SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Output 1.2

Question No. 19

Senator Ludwig asked the following question at the hearing on 14 February 2006:

Review of legal services directions:

Please provide a copy of the Public Issues paper and the additional briefing document (and its website address)

The answer to the honourable senator's question is as follows:

I attach both documents and the explanatory statement to the new Legal Services Directions, which are also available online at www.ag.gov.au/olsc.

REVIEW OF THE LEGAL SERVICES DIRECTIONS

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Introduction

The Legal Services Directions (the Directions) are made by the Attorney-General under section 55ZF of the *Judiciary Act 1903*. They can be found at <http://www.ag.gov.au/Archived/agd/olsc/Legal_Services_Directions.htm>.

The Directions set out the requirements for the performance of Commonwealth legal services, in particular the conduct of litigation by Commonwealth agencies. They provide the framework under which agencies have freedom to choose how they wish to obtain and use legal services and are accountable for their choices.

The Directions have been in operation since 1 September 1999. The Office of Legal Services Coordination (OLSC), which is responsible for assisting the Attorney-General in the administration of the Directions, is conducting a review to consider possible changes to enhance the operation of the Directions. The intention of this review is not to revisit the fundamental concept of the Directions themselves, including the tying of core work on constitutional, national security, cabinet and public international law matters to certain government providers.

This paper is intended to provide agencies and other interested parties with the opportunity to comment on some specific issues which have come to our attention in administering the Directions and to raise any other matters of concern within the scope of the review.

The paper contains extracts of the paragraphs of the Legal Services Directions relevant to each issue, in a box at the beginning of the discussion of that issue.

It would assist us in considering your comments if you provide any relevant examples that illustrate your point. Any general comments from a user's perspective on the current format and style of the Directions are also welcomed. Responses to this paper are sought by **30 April 2004**, and will be taken into account when OLSC reports to the Attorney-General on the review and any possible amendments to the Directions.

Consideration will be given to the need for transitional provisions before any changes are implemented.

Finally, I draw your attention to three other relevant review processes.

First, OLSC has coordinated a survey of the delivery of legal services to the Commonwealth and an independent review of the administration of the Directions and the role and resourcing of OLSC. The Report on the OLSC Review was released on 24 September 2003, and can be found at http://www.ag.gov.au/JAAReport.

Secondly, a separate review is being conducted of paragraph 10 of the Directions, to take into account comments already received through consultation with departments and agencies. The purpose of paragraph 10 is to promote consultation between agencies on the interpretation of legislation. The amendments under consideration aim to improve consistency in the approach across the Commonwealth.

Thirdly, a review will be conducted of the levels approved under the Directions for counsel fees.

The Review of the Legal Services Directions is expected to be completed in 2004.

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Reporting on significant issues

Paragraph 3.1 An FMA agency is to report as soon as possible to the Attorney-General or OLSC on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation. These issues will include matters where:

(a) the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues, with a 'whole of government' dimension

(b) a dispute or disagreement exists between different agencies (whether or not FMA agencies), other than matters arising under legislation which contemplates that 2 or more agencies may be on different sides in a case

(c) a significant level of coordination between different agencies is required

(d) a significant precedent for other agencies could be established, either on a point of law or because of its potential significance for other agencies

(e) a dispute exists with an agency of a State or Territory government, or

(f) the Commonwealth or a Commonwealth agency proposes to submit to or object to the jurisdiction of a State or Territory tribunal, unless approval has been given by the Attorney-General or the Attorney-General's delegate for that position to be taken.

ISSUE 1

1. Is the obligation to report sufficiently clear?

Discussion

2. Virtually all litigation before the High Court involving the Commonwealth or a Commonwealth agency, including a Minister, is of significance and should be reported to OLSC. Much, but not all, of this litigation is already reported to OLSC.

3. Such reporting ensures that the Attorney-General is given sufficient time to form a view on whether he should seek to appear in the proceedings in question. It also allows the Solicitor-General to be kept informed of any important High Court litigation involving the Commonwealth or its agencies. Some High Court litigation, however, such as that brought by some unrepresented litigants, may be unlikely to involve detailed consideration of the operation of Commonwealth legislation.

