



## GUIDANCE NOTE 3

### Compliance with the Legal Services Directions 2017

#### OLSC's role

1. The Office of Legal Services Coordination (OLSC) is responsible for the administration of the *Legal Services Directions 2017* (the Directions). Under the Directions, Commonwealth agencies have various obligations, including an obligation to act as a model litigant.
2. OLSC aims to encourage and support compliance with the Directions by agencies and their legal service providers through education.
3. OLSC does not conduct reviews or investigations in relation to possible or actual non-compliance with the Directions (including allegations of non-compliance), except in exceptional circumstances, such as where there is evidence of a systemic issue emerging within an agency or in the sphere of Commonwealth legal work generally.
4. Agencies or individuals may have specific questions regarding whether certain conduct is compliant with the Directions. OLSC is able to give policy guidance on the Directions. However, OLSC does not provide legal advice on the application of the Directions to particular circumstances, and does not approve a particular strategy or course of action in a particular matter.

#### Monitoring of compliance by OLSC

5. OLSC will monitor (and where necessary verify) agency compliance with the Directions in order to address emerging, systemic or significant issues across the Commonwealth.
6. The means of monitoring compliance will be through the mandatory reporting requirements outlined in the Directions, namely through agency compliance notifications and annual compliance certificates
7. The accountable authority of an agency is responsible for ensuring there is comprehensive and accurate reporting of allegations of non-compliance. It is expected that agencies will notify OLSC about possible or actual non-compliance (including allegations of non-compliance) in a comprehensive manner. Of particular importance are the outcomes reached by agencies, including particular strategies adopted in order to minimise the chances of non-compliance in the future.
8. OLSC will consider the agency notifications and in cases where it considers there are inadequacies in the information provided, or the process undertaken, OLSC may require additional information or further steps to be taken.
9. The Attorney-General is briefed on the Commonwealth's non-compliance with the Directions. Statistical information about non-compliance is published on the Attorney-General's Department website.
10. Any finding by an agency that a legal service provider has failed to comply with the Directions will be recorded and considered by OLSC.

## The Agency's Role

11. Agencies are responsible for the management and handling of legal issues, claims, and disputes affecting or involving the Commonwealth. This includes having an appropriate awareness of agency obligations under the Directions, and ensuring compliance with the Directions. Under the former Compliance and Enforcement Strategy, agencies were required to have systems and processes in place for ensuring compliance with statutory, regulatory and other requirements, and for dealing with general complaints. Under OLSC's *Compliance Framework*, agencies will be expected to have arrangements in place to ensure compliance with the Directions, consider and appropriately respond to allegations of non-compliance, take necessary remedial action including ensuring better practice compliance with the Directions, and report the outcomes of those activities to OLSC.
12. Due to the divergence in agency structures, and the context within which Commonwealth agencies handle legal issues, claims, and disputes, it will be the responsibility of each agency to determine:
  - what form of compliance arrangement is the most appropriate in the circumstances
  - whether appropriate steps have been taken to satisfy themselves that they have fairly and honestly considered the subject of an allegation, and
  - whether appropriate remedial action has been taken, if necessary.
13. Agencies will potentially receive allegations of non-compliance ranging from the spurious to those of substance. Agencies will need to implement arrangements to ensure they have discharged their responsibilities in considering concerns regarding possible and actual non-compliance (including allegations of non-compliance) appropriately. We note that accountable authorities of non-corporate Commonwealth entities and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 will be required to certify in their annual compliance certificates that their entity has appropriate systems and procedures in place to ensure compliance with the Directions.
14. If a Commonwealth agency becomes aware of possible or actual non-compliance with the Directions (including allegations of non-compliance) involving their legal service provider, it is the agency's responsibility to consider the circumstances, including the level of contribution by the legal service provider, and advise OLSC of their conclusions. The agency may determine there was compliance, or that there was non-compliance contributed to by both the agency and their legal service provider, or non-compliance due solely to the conduct of their legal service provider.

