Crown Solicitor's Office

CPD Conference
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Session takeaways

NSW GOVERNMENT

Contents

1. Duty of disclosure in criminal proceedings

A practical look at the interaction of disclosure obligations, subpoenas, privilege and public interest immunity.

- Prosecutor's duty of disclosure – Cameron Gardiner, Solicitor Advocate.
- Subpoenas to produce – Hannah Roberts, Solicitor Advocate.

Chaired by Naomi Malhotra, Assistant Crown Solicitor.

Session takeaways

Application of duty

- The duty of disclosure has been held to apply across all proceedings of a criminal nature, notwithstanding who the prosecuting agency is, the nature of the charge, or the jurisdiction in which the matter is dealt with. The duty also encompasses those involved in both the 'investigation' and 'litigation' aspects of the proceedings.
- The duty of disclosure is an important safeguard against unfair outcomes. Failures can result in a stay of proceedings, adverse costs orders, or successful appeals in circumstances where a miscarriage of justice occurs.

Disclosure: test and approach

- 'Relevance' for the purposes of disclosure is broad. It extends to material which is relevant, potentially relevant, or could lead to identification of new issues. The admissibility of the material is not a factor in determining disclosure.
- Approach disclosure proactively. It is a positive duty on prosecutors and not dependant upon requests from a defendant. Remember, a defendant may not know what material exists in order to ask for it. Don't rely only on case management or subpoenas.
- There are exceptions to disclosure which should be navigated carefully case by case. There may be situations where a decision is made not to disclose. Where this occurs it will be necessary to ensure the proceedings can remain fair, or if charges must be terminated.

Public Interest Immunity (PII)

- An exception to disclosure is where the otherwise disclosable information is subject to a claim of PII.
- The three-stage test for determining a PII claim involves: (1) identifying the information sought to be protected, and the harm that would flow from its disclosure; (2) establishing a legitimate forensic purpose for requiring the information in the proceedings; and (3) balancing the competing interests to determine whether or not the information should be disclosed.

Process for PII claims

- PII is not a form of privilege, and therefore cannot be waived. 4.0 of the *Premier's Memorandum M1997-26 – Litigation Involving Government Authorities* sets out the process for government agencies seeking to make a PII claim, including consultation and notice requirements.
- If otherwise disclosable information is withheld on the basis of a PII claim, regard should be had to s 15A of the *Director of Public Prosecutions Act 1986* (NSW), which sets out the process for law enforcement or investigating officers seeking to make a PII claim over information in criminal proceedings. In regulatory prosecutions where this provision does not apply, it can be considered as a useful guide.
- The PII information could be sought by other means e.g., by a subpoena. The PII claim could then be heard and determined by the court. If a PII claim is upheld, the information will be excluded from evidence (i.e. it cannot be relied upon by either party or taken into consideration by the Court), and there will be no obligation on the subpoenaed party to produce such information in documents under subpoena.

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2. Civil proceedings arising from criminal prosecutions

Examine developments in civil proceedings arising from criminal prosecutions.

- Judicial review of criminal prosecutions – Robert Sherrington, Senior Solicitor.
- Civil proceedings for malicious prosecution – Helen Maamary, Director.

Chaired by Richard Kelly, Assistant Crown Solicitor.

Session takeways

Judicial review of criminal proceedings

- Structure of criminal appeals in NSW means that judicial review is an important pathway.
- Following conviction in the Local Court of NSW and an appeal to the District Court of NSW, there is no further appeal, only judicial review.
- In that context, only review for jurisdictional error is available: s 176 of the *District Court Act 1973; Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531.
- Jurisdictional error is a narrower concept when applied to courts, as opposed to administrative decision-makers.
- Whether a particular error of law is jurisdictional depends on proper interpretation of the statute in question, and there are no absolute rules.
- Case study of *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3: when deciding whether to impose an intensive correction order, failure to conduct assessment s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* is a jurisdictional error (*per* Gordon, Edelman, Steward and Gleeson JJ; Kiefel CJ, Gageler and Jagot JJ *contra)*