4. At the same time, litigation in lower courts may raise sensitive or significant issues. Stipulating reporting of, for example, all High Court cases may lead agencies to focus on the jurisdiction rather than the significance of the issue.

5. The Direction also requires reporting of sensitive issues. This may include where a matter is of interest to the media, and certainly includes any matter which might be raised with the Attorney-General in his role of First Law Officer.

6. The Direction does not focus exclusively on litigation, although most reporting concerns litigation. Significant issues can arise outside or well prior to litigation, and the intent of the

Direction is to require agencies to be aware of the need to report across the breadth of their activities should a significant issue arise.

ISSUE 2

7. Does the fact that paragraph 3.1(f) (see above) and paragraph 4.6[1] of the Directions both refer to objecting to the jurisdiction of State or Territory courts cause confusion?

Discussion

8. Paragraph 3.1(f) of the Directions requires the Commonwealth or a Commonwealth agency to give notice of an intention to submit to, or object to, the jurisdiction of a State or Territory tribunal (unless approval has been given by the Attorney-General or the Attorney-General's delegate).

9. This requirement runs parallel to paragraph 4.6 of the Directions, which obliges the Commonwealth or a Commonwealth agency to seek approval by the Attorney-General or the Attorney-General's delegate to object to the jurisdiction of a State or Territory court.

10. The purpose of paragraphs 3.1(f) and 4.6 is to ensure consistency by the Commonwealth with respect to jurisdictional issues, which can involve constitutional questions and the application of the Judiciary Act.

Claims and litigation by or against the Commonwealth or FMA agencies

Paragraph 4.3 Claims are to be handled and litigation is to be conducted by the agency in accordance with legal principle and practice, taking into account the legal rights of the parties and the financial risk to the Commonwealth (including the agency) of pursuing its rights.

NOTES

1. Some examples of handling claims and conducting litigation in accordance with legal principle and practice are:

(a) acting in the Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate, and

(b) generally enforcing costs orders in favour of the Commonwealth.

2. Section 47 of the FMA Act imposes an obligation on the Chief Executive of an agency to pursue the recovery of debts owing to the Commonwealth for which the Chief Executive is responsible, unless the debts have been written off under an Act, the Chief Executive is satisfied that they are not legally recoverable or the Chief Executive considers that pursuing recovery is not economical. For example, it would generally be considered uneconomical to pursue recovery where the cost of recovery would exceed the value of the debt. An agency should consider whether to seek specific legal advice in order to determine whether to pursue the recovery of a debt. Under section 34 of the FMA Act the Minister for Finance and Administration may waive or defer payments owing to the Commonwealth.

[1] Paragraph 4.6: An objection on behalf of the Commonwealth to jurisdiction of a State court on the basis that it is not a court authorised under section 56 of the *Judiciary Act 1903* is not to be made by the agency without the approval of the Attorney-General or the Attorney-General's delegate.

ISSUE 3

11. Is the interaction between the enforcement of cost orders and the *Financial Management and Accountability Act 1997* (FMA Act) sufficiently clear?

Discussion

12. Section 47 of the FMA Act[2] imposes a duty on a Chief Executive of an agency to recover debts owing. The Chief Executive is given a discretion to either write off a debt or seek to have it waived under section 34 of the FMA Act.[3] Until costs are agreed or taxed, the liability is contingent (as the amount is undetermined) and is therefore not a 'debt owing'. This means the Chief Executive is not obliged by section 47 to pursue recovery of the liability. Similarly, section 34 does not apply to unquantified costs.

Paragraph 4.7 An FMA agency is not to start court proceedings unless the agency has received legal advice from lawyers whom the agency is allowed to use in the proceedings that there are reasonable grounds for starting the proceedings.

ISSUE 4

13. Should the Direction be amended to specify that the legal advice required by paragraph 4.7 must be confirmed in writing if given orally?

Discussion

14. An amendment might be desirable to avoid any possible misunderstanding that may arise from oral advice received by the agency. However, it would need to avoid requiring that written advice is a pre-condition to commencing legal proceedings. For example, in urgent cases, proceedings could be commenced on the basis of the oral advice, but it would be necessary to obtain confirmation of the advice in writing at a later stage.