## **When and how is a non-corporate Commonwealth entity required to report on possible non-compliance?**

### ***Notifications of non-compliance***

15. Paragraph 11.1(d) of the Directions requires a non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 to give reports to OLSC or the Attorney-General about any known, possible or apparent breaches of the Directions by the entity, or allegations of breaches of the Directions by the entity. This includes allegations of non-compliance made to the entity, along with circumstances of possible non-compliance of which the entity becomes aware, for example: judicial criticism, media attention, and internal reviews.
16. For each circumstance of possible non-compliance (whether it is a complaint directed at the entity or discovered through internal procedures), an entity should complete the Agency Notification Form that appears at **Attachment A** and is also available from the

OLSC website. The Agency Notification Form should be provided to OLSC as soon as practicable. The entity can provide subsequent Agency Notification Forms to update OLSC on the progress or outcome of a circumstance of potential non-compliance.

17. For example, if an allegation is made against an entity, the entity should notify OLSC via an Agency Notification Form that they are reviewing the complaint. Once the review has been finalised, an updated Agency Notification Form should be submitted providing a summary of the outcome of the review, and details of any remedial action taken by the entity, if required.
18. Once the Agency Notification Form is received by OLSC, it will be recorded on our Notification Register. As OLSC will be monitoring entity notifications, OLSC may seek specific updates or information relevant to a particular notification.

### ***Annual compliance certificates for non-corporate Commonwealth entities***

19. Paragraph 11.2 of the Directions requires a non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 to provide a compliance certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the entity has complied with the Directions. The onus is primarily on entities to demonstrate their compliance with the Directions and to show that they have appropriate systems in place for monitoring compliance. There is no prescribed format for the certificate, however OLSC recommends the use of the Compliance Certificate template that can be found at **Attachment B**. Entities are also required to include details of the entity's use of persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* (Judiciary Act) 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.
20. In addition, OLSC has prepared a Compliance Checklist to assist entities when completing the compliance certificate. The document is for internal purposes and is found at **Attachment C**.
21. Signed certificates should be scanned and emailed to the Assistant Secretary of OLSC at [olsc@aq.gov.au](mailto:olsc@aq.gov.au).

### ***When to notify OLSC of an allegation of non-compliance***

22. In circumstances where there is an allegation of non-compliance, entities are not required to notify OLSC of spurious complaints in which there is no particularisation of the allegation.
23. However, entities are required to notify OLSC of all allegations in which the complainant has alleged that specific entity conduct has resulted in non-compliance with a specific part of the Directions (or where it is apparent from their complaint). For example, Mr A alleges that an entity failed to provide discovery by a particular date in accordance with a court imposed deadline and accordingly they have caused unnecessary delay in the litigation, thereby failing to comply with paragraph 2(a) of Appendix B to the Directions.
24. We note that all judicial criticism of an entity's compliance with the Directions should be notified to OLSC.

### **The Legal Service Provider's Role**

25. Legal service providers have obligations in relation to complying with the Directions in accordance with:

- a. Section 55ZG of the Judiciary Act which provides that “a legal practitioner or firm of legal practitioners” that is acting in a matter, for a person or body described in s 55N(1) of the Judiciary Act, must comply with the Directions. Section 55N(1) includes the Commonwealth, companies in which the Commonwealth has a controlling interest, and Ministers.
26. If a legal service provider becomes aware of possible or actual non-compliance (including allegations of non-compliance), it is their responsibility to report it to the Commonwealth agency in the first instance, and then work with the agency to resolve the issue. The agency is responsible under the Directions to notify OLSC of the circumstances and outcome of non-compliance using the Agency Notification Form.

**If you have a concern that a Commonwealth agency is not complying with the Directions**

27. If you are a party to a claim and/or litigation involving the Commonwealth and you want to make an allegation of non-compliance, you should contact the agency directly and particularise your concerns relating to their compliance with the Directions. OLSC does not resolve complaints from members of the public about agency compliance. If you contact OLSC, you will be advised to forward your complaint to the relevant agency. That agency will notify OLSC of your concerns in accordance with the *Compliance Framework*.
28. Please note, the issue of non-compliance with the Directions cannot be raised in any proceedings except by, or on behalf of, the Commonwealth (see subsection 55ZG(3) of the Judiciary Act).

