

## Government lawyers

This information sheet explains how the Uniform Law, in force in NSW and Victoria since 1 July 2015 and in Western Australia since 1 July 2022 applies to government lawyers.

### Prohibition against unqualified legal practice

Under the Uniform Law a person who 'engages in legal practice' must generally be admitted to practice and have a practising certificate.<sup>1</sup> This requirement also applies to many government lawyers in NSW, Victoria and Western Australia.<sup>2</sup> In Western Australia, transitional arrangements are in place for certain government lawyers who did not hold an Australian practising certificate when the Uniform Law scheme commenced in Western Australia.<sup>3</sup>

The Uniform Law makes clear that engaging in legal practice does not include developing or commenting on policy.<sup>4</sup>

People engaging in legal practice under the authority of the Commonwealth or local law do not need a practising certificate.<sup>5</sup>

The penalty for breaching the prohibition against unqualified legal practice is 250 penalty units or imprisonment for two years or both.<sup>6</sup>

### Definition of government lawyer and government authority

Under the Uniform Law, a government lawyer is defined as a person who engages in legal practice only as:

- an officer or employee of a government authority;
- a statutory officer holder of the Commonwealth or an Australian jurisdiction; or
- another category specified in the Uniform Rules.<sup>7</sup>

A government authority includes a Minister, government department or public authority.<sup>8</sup>

The NSW regulations also clarify that legal practice engaged in as a statutory Crown law officer is legal practice as a barrister. This applies to government lawyers, such as the Solicitor General, Crown Advocate, or counsel assisting those officials, parliamentary counsel, a Crown prosecutor, and public defender.<sup>9</sup>

The Western Australian regulations make it clear that a contract legislative drafter is a government lawyer for the purposes of the Uniform Law and that in certain circumstances, a foreign legislative drafter who is undertaking legislative drafting work under the direction of Parliamentary Counsel will be taken to be an Australian lawyer.<sup>10</sup>

### Supervised legal practice

A government lawyer granted a practising certificate will be required to engage in a period of supervised legal practice.<sup>11</sup>

In NSW, any period of legal practice before 1 July 2015 (whether supervised or not) will be counted towards the statutory period of supervised legal practice. The deeming provision also covers any legal practice engaged in pursuant to a transitional provision.<sup>12</sup>

In Victoria, any period of legal practice before 1 October 2015 (whether supervised or not) will be counted toward the statutory period.

In Western Australia, a person who engaged in a period of supervised legal practice before 1 July 2022 is taken to have completed the same period of supervised legal practice for the purposes of the Uniform Law.<sup>13</sup>

For the purpose of these arrangements, legal practice is not restricted to legal practice as a government lawyer.

### Applying for a practising certificate

Practising certificates may authorise the holder to engage in legal practice in one or more the following categories:

- principal or employee of a law practice;
- corporate legal practitioner;
- government legal practitioner;
- barrister only; or
- both as a volunteer at a community legal service and otherwise on a pro bono basis only.<sup>14</sup>

### Private, government and corporate legal practice

Until an Australian practising certificate is renewed, a person whose practising certificate authorises them to practice only as:

- an employee of a law practice, may also work as a

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- corporate or government legal practitioner;<sup>15</sup>
- a government legal practitioner, may also work as a corporate legal practitioner; and
- a corporate legal practitioner may also work as a government lawyer.<sup>16</sup>

This will assist lawyers in the private sector to move to government or corporate legal practice. It will also assist lawyers to move between government and corporate legal practice without having to immediately vary their practising certificate.

### Pro bono work

An Australian legal practitioner may engage in legal practice as a volunteer at a community legal service or otherwise on a pro bono basis on any 'type' of practising certificate.<sup>17</sup>

A government lawyer who is admitted but does not hold a practising certificate may apply for a practising certificate that authorises legal practice as a volunteer at a community legal service and otherwise on a pro bono basis only.<sup>18</sup> To provide such services the person must be covered by an approved professional indemnity insurance policy.<sup>19</sup>

### Uniform Law and Uniform Rules

A government lawyer is bound by the Uniform Law and Uniform Rules, including Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules.

