

**GOVERNMENT RESPONSE TO THE JOINT COMMITTEE OF PUBLIC
ACCOUNTS AND AUDIT REPORT 412 – RECOMMENDATIONS 11 AND 12**

Recommendation 11 (p.126 of JCPAA Report 412)

The Committee recommends that, in an effort to minimise inefficient use of legal services, PM&C, Finance, and any other relevant bodies, implement monitoring systems to ensure that legal advices obtained by agencies, with implications broader than that specific agency's circumstances, are appropriately distributed to other relevant government agencies.

Accepted.

The *Legal Services Directions 2005*, issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903* establish a framework to maximise the efficient use of legal services as well as reducing the risk that legal advice is inconsistent or does not address whole of government and public interest issues. For example:

- An agency must ensure arrangements concerning legal services deliver efficient and effective services. See paragraph 1 of the Directions.
- Agencies must report to the Office of Legal Services Coordination on significant issues arising in the provision of legal services, especially in relation to claims and litigation. See paragraph 3 of the Directions.
- Where legal advice is sought on legislation administered by another agency, the administering agency must generally be consulted before advice is requested. See paragraph 10 of the Directions. This provision prevents agencies obtaining unnecessary or duplicate advice. It also facilitates consistency across government in statutory interpretation.
- Core areas of government legal work such as constitutional, cabinet, national security and public international law work are tied to the Australian Government Solicitor and the Attorney-General's Department. See Appendix A of the Directions. This means that significant legal opinions provided on these issues are readily available to AGS and the Department.
- There are special arrangements for constitutional advice. Agencies must provide a copy of a request for advice on a constitutional law issue to the Secretary of the Attorney-General's Department. The Australian Government Solicitor must provide a copy of any advice it gives on a constitutional law issue to the Attorney-General's Department. This enables the Department to monitor constitutional issues, coordinate requests for advice across agencies and avoid unnecessary duplication. See paragraph 10A of the Directions.
- Agency chief executives have specific responsibilities concerning the handling of legal services and compliance with the Directions. See paragraph 11 of the Directions. An annual compliance certificate must be provided to OLSC.

The Directions are a legislative instrument and have the force of law. Sanctions can be imposed for non-compliance. They apply to *Financial Management and Accountability Act 1997* agencies and, to a lesser extent, to Commonwealth agencies regulated by the *Commonwealth Authorities and Companies Act 1997*.

The OLSC conducts ongoing education and monitoring to ensure government agencies comply with their obligations under the Directions.

Recommendation 12 (p.126 of JCPAA Report 412)

The Committee recommends that PM&C and Finance establish a repository of legal advices obtained by government agencies, for use by all government bodies where practicable.

Not accepted.

The Australian government legal services market comprises close to 200 departments, agencies and other bodies. A government agency may obtain legal advice from the Australian Government Solicitor, a private sector law firm or an in-house lawyer. For certain matters, an agency will obtain advice from the Attorney-General's Department, the Solicitor-General or may directly brief counsel from the private bar.

There is currently a database that gives the Attorney-General's Department, the Australian Government Solicitor, the Solicitor-General and the Office of Parliamentary Counsel access to each other's legal opinions.

To implement the Committee's recommendation would require all legal services providers to the Commonwealth to contribute to a repository (database) and would give all government bodies (and by extension their legal representatives, who may be government or private sector) access to that database.

This raises financial, technical and practical concerns. The costs of establishing and maintaining a database and the risks it would create, particularly regarding access and undue reliance, outweigh the benefits that could accrue from its establishment.

In purely financial terms, it is questionable whether the costs of establishing and maintaining a Commonwealth-wide opinions database would be matched by reduced legal costs of government bodies seeking legal advice. This analysis is based on experience relating to the costs involved in the upgrade and maintenance of the existing legal opinions database referred to above.

Technical concerns primarily relate to quality control, that is, which advices would be included in, or excluded from, the database and who would be responsible for making the decision to include or exclude an advice. Who would determine when an advice was superseded or should be removed in the face of conflicting advice? These issues arise with the existing legal opinions database, but would be more difficult to resolve if multiple users from different organisations were submitting advice.

The integrity and technical security of the database, for example in relation to password protection, access controls and unauthorised forwarding of contents is also of concern and the risks would be compounded if multiple users from different organisations were granted access to the database.

Practical concerns relate to the specific nature and type of advice sought by agencies. Legal advice databases carry a risk of over reliance or inappropriate application of previous advice to different factual contexts. Reference to previous advice and precedents in the course of researching a legal issue can be useful but there is no substitute for a government agency obtaining its own legal advice on an issue.

The participation of private sector legal providers in the Commonwealth market means that it is inevitable some firms will at times act against the Commonwealth. This intensifies the potential for users to have a conflict of interest. It would be difficult to establish access controls or firewalls that would prevent a legal service provider who is, or may in future act against the Commonwealth from accessing advices for reasons other than performing work for the Commonwealth.

It would be resource intensive to ensure that legal advices included in the repository were appropriately amended to protect privacy and confidentiality. Access to advices that touched on constitutional, cabinet or national security matters would need to be restricted. There are numerous other examples of advices that would not be suitable for broad access by all government bodies or their legal service providers. For example, publication of opinions that relate to the corporate governance of a department or management of Commonwealth litigation could inappropriately prejudice the legitimate interests of the Commonwealth. The need to edit advices, suppress publication and restrict access within the database would limit the capacity of the database to serve as a broad ranging and comprehensive legal resource.

Finally, the protection of legal professional privilege would also be problematic. There is a risk that allowing broad access to third parties may deprive legal advice of the confidentiality necessary to establish a claim for legal professional privilege.