Office of Legal Services Coordination  
Telephone: 02 6141 3642  
E-mail: [olsc@ag.gov.au](mailto:olsc@ag.gov.au)  
Re-issued: July 2018



### Agency Notification Form

#### Agency Notification under 11.1(d) of the *Legal Services Directions 2017*

*Under paragraph 11.1(d) of the Legal Services Directions 2017 (Directions), an agency must report about any possible or actual non-compliance with the Directions by the agency (including an allegation of non-compliance) of which the agency is aware, and about any corrective steps that have been taken or are proposed to be taken, by the agency.*

*Please complete this Form and return to OLSC at [olsc@ag.gov.au](mailto:olsc@ag.gov.au).*

<b>Agency notifying OLSC:</b> Contact Officer: Phone Number: Email:	<b>Date Notification Form lodged with OLSC:</b>
<b>Matter Name (if applicable) and Court/Tribunal and Reference Details (if applicable):</b>	
<b>Is this the first Notification Form that has been lodged in relation to the possible or actual non-compliance (including an allegation of non-compliance)?</b>	
<b>If no, please specify the dates on which previous Notification Forms have been lodged.</b>	
<b>Agency's legal service provider (if applicable):</b> Firm: Contact Officer: Phone Number: Email:	
<b>Details of other party (if applicable):</b> Name: Phone Number: Email: Legal representative and contact details (if applicable):	
<b>What does the possible or actual non-compliance (including an allegation of non-compliance) relate to:</b>  <input type="checkbox"/> Model litigant obligation (specify) _____ <input type="checkbox"/> Tied work <input type="checkbox"/> Counsel engagement <input type="checkbox"/> Failure to report a request for legal advice on a constitutional law matter <input type="checkbox"/> Failure to report a significant legal issue <input type="checkbox"/> Failure to obtain the Attorney-General's approval to settle a claim reported as significant <input type="checkbox"/> Handling monetary claims <input type="checkbox"/> Other _____	

<p><b>Please provide a brief summary of the background to matter:</b></p>
<p><b>Please outline the circumstances of possible or actual non-compliance (including an allegation of non-compliance):</b> <i>Please attach any relevant documentation including a copy of the document containing the allegation.</i></p>
<p><b>Please provide a brief summary of the steps the agency has taken, or proposes to take, to assess and analyse the circumstance of possible or actual non-compliance:</b> <i>For example, the agency proposes to undertake a review of the circumstances or the agency has undertaken a review of the circumstances. Please attach any relevant documents including a copy of any review or investigation findings.</i></p>
<p><b>Please outline findings by the agency including whether or not the circumstances were found to be non-compliant with the Directions, or alternatively, if the agency has not yet resolved the circumstances, please provide a subsequent notification form updating OLSC of the outcome.</b></p>
<p><b>If an agency has made a finding of non-compliance, please advise who was responsible for the non-compliance:</b></p> <ul style="list-style-type: none"><li><input type="checkbox"/> The agency</li><li><input type="checkbox"/> The legal service provider</li><li><input type="checkbox"/> Both the agency and the legal service provider</li></ul>
<p><b>Corrective steps:</b> <i>Please outline corrective steps that have been taken or are proposed to be taken, by the agency including steps taken to response to an allegation of non-compliance</i></p>
<p><b>Other comments:</b></p>

***Legal Services Directions 2017 – Certificate of Compliance [insert relevant period]***

[Name of Entity]

I, [Name of Accountable Authority], Accountable Authority of [Name of Entity], certify under the *Legal Services Directions 2017* that during the financial year [insert relevant period]:

- (a) this entity reported to OLSC as soon as practicable, all apparent or possible non-compliance with the Directions, or allegations of non-compliance of which the entity is aware:

Yes  No

*[If no, please list below all instances of the possible or actual non-compliance (including alleged) including for previously unreported non-compliance, information of the kind required under paragraph 11.1(d) of the Directions.]*