15. While this is usually done in practice, inclusion in the Directions could assist in ensuring that this occurred, as well as reiterating the importance of written advice, especially in the context of Commonwealth accountability and the length of time for which litigation can run. At the same time, there would be a cost to agencies of obtaining written advice in all cases.

16. The Direction does not specify the nature of the legal advice that is required, but the advice should be sufficient to enable the agency to make a proper and fully informed decision before commencing any proceedings.

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[2] Section 47: Recovery of debts
(1) A Chief Executive must pursue recovery of each debt for which the Chief Executive is responsible unless:
(a) the debt has been written off as authorised by an Act; or
(b) the Chief Executive is satisfied that the debt is not legally recoverable; or
(c) the Chief Executive considers that it is not economical to pursue recovery of the debt.
(2) For the purposes of subsection (1), a Chief Executive is responsible for:
(a) debts owing to the Commonwealth in respect of the operations of the Agency: and
(b) debts owing to the Commonwealth that the Finance Minister has allocated to the Chief Executive.

[3] Subsection 34(1): The Finance Minister may, on behalf of the Commonwealth:
(a) waive the Commonwealth's right to payment of an amount owing to the Commonwealth;
(b) postpone any right of the Commonwealth to be paid a debt in priority to another debt or debts;
(c) allow the payment by instalments of an amount owing to the Commonwealth;
(d) defer the time for payment of an amount owing to the Commonwealth.

Use of in-house lawyers for court litigation

Paragraph 5.1 An FMA agency may only use an in-house lawyer to conduct court litigation as solicitor on the record or as counsel with the express approval of the Attorney-General. Factors relevant to giving approval will include:

(a) whether the agency is able to demonstrate a capacity to conduct the litigation properly and efficiently

(b) whether the agency is able to conduct the litigation at a lower cost than by using external solicitors, taking into account accrual accounting and, where relevant, competitive neutrality principles, and

(c) whether the agency has a statutory charter which gives it an operation independent of government.

5.2 The use of in-house lawyers may be approved, either in specific cases or generally, subject to compliance with conditions specified by the Attorney-General.

ISSUE 5

17. Should this Direction be amended to either
(a) free up, or
(b) further restrict;
the use of in-house lawyers in conducting litigation?

Discussion

18. The Directions allow a degree of flexibility by permitting an agency to use in-house lawyers to conduct court litigation as solicitors on the record or barristers with the Attorney-General's approval.

19. Where an agency requests to use in-house lawyers to conduct court litigation, they are required to substantiate their claims against the criteria under subparagraphs 5.1 (a)-(c). The Attorney-General has given approval to a small number of agencies to use in-house lawyers to conduct court litigation. Some approvals are general in nature, while others limit the agency in question to specified types of in-house matters.

20. The possible reasons for relaxing the restriction in paragraph 5 include:

- allowing full agency choice accords with devolved responsibility under the FMA Act
- recognising that agencies may now be better able to properly compare the cost of in-house and external service providers as agencies now operate on a full accrual accounting basis
- adhering to the principles of competitive neutrality which suggest that, subject to proper costing of in-house options, agencies should not be restricted to using external legal services providers
- avoiding duplication and enhancing flexible and efficient use of resources, as in-house providers may already be conducting non-litigious work including preparation for litigation, and
- recognising that agency staff may have specialist knowledge in the interpretation of relevant legislation.

21. Reasons against relaxing the restriction in paragraph 5 include:

- maintaining a desirable level of independent legal advice in the conduct of litigation
- ensuring that the Commonwealth maintains a consistent standard of conduct in court litigation
- facilitating the Attorney-General's exercise of his First Law Officer responsibilities in controlling Commonwealth litigation
- litigation is resource intensive, requires specialist skills beyond merely knowledge of relevant legislation and can have an impact far beyond an individual agency
- agencies may not have sufficient staff or volume of litigation to maintain appropriate skill levels, and
- the cost to the Commonwealth of using in-house lawyers may be higher, if it is not subject to the same meaningful and effective scrutiny as a purchaser-provider relationship.

22. It should be noted that the ability to utilise in-house legal service providers for litigation does not alter the requirements in relation to 'tied' legal work under the Directions.

