

# LEGAL SERVICES DIRECTIONS 2005

## BRIEFING NOTE

### Background to the new Legal Services Directions

Section 55ZF of the *Judiciary Act 1903* gives the Attorney-General power to issue directions to Australian Government agencies in relation to the provision of legal services to the Commonwealth. The Legal Services Directions were first issued by the then Attorney-General in 1999.

The Directions are designed to ensure the delivery of Australian Government legal services in a consistent and coordinated manner, so as to protect the Australian Government's legal and financial position. They facilitate a 'whole of government' approach to legal and policy considerations. Agencies are free to choose and use legal service providers, subject to compliance with the Directions, and agencies are accountable for their use of legal services. The Directions are an integral part of the Government's policy for the use of legal services by agencies.

An Issues Paper on the operation of the Directions was released for public comment in March 2004. The Department has analysed the 30 submissions that were received in response to the Issues Paper, and has held follow-up discussions with key stakeholders. A number of amendments are now being made to the Directions, reflecting the Issues Paper, the submissions received, and some additional matters that have come to light since the Issues Paper was released.

Many of the amendments involve minor changes which simply clarify the existing wording and operation of the Directions. These are not separately discussed in this briefing. Other changes do have substantive impact. These are discussed in turn below, grouped by topic.

### Making and commencement

The *Legal Services Directions 2005* were made by the Attorney-General on 29 December 2005. They commence on 1 March 2006. The previous Legal Services Directions, made in 1999 and subsequently amended, are repealed when these new Directions commence.

The new Directions are registered on the Federal Register of Legislative Instruments. The Directions and their accompanying explanatory statement can also be found at [www.ag.gov.au/olsc](http://www.ag.gov.au/olsc) under 'Legal services policy'.

### Further information

For further information about the Directions, please contact the Office of Legal Services Coordination:

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Guidance Notes and other materials concerning the Directions can be found at [www.ag.gov.au/olsc](http://www.ag.gov.au/olsc) under 'Legal services policy'.

## **Topic 1 Claims and litigation**

### *Third parties (new paragraph 11A of the Directions)*

Difficult issues arise where the Commonwealth contracts with a third party (eg to supply goods or services on behalf of the Commonwealth) and there is litigation in relation to the actions of the third party in acting for the Commonwealth. Commonly, third party contracts will include a right of ‘subrogation’ under which the third party, rather than the Commonwealth, is responsible for the handling of the litigation. This means that even if action is taken or defended in the name of the Commonwealth, the third party will control that litigation. In many contexts, third parties are only willing to contract with the Commonwealth if they are given this right of subrogation, so as to be able to directly protect their commercial interests and reputation in the event of litigation.

If the third party is free of any requirement to comply with the Directions when conducting such litigation, there is a risk that it may, while acting in the name of the Commonwealth, run an argument contrary to current government policy or interests, or contrary to a position which the Commonwealth has taken in related or similar legal cases. This extends to issues in which the Commonwealth has an important stake, such as issues of constitutional interpretation. There is also a risk that the third party may not act as a model litigant, opening the Commonwealth to criticism.

To help to protect the Commonwealth’s legal, policy, financial and reputational interests, the new Directions require agencies to use their best endeavours to protect the Commonwealth by imposing caveats on subrogation where possible.

### *Settlement of limitation period cases (paragraph 8 of the Directions)*

On occasions, there has been a tension between the encouragement under the Directions to settle matters, where appropriate, and the obligation to assert applicable limitation periods. New paragraph 8.3 is designed to balance the potentially competing considerations of encouraging early settlement and the avoidance of litigation, on the one hand, and protecting the Commonwealth’s legitimate legal and financial interests on the other.

### *Claims by the Commonwealth (Appendix C of the Directions – handling monetary claims)*

Appendix C to the Directions now provides that monetary claims by and against the Commonwealth are to be settled in accordance with legal principle and practice. Where a claim is a major claim, it can only be settled if advice is received that the settlement is in accordance with legal principle and practice and it has been authorised by the Chief Executive of the agency.

