whereas **legal professional privilege** is a common law right. All that is privileged is confidential, but not vice versa.[94]

120. The fact that a lawyer does or does not hold a practicing certificate is not necessarily relevant.[95]

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[89] Ibid. s 26
[90] Ibid. s 38
[91] Ibid. s 39
[92] Ibid. s 40
[93] Ibid. s 42
[94] See generally Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2016), ch 6
[95] *Commonwealth v Vance* (2005) 158 ACTR 47, 55 (Full Court)

121. Privilege, however, is not taken to be abrogated by statute absent express language or clear and unmistakable implication.[96] The *Protected Disclosure Act* 2012 does not specifically reference legal privilege. But is that necessary?

122. In general, lawyers must not disclose information which is confidential to a client.[97] In this context, it is worth noting two exceptions, where:

> *9.2.2 the solicitor is permitted or is compelled by law to disclose;*
>
> *9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence.*

The Australian Solicitors' Conduct Rules define 'serious criminal offence' as:

> *(a) an indictable offence against a law of the Commonwealth or any jurisdiction (whether or not the offence is or may be dealt with summarily);*
>
> *(b) an offence against the law of another jurisdiction that would be an indictable offence against a law of this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or*
>
> *(c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction).*

123. Note that what is not included above is an exception where information can be disclosed for the purpose of 'solving' a serious criminal offence.

124. For our purposes though, just who is the client? For the most part, it is not a difficult proposition to say that 'my client is the Department' or 'my client is the Commonwealth.' Indeed, section 117 of the Uniform Evidence Law provides that ***client*** includes both of–

> (b) an employee or agent of a client;
>
> (c) an employer of a lawyer if the employer is—
>
> (i) the Commonwealth or a State or Territory; or
>
> (ii) a body established by a law of the Commonwealth or a State or Territory;

[96] See generally *Daniels v ACCC* (2002) 213 CLR 543
[97] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 9

In other words, statute treat governments and their employees/agents (as with companies) as one and the same. This is, broadly speaking, the position at common law.

125. Denning LJ, in 1972, reflected that, in the nineteenth century:[98]

> *" nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer… They are regarded by the law as in every respect in the same position as those who practise on their own account.* ***The only difference is that they act for one client only, and not for several clients****. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court.* ***They must respect the same confidences. They and their clients have the same privileges****…"*

126. In other words, a government lawyer might discover wrongdoing, but their duty is owed to the government (or the public body), as opposed to the colleague who revealed it to them, meaning that confidentiality and privilege are not owed to those colleagues; there is no retainer with them.

127. But even then, no privilege attaches where the client is engaged in wilful wrongdoing (even if the lawyer is unaware).

128. The best explanation I have found, on the non-privileged character of criminal behaviour, is in *R v Cox and Railton* (1884) 14 QB 153,168-9 (Stephen J):

> "*In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.*

[98] *Alfred Crompton Amusement Machines v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, 129

> *To return to our former illustration. If A., proposing to forge a will, says to B., a solicitor, "forge for me a will in the name of C.," he asks B. to commit a crime which is not B.'s professional business. If he says, "I am C., and I want you to make my will for me," he reposes no confidence in B., but on the contrary, commits a gross fraud upon him.*"

129. The challenge for the government lawyer is that, unlike their colleagues in private practice, it is not so easy to drop the client who asks questions that cause them to feel uncomfortable.

130. What all these concepts go to show is that the position of the government lawyer is never, in these circumstances, an easy one.

IV. Closing Lessons

131. As mentioned earlier, every situation involving potential, unethical conduct exist will (hopefully) be different.

132. Is there something in particular that lawyers ought to lookout for? As the example of Dalton in the Ultranet investigation shows, the circumstances will dictate if the lawyer becomes aware of any misconduct (we are not, after all, employed as investigators), and the question is then, simply: what to do?

133. I cannot, unfortunately, provide a straightforward answer, because every scenario is different. What this paper does, however, is collect the concepts that government lawyers need to understand both to avoid the unethical conduct, and ensure that if it is identified, they can deal with it in a manner that is consistent with their professional obligations as practitioners and employees.

134. Lawyers should understand public officials' ability to raise complaints within their organisation, and to make protected disclosures in accordance with the *Protected Disclosures Act* 2012. In that sense, they also must understand what questions to ask, in

particular, what disclosures have been made, and more generally, if any improper relationships exist (asking so directly may not yield a direct answer).

135. The duty to the client (be that the State, or a government organisation) requires lawyers in a probity role, in my view, to have an ability to advise their co-workers when and how a protected disclosure is in the State's best interests.

136. As to why public officials do come off the rails, what the case studies show is conflict of interests are the cause, be they an improper motive to make a personal profit (that is, greed), or to help out those close to them, gazumping the interests of the State.