Civil Proceedings for Malicious Prosecution

- Alleged failures of prosecutors to comply with prosecutorial obligations of disclosure in criminal proceedings are regularly raised in civil claims for damages for the tort of malicious prosecution.
- To establish malicious prosecution, the plaintiff must prove that the:
  - prosecution was initiated by the defendant
  - prosecution terminated favourably to the plaintiff
  - defendant acted with malice in bringing or maintaining the prosecution
  - prosecution was brought or maintained without reasonable and probable cause (*A v State of NSW* (2007) 230 CLR 500 at [1] and reformulated in *Beckett v NSW* (2013) 248 CLR 432 at [4]).
- Failure to disclose relevant evidence to the defence under s 142 *Criminal Procedure Act* or to the DPP under s 15A of the *Director of Public Prosecutions Act* has been found to establish:
  - that a police officer continued to be a prosecutor for the purposes of the tort even after the DPP had taken over the proceedings
  - evidence of an absence of honest belief in the prosecution (subjective limb of absence of reasonable and probable cause)
  - evidence of malice (see *Spedding v State of NSW [2022] NSWSC 1627*).

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3. Managing invalid administrative decisions – what, when and how?

Explore the circumstances in which decision makers can reverse or alter invalid administrative decisions.

Panellists: Michael Granziera, Assistant Crown Solicitor, Christopher Frommer, A/Special Counsel, Elizabeth Daley, Principal Solicitor.

Session takeaways

Jurisdictional error

- An administrative decision made pursuant to a statutory power will only be invalid if it is infected by jurisdictional error.
- A jurisdictional error is an error that takes a decision outside the limits of the authority conferred on the decision-maker by the statute to make a decision with a particular legal effect. These limits include the preconditions the statute requires to exist for the decision-maker to embark on the decision-making process (e.g., the making of an application) and the conditions which the statute expressly or impliedly requires to be observed in, or in relation to, the decision-making process (e.g., affording procedural fairness).
- A finding of jurisdictional error does not only reflect the existence of an error, but also the gravity of that error. Generally, breach of a condition will not meet the threshold of materiality set by the statute if the breach does not result in any practical injustice. Put another way, breach of a condition will not be material unless compliance with the condition *could* have resulted in a different decision.
- A finding of jurisdictional error is essentially a conclusion that the decision-maker did not have power to make the decision.

Options for dealing with an invalid decision

- Where jurisdictional error is established, it is necessary to engage in a process of statutory construction to determine what legal, practical or operational effect is given to the decision by the statute conferring the decision-making authority.
- Where a decision is infected by jurisdictional error, it may be possible for the decision-maker to remake the decision without intervention by the courts. This is only possible in circumstances where the statute, on its proper construction, does not treat the decision-maker as *functus officio* in circumstances where a decision, which has in fact been made, is invalid (see, generally, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597).
- *Functus officio* is a common law doctrine (capable of being displaced by statute) which provides that, once a decision-making power has been exercised in a particular case, the power is spent and cannot be re-exercised.
- Even where the facts appear to be straightforward, it is necessary to engage in careful legal analysis to determine whether this is the correct operation of the statute. This is often a contestable proposition.
- In some cases, while the statute may not give full legal force to an invalid decision, it may nonetheless treat the decision-maker as *functus officio*.
- Factors that may be relevant in determining whether a statute treats a decision-maker as *functus officio* in circumstances where the decision-maker has made an invalid decision include: the existence of appeal or review mechanisms; practical importance of finality; the extent to which third parties may be affected by the decision; and (d) the extent to which other action may be taken in reliance on the decision.
- Other options to explore, as an alternative to remaking an invalid decision, include: making a fresh decision in reliance on s 48 of the *Interpretation Act*; applying to an appropriate court for a declaration of invalidity or an order quashing the decision; or considering other creative options tailored to the particular scenario (e.g., in a case involving a statutory payment of money, consider an *ex gratia* payment and a deed of release).