This means that government lawyers are:

- subject to the complaints mechanisms of the local jurisdiction;<sup>20</sup> and
- must complete 10 continuing professional development points per year.<sup>21</sup>

### Fidelity Fund and Professional Indemnity Insurance (PII)

Government lawyers/legal practitioners are not required to make contributions to a fidelity fund or hold or be covered by PII unless it is needed to cover volunteer work at a community legal service or other pro bono work.<sup>22</sup>

The exemption does not affect the requirement for an Australian legal practitioner (including a government lawyer) to hold a practising certificate to engage in legal practice as a principal, and hold or be covered by PII when practising on their own account.<sup>23</sup>

### Exemptions

An individual who is engaged in legal practice under the authority of the law of the Commonwealth or a law of NSW, or Victoria or Western Australia (other than the Uniform Law) is considered to be a 'qualified entity' for the purposes

of the Uniform Law. For example, a government lawyer employed by the Australian Government Solicitor may practice as a solicitor or barrister in any court pursuant to the *Judiciary Act 1903* (Cth).<sup>24</sup>

The Uniform Rules also exempt from the prohibition on engaging in legal practice, persons acting in an official capacity undertaking certain work. Some examples are:

- the drawing of instruments (but not parliamentary/legislative counsel and legislative drafters);<sup>25</sup>
- appearing in courts or tribunals as authorised by jurisdictional or Commonwealth law;<sup>26</sup>
- preparing wills or providing a related service; or work involving the administration of trusts, the estates of living and deceased persons, or the affairs of living persons.<sup>27</sup>

<sup>1</sup> Legal Profession Uniform Law (**Uniform Law**), s 10(1)

<sup>2</sup> Uniform Law, s 56

<sup>3</sup> *Legal Profession Uniform Law Application Act 2022* (WA), ss 284, 285

<sup>4</sup> Uniform Law, s 6. This exclusion also applies to policy work conducted outside of government

<sup>5</sup> In these circumstances the person is defined as a 'qualified entity' under the Uniform Law, s 6

<sup>6</sup> Uniform Law, s 10(1)

<sup>7</sup> Uniform Law, s 6

<sup>8</sup> Uniform Law, s 6

<sup>9</sup> Legal Profession Uniform Law Application Regulation 2015 (NSW) (**NSW Application Regulation**), cl 23(1) and (2)

<sup>10</sup> Legal Profession Uniform Law Application Regulations 2022 (WA), cl 42, 43

<sup>11</sup> Uniform Law, s 49

<sup>12</sup> NSW Application Regulation, s 22(1) and (2)

<sup>13</sup> Legal Profession Uniform Law Application Act 2022 (WA), s 289

<sup>14</sup> Uniform Law, s 47

<sup>15</sup> Uniform Law, s 47(4)(a)

<sup>16</sup> Uniform Law, s 47(4)(a), (b) and (c)

<sup>17</sup> Uniform Law, s 47(5)

<sup>18</sup> Uniform Law, s 47(1)(c)

<sup>19</sup> Uniform Law, s 211; Legal Profession Uniform General Rules (**Uniform General Rules**), r 82(2)(b)

<sup>20</sup> Uniform Law, s 263(4). Chapter 5 Part 5.3 (Consumer Matters) does not apply to the executive or administrative functions under legislation of a government lawyer who is not required to hold a practising certificate

<sup>21</sup> Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015, r 6; Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015, r 8

<sup>22</sup> Uniform Law s 225(4)(b); Uniform General Rules, r 82 (1)(a),(2)(b)

<sup>23</sup> Uniform Law, s 211; Uniform General Rules, r 82(2)(a)

<sup>24</sup> Definition of qualified entity, Uniform Law, s 6; *Judiciary Act 1903* (Cth), s 55E(2)

<sup>25</sup> Uniform General Rules, r 10(1) (c)

<sup>26</sup> Uniform General Rules, r 10(1)(d)

<sup>27</sup> Uniform General Rules, r 10(1)(e) – this applies to a public trustee (however named) and any officer, employee or staff of the public trustee or company that performs the functions of the public trustee itself or on behalf of the government of the jurisdiction