

GUIDANCE NOTE NO 3

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.

Breach of the *Legal Services Directions 2005*

How is a breach of the Directions identified?

OLSC identifies possible breaches of the Directions by:

- monitoring reports of case law and tribunal decisions
- monitoring media reports
- receiving reports from agencies, legal services providers, courts and tribunals, and
- receiving complaints from other parties to litigation involving the Commonwealth

What is an agency's responsibility for the reporting of possible breaches?

Paragraph 11.1(d) of the Directions requires an FMA Agency to report to OLSC or the Attorney-General about any known possible or apparent breaches of the Directions by the agency, and to advise on the action that the agency has taken to remedy the situation.

Paragraph 11.2 requires an FMA agency to provide a compliance certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the agency has complied with the Directions.

The onus is primarily on agencies to demonstrate their compliance with the Directions and to show that they have appropriate systems in place for monitoring compliance.

How would an agency make a report under paragraph 11.1(d)?

A written report should be provided to OLSC:

- indicating the provision of the Directions that may have been breached
- with a succinct statement of the facts giving rise to the possible or apparent breach, including when it occurred, any legal services provider involved, and other parties possibly affected
- outlining the consequences that have flowed from the breach, and
- outlining any action that has been taken to remedy the apparent breach (if appropriate) or to prevent recurrence of a similar issue. Even if an actual breach has not occurred, some situations may bring to light systemic problems that should be addressed.

What format is required for the certificate referred to in paragraph 11.2?

There is no prescribed format for these certificates. However, the following format is recommended:

I, [Name of Chief Executive], Chief Executive of [Name of Department/Agency], certify under paragraph 11.2 of the *Legal Services Directions 2005* that:

- (a) this agency has appropriate systems and procedures in place to ensure compliance with the Directions, and
- (b) this agency has no record of any alleged, possible or determined breach of the Directions by this agency during the financial year [insert relevant period]

OR

- (a) this agency has no record of any alleged, possible or determined breach of the Directions by this agency during the financial year [insert relevant period] other than the following:
 - (i) succinct statement of the alleged, possible or determined breach including for previously unreported breaches, information of the kind required for reports under paragraph 11.1(d) of the Directions, and
 - (b) internal systems and procedures have been reviewed following the above breach(es) and are appropriate to ensure compliance with the Directions.

Signed: [Signature of Chief Executive]

Signed certificates should be sent to:

Assistant Secretary
Office of Legal Services Coordination
Australian Government
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Note: As from 1 July 2008, agencies are also required to include details of the agency's use of persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* to receive service in proceedings to which the Commonwealth is a party. The details to be provided are outlined in paragraph 11.2(ba) of the Directions.

What is the effect of a breach of the Directions and is the outcome published?

To breach the Directions is to breach a legislative instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*.

If an FMA agency were found to have expended moneys on legal services in a manner inconsistent with the Directions then the agency may also be considered to have breached the *Financial Management and Accountability Regulations 1997*.

The Attorney-General is briefed on the details of breaches. The Attorney-General is able to enforce compliance with the Directions (subsection 55ZG(2) *Judiciary Act 1903*) and under Part 3 of the Directions may impose sanctions for non-compliance. Examples of the sanctions available are set out in the *Compliance Strategy for Enforcement of the Legal Services Directions* available online at www.ag.gov.au/olsc.

Statistical information is published in the Australian Government Attorney-General's Department Annual Report. In the past, details of breaches have also been provided in response to questions raised in Parliament or at Senate Estimates hearings. The issue of non-compliance cannot be raised in any proceedings except by, or on behalf of, the Commonwealth (subsection 55ZG(3) *Judiciary Act 1903*).

What is the process for investigation of an alleged breach?

The procedure to be followed in investigating an alleged breach will vary according to the circumstances. In general, the procedure is:

1. OLSC considers the allegation or inference to determine whether it might, at least potentially, disclose a breach. If OLSC considers that person may have further relevant information it will seek to obtain that information.

Note: if OLSC determines that the circumstances do not raise a possible breach it will not seek further information and will advise the complainant (if applicable) accordingly.

2. If OLSC considers that there has been or might have been a breach, it will put the facts and any preliminary view it has formed to the relevant agency, and in appropriate cases, to a legal services provider involved in the matter. A prompt response is sought addressing the allegation. If relevant, OLSC may seek information from other sources.
3. After considering the information provided by the relevant agency, legal services provider or other source, OLSC may contact the complainant for further information.
4. OLSC will then assess the matter to form a view as to whether a breach has occurred.
5. If OLSC considers a breach to have occurred it will determine the circumstances of the breach, the responsible agency, whether any legal services provider was involved, and steps to be taken to address the breach.

6. OLSC will notify the Attorney-General of the breach, and, if appropriate, recommend that a Direction be issued in relation to the matter. In most cases, agencies and/or legal services providers will themselves identify a range of remedial actions.
7. OLSC will monitor the actions taken by the agency and/or legal services provider to prevent a further breach of the Directions. It will also disseminate to other agencies any lessons to help prevent breaches.

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