Reliance on limitation periods

Paragraph 8.1 A defence based on the expiry of an applicable limitation period is to be pleaded by an FMA agency, unless approval not to do so is given by the Attorney-General or the Attorney-General's delegate. Approval will normally be given only in exceptional circumstances, for example, where the Commonwealth has through its own conduct contributed to the delay in the plaintiff bringing the claim.

8.2 An application for an extension of a limitation period is to be opposed by the agency unless approval to consent to the application is given by the Attorney-General or the Attorney-General's delegate. Approval will normally be given only in exceptional circumstances which would justify not pleading a limitation defence or where it is expected that the application will succeed (in which case not consenting would be likely to result in unnecessary costs and delay).

ISSUE 6

23. Should this Direction be amended to clarify what kind of limitation periods it applies to?

Discussion

24. Agencies have suggested that it is unclear from the wording of paragraph 8 whether it applies to:

(a) limitation periods as they apply to the initiation of original court proceedings

(b) time limits applicable to procedural steps in litigation (eg time for filing a statement of claim or providing discovery)

(c) periods in which to appeal (eg from a single judge of the Federal Court to the Full Court of the Federal Court), and/or

(d) time limits that apply to the merits review of administrative decisions.

25. Paragraph 8 of the Directions was intended to apply to only substantive causes of action rather than procedural steps and therefore was not intended to cover the circumstances described in point (b). Extension of the requirement to seek approval to procedural steps in litigation (point (b)) would represent a significant change in policy.

26. Similarly, time limits that apply to the commencement of appeals from original decisions or to applications for administrative review are not intended to be covered by paragraph 8, which is only intended to cover the initial commencement of court proceedings where the court is exercising original jurisdiction.

27. If the Commonwealth or agencies are currently pleading the types of time limits outlined in points (b), (c) and (d), it could place an additional burden on these agencies to seek approval on each occasion. However, pleading these types of limits, particularly where the delay is not significant, raises issues concerning the Commonwealth's obligation to act as a model litigant.

28. It is suggested that paragraph 8 be amended to clarify this position. This would have the result that any decision to plead a time limit of the kind referred to in points (b), (c) and (d) would be a matter for the discretion of the relevant agency and its legal service provider, subject to compliance with the model litigant guidelines.

Agency responsibility

Paragraph 11.1 The Chief Executive of an FMA agency is responsible for ensuring that:

(a) the agency's arrangements for legal services, especially any litigation for which the agency is responsible, are handled efficiently and effectively

(b) appropriate management strategies and practices are adopted so as to achieve compliance with these Directions

(c) lawyers (whether AGS, the Attorney-General's Department, private lawyers, counsel or in-house lawyers) providing legal services to the agency are aware of, and are required to assist in ensuring that the agency complies with, these Directions (including compliance by legal services providers with these Directions through contractual arrangements wherever possible)

(d) any breaches of these Directions are remedied, or details reported to the Attorney-General or OLSC

(e) any matters required to be approved by the Attorney-General or the Attorney-General's delegate are raised promptly, and

(f) any matters of which the Attorney-General or OLSC is required to be informed are notified promptly.

ISSUE 7

29. Should this Direction be amended to include a statement that affirms the Commonwealth position that lawyers who act pro bono for clients against the Commonwealth are not disadvantaged as a result when seeking to provide legal services to the Commonwealth?

Discussion

30. The Commonwealth encourages pro bono legal work by both private and public sector lawyers. Private sector lawyers may, however, be discouraged if they perceive that acting pro bono in actions against the Commonwealth would prejudice them in obtaining legal work from the Commonwealth. It is appropriate for private sector lawyers to act against the Commonwealth in pro bono matters where there is no direct legal conflict of interest. However, there appears to be a concern within the pro bono community that there could be a danger that private sector lawyers could potentially be prejudiced in the selection of legal service providers by agencies if the lawyer has previously acted against the Commonwealth in pro bono matters.