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4. Grants in the NSW public sector

What they are, the legal framework that applies to them, and compliance considerations.

Presented by Karen Ferris, Director, and Nicholas Borger, Principal Solicitor.

Chaired by Michael Granziera, Assistant Crown Solicitor.

Session takeaways

- Since September 2022, administration of most grants has been regulated by the Grants Administration Guide, enforced through Premier's Memorandum and, since 1 July 2023, through s 10.3A of the *Government Sector Finance Act 2018* (GSF Act). A new version of the Guide took effect from 18 March 2024.
- **The Guide covers** grants paid by/on behalf of NSW Government to non-NSW Government entities to address policy outcomes, assist grantees achieve their objectives and which do not result in the return of goods or services of equivalent value.
- **The Guide does not cover**: procurements; commissioning of works; gifts of government property within s 5.6 of the GSF Act; ex gratia and act of grace payments to a person who has suffered detriment *as a result of the workings of government* (but other act of grace payments may be subject to the Guide); payments pursuant to statutory entitlements; intra-government transfers; tax concessions or offsets (excluding voucher schemes); loans on commercial terms; remuneration; compensation or damages; payments by NSW Government to the Commonwealth; Commonwealth payments distributed by NSW Government to its agencies or non-Government entities; scholarships; sponsorships; and third-party asset transfers.
- The Guide imposes mandatory requirements on ministers, their staff, and public officials, including to ensure (with some exceptions) that: grant processes are transparent and based on published grant guidelines with mandated content; reasons are given and approval obtained if a grant is not offered on the basis of a competitive, merit-based selection process; decisions on grants are taken on the basis of advice, and recorded in writing with reasons given; information about grant opportunities is published, and information about awarded grants is published within 45 days after the grant agreement takes effect or, if there is no agreement, within 45 days after the first grant payment is made.
- Compliance with Guide requirements and a consistent approach to grant processes is supported through the NSW Government's grants and funding webpage at https://www.nsw.gov.au/grants-and-funding, which includes automated processes for writing grant documentation, templates and guidance. Grant opportunities and awarded grants must be published through this webpage.
- The requirements of the Guide should be complied with, and a minister's state of satisfaction (required under s 10.3A(2) of the GSF Act as to the grant being an efficient, effective, economical and ethical use of money and value for money) should be reasonably and rationally formed and based on probative material, to minimise risk of judicial review challenge to grant funding decisions.
- Enforceability of grant agreements is supported by ensuring the agreement parties are legal entities and by executing the agreement as a deed, at least for higher risk/higher value grants. The statutory right of recovery for act of grace payments also assists recovery for these types of payment. However, legal recovery action may not always be practicable, so it is important to minimise risk of breach through measures such as clear terms and conditions, due diligence on the grantee, payments by instalments against milestones, effective monitoring, reporting and financial acquittal.

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5. *Public Interest Disclosures Act 2022* and public sector misconduct

Understand how your obligations have changed under the newly enacted *Public Interest Disclosures Act 2022*, and how those obligations interact with the employer's duty to deal with allegations of misconduct.

- *Public Interest Disclosures Act 2022*: your obligations and how they have changed – Kitty Ray, Director.
- Dealing with misconduct in the public sector: common mistakes and how to avoid them – Kira Kless, Principal Solicitor, and Meena Mariadassou, Senior Solicitor.

Chaired by Karen Smith, Crown Solicitor.