Previously, the rule in Appendix C extended only to claims against the Commonwealth. However, there is no reason why claims by the Commonwealth should not be subject to the same framework as has been applied to claims against the Commonwealth since 1999. The settlement of claims by the Commonwealth gives rise to very similar considerations as settlement of claims against the Commonwealth. In each case, it is necessary to carefully assess:

- the merits of the Commonwealth’s position
- the range of possible and likely outcomes in court
- the costs of continuing with litigation
- the possible terms of settlement, and

- whether the desirability of clarifying the law or setting a precedent are relevant to the decision to maintain the litigation or to settle.

These matters must be weighed up to achieve an outcome that, in total, best advances the Commonwealth's legal, financial and other interests.

Accordingly, it is appropriate that settlement of claims by the Commonwealth should be based on the same rigorous assessment as claims against the Commonwealth, including testing consistency with legal principle and practice, and chief executive approval of settlement of larger claims.

*Settlement of major claims (Appendix C of the Directions – handling monetary claims)*

Under the previous Directions, a settlement amount exceeding \$10,000 required an agency to obtain legal advice that the settlement was in accordance with legal practice and principle. The new Directions increase the threshold to \$25,000. This gives agencies greater leeway to settle smaller matters. Agencies should still, of course, carefully consider the merits of the settlement, whether or not they are required to seek legal advice. The extent and nature of legal advice sought should also be proportionate to the quantum and issues involved in the matter, in any case.

**Topic 2 Engaging counsel**

*Bankrupt barristers (Appendix D of the Directions – engaging counsel)*

There has been a long-standing concern about some barristers arranging their affairs to place their assets in others' names, declare themselves bankrupt, continue to practise, and avoid liabilities to the Australian Taxation Office and other creditors. In March 2001, the then Attorney-General determined that the Australian Government should, as a general rule, avoid briefing counsel who use bankruptcy to avoid taxation liabilities. More broadly, the Government seeks to ensure that adverse disciplinary findings against any barrister are taken into account before deciding whether it would be appropriate to brief that barrister.

To underpin this policy, the new Directions include new paragraphs 4A and 4B in Appendix D which deals with briefing of counsel.

These provisions require:

- counsel to warrant that he or she has not been declared bankrupt, unless counsel advises of any bankruptcy, and
- the approval of the Attorney-General to brief counsel who have been declared bankrupt and who have been the subject of an adverse disciplinary finding by a professional body in relation to the circumstances of the bankruptcy.

*Model briefing policy (Appendix D of the Directions – engaging counsel)*

Model briefing policies have been adopted by a number of professional legal bodies within Australia and by the Victorian Government. These are primarily directed at ensuring that female counsel receive an appropriate share of briefs. For government, there is also a broader issue of ensuring the market is continually tested and that a broad range of counsel is considered for government work. The Law Council of Australia has released its own model briefing policy.

There was a provision in paragraph 2 of Appendix D to the previous Directions which provides that ‘Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women’.

This encouragement has been fortified by new paragraphs 4C and 4D in Appendix D, which emphasise the obligations on agencies to select counsel on merit and to develop a wide pool of skilled counsel. These obligations serve the policy objectives of ensuring that the Commonwealth receives the benefit of an assured supply of expert legal services.

In addition, a new note following paragraph 4D encourages agencies to publish statistics annually, to bring greater focus to the implementation of equitable briefing practices, and to facilitate assessment of progress on this issue.

#### *Counsel fees (Appendix D of the Directions – engaging counsel)*

The new Directions:

- raise the daily rate above which the Attorney-General’s approval is required to pay counsel that rate from \$3,800 per day (inclusive of GST) to \$5,000 per day (inclusive of GST), and
- impose on the Office of Legal Services Coordination an obligation to set all initial rates for counsel working for the Commonwealth, even where those rates are below the existing thresholds.

