

GUIDANCE NOTE NO 2

The Office of Legal Services Coordination (OLSC) provides Guidance Notes in order to assist Australian Government Departments and Agencies, and legal services providers (as applicable), to comply with the Legal Services Directions, procure legal services, and deal with legal issues in an efficient and effective manner. OLSC welcomes feedback on this Guidance Note.

Use of in-house lawyers for court litigation

Under paragraph 5 of the *Legal Services Directions*, the Attorney-General's approval is required for an FMA agency to use in-house lawyers to conduct court litigation as solicitor on the record or as counsel.

Paragraph 5.1 sets out factors relevant to the Attorney's decision, and paragraph 5.2 provides that approvals may be given subject to conditions.

The factors relevant to the Attorney's decisions are expressed to include:

- Whether the agency is able to demonstrate a capacity to conduct the litigation properly and efficiently
- Whether the agency is able to conduct the litigation at a lower cost than using external solicitors, taking into account accrual accounting and, where relevant, competitive neutrality principles, and
- Whether the agency has a statutory charter which gives it an operation independent of government.

Applicants seeking an exemption should demonstrate what they can bring to litigation, having regard to what an external legal services provider would bring. The following information should be included in a request for approval (while it is not in itself determinative, it greatly assists the consideration process):

- Information about the size and nature of the agency's legal services area (and, in particular, how many people are involved in court litigation). This goes to the agency's capacity to manage matters and competing priorities and to manage expertise and knowledge, and assists OLSC in developing a picture of how exposed the agency would be if it lost one or more of its lawyers. Points that ought to be addressed include:
 - Whether agency lawyers have practising certificates
 - What experience and expertise they have (noting that litigation requires knowledge beyond the legislation an agency administers)
 - What sort of administrative and paralegal support is available to agency lawyers (given that, in litigation, time pressures can be critical)
 - The degree of access agency lawyers have to specialist litigation tools (for example, so that lawyers can readily access and cross-reference witness statements, evidence, transcripts etc).
- Information about the nature of supervisory arrangements that are in place for the agency's lawyers, to ensure consistency and the meeting of appropriate

standards. The application should address the nature of supervisory arrangements, and how these fit within the overall structure of the organisation. For example, the following points should be addressed:

- Whether the lawyers are supervised by a senior lawyer, and whether that senior lawyer has a practising certificate
 - Whether there are procedures for sign-off or second counselling by a supervising lawyer or professional leader on court documents and advices, or are the lawyers effectively 'sole practitioners'
 - How matters are allocated within the in-house area
 - How the legal services unit determines whether to allocate a matter internally or externally
 - Whether there is a matter management system (eg to track progress on cases, get reports on cases and on the overall caseload etc)
 - To whom the legal services manager reports if there are issues to be resolved.
-
- Information about the nature of knowledge management arrangements in place in the agency (for example, how the agency stores and accesses past opinions and its 'corporate memory'). This, too, goes to the agency's ability to provide consistency of service and to attain high standards in the conduct of court litigation. Knowledge management also includes generally collating, recording and accessing the specialist expertise that in-house lawyers may have, how they acquire it, how they share it and how they maintain it for future in-house lawyers. A knowledge management system should ideally address litigation knowledge, jurisdictional knowledge and understanding of relevant legislation. In this regard, agencies should refer to the Legal Services Arrangements in Australian Government Agencies Better Practice Guide released by the Australian National Audit Office in August 2006.
 - Information about the costs of using in-house lawyers compared to the costs of using external legal services providers. The agency should also ideally address issues such as whether the costs and choice of external counsel are affected by the use of in-house lawyers (for example whether appropriate counsel are prepared to accept direct briefing, whether direct briefing by in-house lawyers has an impact on preparation time etc for counsel). Information should also be provided on how an area costs in-house services during matters (so there can be a proper analysis of cost and benefit).

Janette Davis
Assistant Secretary
Office of Legal Services Coordination

Telephone: (02) 6250 6611
Facsimile: (02) 6250 5968
E-mail: olsc@ag.gov.au

First date of issue: 18 May 2005
Last date of issue: 1 July 2008