- (b) this entity has appropriate management strategies and practices in place to ensure compliance with the Directions:

Yes  No

*[If no, please advise how the entity intends to improve the internal systems and procedures to ensure compliance with the Directions and to respond to instances of potential or actual non-compliance.]*

- (c) this entity has used person/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:

Yes  Not applicable

If yes, please provide details and attach the list to this Certificate (refer paragraph 11.2(ba) of the Directions)

*[please attach a list]*

Signed: [Signature of Accountable Authority]

[day]/[month]/ [year]

[Insert title]

## Compliance Certificate checklist

Paragraph 11.2 of the *Legal Services Directions 2017* (Directions) requires a non-corporate Commonwealth entity to provide a compliance certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the entity has complied with the Directions.

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

	<b>Obligations under the <i>Legal Services Directions 2017</i></b> In the most recent Financial Year, has your entity always complied with the requirement to:	<b>Yes/No/Not Applicable</b>
1	Engage tied providers to do constitutional, cabinet, national security, public international law or drafting work in accordance with <b>Appendix A</b> and Paragraph 2	
2	Report a significant issue to the Attorney-General or OLSC in accordance with Paragraph 3.1	
3	Only settling a claim reported as a significant issue with the agreement of the Attorney-General pursuant to Paragraph 3.2	
4	Comply with an instruction from the Attorney-General about the handling of claims or the conduct of litigation pursuant to Paragraph 4.1	
5	Comply with the model litigant obligation pursuant to <b>Appendix B</b> and Paragraph 4.2	
6	Handle claims and conduct litigation in accordance with legal principle and practice pursuant to Paragraph 4.3	
7	Handle monetary claims in accordance with the Directions on Handling Monetary Claims at <b>Appendix C</b> and Paragraph 4.4	
8	Comply with obligations on the disclosure of a settlement pursuant to Paragraphs 4.5 and 4.5A	
9	Only objecting or consenting to the jurisdiction of a State or Territory court or tribunal with the Attorney-General's approval (Paragraphs 4.6 and 4.6A)	
10	Obtain written legal advice from lawyers the agency is able to use that there are reasonable grounds for commencing court proceedings, before commencing proceedings pursuant to Paragraph 4.7	
11	Only using in-house lawyers to conduct court litigation as solicitor on the record or as counsel with the approval of the Attorney-General pursuant to Paragraph 5	
12	Engage counsel in accordance with <b>Appendix D</b> and Paragraph 6	
13	Comply with the requirements relating to public interest immunity where a request or demand to provide documents or information arises in the conduct of litigation pursuant to Paragraph 7	
14	Waiving obligations in relation to limitation periods pursuant to Paragraph 8	

15	Comply with the requirements of <b>Appendix E</b> to the Directions when providing financial assistance to a Commonwealth employee pursuant to Paragraph 9	
16	Comply with the requirements of <b>Appendix F</b> to the Directions when procuring legal services from external legal service providers pursuant to Paragraph 9A	
17	Consulting with the administering agency on a request for advice pursuant to Paragraph 10	
18	Taking reasonable steps to share advice that may be significant to other agencies with those agencies pursuant to Paragraph 10.8	
19	Advise the Secretary of the Attorney-General's Department where a request for advice has been made to AGS about a constitutional law matter pursuant to Paragraph 10A	

Describe the circumstances of any instance of potential non-compliance identified above and any action undertaken by the entity to address potential non-compliance:

Have you used a person or persons appointed by the Attorney-General under s 63 of the *Judiciary Act 1903* to receive service in proceedings where the Commonwealth is a party?

If so, (in accordance with paragraph 11.2(ba)) in respect of each proceeding, please provide the following:

- name of the persons who received service
- proceedings in which the appointed person received service
- issues raised in proceedings in which appointed persons received service
- nature of each document served on the appointed persons
- date on which these documents were served, and
- date on which the agency or OLSC was advised of the receipt of service of each document by the appointed person

Is there any other information relevant to the entity's compliance with the Directions that you have not already provided?