Session takeaways

- Addressing employee complaints about wrongdoing efficiently and fairly is critical because it can: identify ways to improve workplace practices and policies; improve staff morale, productivity and retention; and minimise the risk of complaints to external agencies and/or legal action.
- Public sector employees may make complaints about a range of matters, which may enliven an employer's obligations at common law (for example, *Kozarov v Victoria* [2022] HCA 12). under the *Work Health and Safety Act 2011,* Federal and State anti-discrimination legislation, or the PID Act 2022. This presentation focuses on the PID Act 2022 and allegations of misconduct against public service employees.
- The PID Act 2022 protects public officials who make public interest disclosures (PIDs) from 'detrimental action' (pt 3, div 2), as well as civil and criminal liability (pt 3, div 3) in relation to the making of the PID. It is an offence to take detrimental action against the maker of a PID in the circumstances set out in s 33 of the Act. A person who takes detrimental action against a person in relation to a PID may be liable in damage: s 35.
- Some key changes in the PID Act 2022 include:
  - 'no wrong door' approach
  - 'grievances' are not PIDs, provided the conditions in s 26(3) are met
  - an employer is not prevented from taking 'reasonable management action': s 31
  - the Act includes new 'risk management' provisions: ss 61-62.
- Complaints may also disclose misconduct and need to be dealt with under s 69 of the *Government Sector Employment Act 2013* (GSE Act) and pt 8 of the *Government Sector Employment (General) Rules 2014* (GSE Rules) (in the case of public service employees).
- What is misconduct: see the inclusive definition of 'misconduct' in s 69(1) of the GSE Act. 'Misconduct' has its ordinary meaning but also extends to (for example) a contravention of the GSE Act or an instrument made under the GSE Act. It extends to off-duty conduct and conduct which occurred before the person was employed.
- What is not misconduct: inadvertence, poor performance.
- It is critical to ensure that:
  - all requirements under the GSE Act and GSE Rules are complied with
  - all reasonable efforts are made to afford procedural fairness
  - accurate and comprehensive records are kept
  - the wellbeing of the complainant and the person against whom the allegations have been made as well as any other affected parties (such as witnesses) is considered.

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6. The constitutional role of the public service

Explore where the public service fits in the broader framework and institutions of government.

Presenters: Karen Smith, Crown Solicitor, and James Monaghan, Senior Solicitor.

Session takeaways

Introduction: two quotes from Paul Finn

- "Whom do public officials serve — a minister or an authority; the public; the public interest; the law; the Crown (whatever this Delphic term might signify)? And what if these conflict?"[1]
- "…[P]ublic service legislation … serves … public and constitutional purposes as well as bare employment ones. This is not at all surprising given: (i) that such legislation provides for the marshalling of the human machinery to implement the exercise of executive power constitutionally vested in the Crown … and (ii) the distinctive position as public officers that public servants in consequence occupy … in our governmental order."[2]

Looking to the Constitution Act 1902

- Only a few provisions of the *Constitution Act* – contained in pts 6 and 7 – are concerned with the public service. See particularly ss 47A, 50C and 50D. Otherwise, in common with other Australian constitutional instruments, the *Constitution Act* says relatively little about the internal organisation of the Executive government generally, and about the role of the public service specifically. This design choice facilitates flexibility.[3]
- The *Constitution Act* is drafted against the background of, and intended to give effect to, a system of responsible government. The High Court has recognised, albeit in the Commonwealth context, that an apolitical and impartial public service is essential to the proper operation of a system of responsible government.[4]

Public service legislation

- Filling out part of what the *Constitution Act* leaves open, the public service has, for a long time now, been established by statute.
- The fact that the public service is established by statute reminds us that public servants are creatures of law, constrained by law, and accountable to law.
- Public service values recognised in statute – for example, in pt 2 of the *Government Sector Employment Act 2013* – are intended to guide conduct.

Relationships of accountability

- The public service stands in a range of accountability relationships within our constitutional system: with Ministers, the Parliament, courts and tribunals, integrity bodies, and the public.
- These relationships can make different demands in different contexts — but, because public servants are creatures of law, accountability to law is ultimately fundamental.

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1 Paul Finn, "Myths of Public Administration", in John Power (ed), *Public Administration in Australia: a watershed* (Hale & Iremonger, 1990) 41 at 41.

2 *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24-25 (Finn J).

3 See: W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) at 212 (cited, with apparent approval, in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 58 [123] (French CJ)); and *Re Patterson; ex parte Taylor* (2001) 207 CLR 391 at 401 [11] (Gleeson CJ).

4 See *Comcare v Banerji* (2019) 267 CLR 373.