The new obligation to be imposed on OLSC is intended to address the risk that agencies may face pressure to brief counsel new to Commonwealth work at the upper limit for junior counsel of \$1600 per day, inclusive of GST. There is anecdotal evidence of this occurring in some instances, creating a possibly inflationary effect on counsel fees generally, and thus undermining the Government’s broader objective of using its purchasing power to secure high quality legal services at the best possible price. By assuming a role in setting all initial rates, OLSC will be able to ensure that careful consideration is given to an appropriate rate for each individual counsel, reflecting each counsel’s skills and expertise, and that there is improved consistency in rates set for comparable counsel. When seeking to engage any counsel without a known Commonwealth rate, agencies will first need to consult OLSC to seek a rate.

In addition, OLSC proposes to review Commonwealth counsel fee rates annually.

### **Topic 3 Merits review and alternative dispute resolution**

#### *The model litigant obligation and merits review proceedings (Appendix B to the Directions)*

Some stakeholders expressed a concern that some agencies, when appearing in merits review proceedings, may take an adversarial approach that is not consistent with the aims and practices of non-judicial proceedings.

To address this concern, the new Directions clarify the application of the model litigant obligation in merits review proceedings (see new paragraphs 3 and 4 in Appendix B, and the new note following paragraph 4).

### *Alternative dispute resolution*

In recent years, there has been an increased emphasis on alternative dispute resolution as a means to reduce legal costs and delays for all parties, and achieve more ‘win / win’ outcomes.

To reflect this growing emphasis, paragraph 2(d) of Appendix B, which contains the model litigant obligation, has been revised to implement recommendation 19 of the Federal Civil Justice System Strategy Paper, which can be found on the website of the Attorney-General’s Department, under ‘Publications’ (see [www.ag.gov.au](http://www.ag.gov.au)). It now includes a positive obligation to consider the use of alternative dispute resolution.

### **Topic 4 Legal assistance to employees**

#### *Assistance for criminal proceedings (Appendix E to the Directions)*

Criminal proceedings carry the risk that a penalty such as imprisonment or a criminal record will be imposed on the accused personally, notwithstanding any indemnity given by the Commonwealth. An employee who is a party to civil proceedings, and who has been indemnified by the Commonwealth, on the other hand, is not personally exposed to the possible award of damages that could result. In the circumstances of a criminal proceeding, the employee should be permitted to control his or her own defence.

To reflect this, Appendix E to the Directions now provides in clause 8A that the indemnification of an employee against any costs incurred in criminal proceedings, and any penalty payable by the employee as a result of those criminal proceedings, is not to be conditional on the Commonwealth controlling the employee’s defence. However, to protect the Commonwealth against the risk of open-ended or excessive exposure (for example, excessive expenditure on the defence), the agency may appropriately qualify or limit the expenses which it approves.

### **Topic 5 Consultation between agencies**

#### *Consultation on advice (paragraph 10 of the Directions)*

In 2005, the ANAO’s report on legal services purchasing in the Australian Public Service highlighted the desirability of strengthening and clarifying paragraph 10 of the Directions, a matter on which the Department had already undertaken consultations. Consultation between agencies before seeking legal advice on legislation administered by another agency (and sharing the advices that are obtained) is a crucial element of the Government’s strategy to ensure a whole of government approach to legal and policy issues, and to manage risks such as duplication of advice.

For example, if a number of agencies are running into similar uncertainties in the operation of particular Commonwealth legislation, it is important that the administering agency be ‘in the loop’ on requests for advice. This will help the administering agency to:

- identify and address any deficiency in that legislation
- broadcast advice or guidance on interpretation of the legislation to all interested agencies, and
- ensure that the process of interpreting the legislation is informed by any information it holds about previous interpretations of the legislation, extrinsic material relevant to interpretation, and the policy objectives and context for the legislation.

To promote achievement of these objectives, the new Directions impose additional obligations on FMA agencies seeking legal advice on legislation administered by another agencies. These obligations involve:

- providing the administering agency with a copy of the request for advice
- providing the administering agency (and its legal services provider) with a reasonable opportunity to consult before the advice is finalised, and
- requiring the administering agency to consider whether advices received indicate an ambiguity or other issue in its legislation that should be addressed by remedial action to be taken by the administering agency.

These requirements reflect existing good practice for ensuring a whole of government approach to legal issues.

## **Topic 6 Reporting and compliance**

### *Classified material (paragraph 11 of the Directions)*

Under the previous Directions, there was no obligation on agencies to ensure that classified information is appropriately secured by a legal services provider. Legal services providers may not always be attuned to the requirements attaching to protection of classified information under the *Protective Security Manual*.

To assist agencies in identifying and handling this issue, the new Directions explicitly draw agencies' attention to the *Protective Security Manual*, and encourage agencies to make provision, in their legal services contracts, for legal services providers to adopt effective security arrangements for classified material (including electronic material). See the note following paragraph 11.1.

### *Reporting requirements (paragraph 11 of the Directions)*

The 2005 report of the Australian National Audit Office on legal services purchasing arrangements in the Australian Public Service highlighted the need for improved legal expenditure recording.

The new Directions include a provision to assist and facilitate greater transparency in legal services expenditure recording and reporting, by providing that the agency's legal services expenditure is appropriately recorded and monitored. The new Directions also require each agency to make publicly available records of its legal services expenditure for each financial year.

It is anticipated that the ANAO's 'Better Practice Guide' about management of legal services expenditure will provide further assistance to agencies in meeting their obligations in this area.

### *Compliance with the Directions (new paragraph 11.2 of the Directions)*

The ANAO also expressed concern that OLSC's means of monitoring for breaches of the Directions did not provide an adequate level of assurance about agencies' compliance with the Directions. The ANAO suggested that one means to provide greater assurance of compliance with the Directions was to require the chief executive of each agency to issue a certificate concerning the agency's compliance with the Directions during the financial year.

Consistent with this suggestion, new paragraph 11.2 of the Directions imposes on chief executives an obligation to issue a certificate of compliance with the Directions, and to give to OLSC relevant information about breaches by agencies and the remedial action taken to prevent further breaches.

This new obligation will provide the Attorney-General and OLSC with more extensive information about compliance with the Directions, and therefore assist the Government to manage risk to the interests that the Directions seek to protect. It also promotes agency consideration more broadly of the usage of legal services.

*Sanctions for non-compliance with the Directions (paragraph 14 of the Directions)*

The new Directions explicitly refer to the fact that sanctions may be imposed for non-compliance with the Directions. They also require agencies to ensure that their contracts with legal services providers include mention of the actions that could be taken against the legal services provider if the provider causes, or is complicit with, a breach.

The administration of the Directions is directed to assisting agencies, and their legal services providers, to understand their obligations, advancing the Government policy objectives to which these obligations are directed, and advising agencies on the means by which any deficiencies in complying with those Directions may be remedied. There are, however, occasions on which the Government's policy objectives can only be met by the imposition of sanctions.

The following two hypothetical examples illustrate some of the circumstances in which sanctions may be appropriate, and the kinds of sanctions that may be appropriate in those circumstances.

1. A legal services provider gives advice including advice on constitutional law (that is, tied work) for an agency without approval from the Attorney-General or OLSC to do this work. A low level sanction would be to require that the provider receive no payment for the advice. The agency would also be required to obtain advice on the constitutional issue from a tied provider.
2. A legal services provider repeatedly flouts the Commonwealth's obligation to act as a model litigant, for example, by misleading other parties or engaging in intimidatory tactics. A suitable sanction may be to bar that provider from doing any work for the Commonwealth for a period. The response of the Attorney-General or OLSC to a breach may also include other elements. For example, the conduct of the provider may be reported to the relevant professional body. An agency involved in such a breach may be required to conduct certain litigation or all litigation under the supervision of OLSC.