31. At a speech to the Second National Pro Bono Conference on 20 October 2003, the Attorney-General stated that:

> An important issue the [National Pro Bono Resource] Centre is looking into is pro bono conflicts and Government.
>
> It is important that governments address the perception amongst lawyers that providing pro bono legal assistance in matters against the Government makes it less likely they will be asked to undertake Government legal work.
>
> It is my belief that, subject to the usual conflict of interest rules, it is irrelevant whether or not legal providers have acted pro bono for clients against the Commonwealth.

32. It has been suggested that it should be stated (in paragraph 11 of the Directions) that agencies are obliged to give all lawyers the same level of consideration in relation to the selection of legal service providers, in particular for tender bids, regardless of whether those lawyers have acted pro bono for clients against the Commonwealth (see the draft protocol developed by the National Pro Bono Resource Centre, located at: <http://www.nationalprobono.org.au/publications/conflicts/protocol.pdf>).

ISSUE 8

33. Should the Directions impose an obligation on agencies to take reasonable steps to ensure that legal service providers maintain an adequate level of security for in-confidence and sensitive material (including electronic material)?

Discussion

34. The Directions currently contain no requirement that Commonwealth agencies take reasonable steps to ensure that all legal service providers maintain an adequate level of security for in-confidence and sensitive material, including electronic material. Such requirements may of course be included in contracts with legal services providers and in briefs to counsel.

35. The Protective Security Manual provides comprehensive guidelines on security issues. Cases have however occurred of Commonwealth laptops containing confidential material being stolen from legal service providers.

Special application to certain agencies

Paragraph 12.1 Unless a different approach is adopted in accordance with paragraph 12.2 or 12.3, an agency that is not an FMA agency, and is also neither a government business

enterprise prescribed under the CAC Act, nor a Corporations Act company controlled by the Commonwealth, is required to:

(a) inform the Attorney-General or OLSC of the details of any litigation (including threatened or proposed litigation) which gives rise to constitutional issues and comply with any specific instructions given by the Attorney-General or the Attorney-General's delegate concerning the conduct of the litigation (including as to the choice of lawyers to be used and the arguments to be put on constitutional issues)

(b) inform the Attorney-General or OLSC of any claim or litigation proposed to be brought against, or involving, another Commonwealth agency

(c) handle claims and conduct litigation in accordance with the *Directions on the Commonwealth's Obligations to Act as Model Litigant,* at Appendix B

(d) engage counsel in accordance with the *Directions on Engagement of Counsel*, at Appendix D, and

(e) comply with the requirements of paragraph 7 of these Directions concerning the handling of claims of public interest immunity.

12.2 An agency which is not an FMA agency and which handles claims or conducts litigation in the name of, or on behalf of, the Commonwealth is nevertheless required to comply with the Directions applicable to FMA agencies in respect of such claims and litigation.

12.3 The Attorney-General may decide in relation to a particular agency, including bodies covered by the CAC Act, that:

(a) the agency is not required to comply with some or all of these Directions, or is to do so in accordance with modified obligations that are notified to the agency, and

(b) if the agency is not an FMA agency – the agency is nevertheless required to comply with some or all of the Direction that are applicable to FMA agencies and that are notified to the agency.

ISSUE 9

36. Should this Direction be amended to clarify its application to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) agencies other than Government Business Enterprises (GBE) and Corporations Act companies controlled by the Commonwealth?

Discussion

37. Paragraph 12.2 provides that CAC Act bodies which handle claims or conduct litigation in the name of, or on behalf of, the Commonwealth must comply with the same Directions applicable to FMA agencies in respect of such claims or litigation. Where a CAC Act body (other than a GBE or a Corporations Act company controlled by the Commonwealth) handles claims or conducts litigation in its own name, it is required to comply with subparagraphs (a) – (e) as set out in paragraph 12.1 of the Directions. GBEs and Corporations Act companies controlled by the

Commonwealth are not required to comply with any of the Directions unless the Attorney-General, under paragraph 12.3, applies some or all of the Directions to such a body.

38. Concerns have been raised that the current wording of paragraph 12.1 is unclear. It is not suggested that the policy concerning the application to CAC Act agencies be altered in any way.

Directions on tied areas of Commonwealth legal work

Appendix A, paragraph 5. The tying of constitutional, national security, Cabinet, public international law and drafting work is not intended to affect:

(a) the role of the Director of Public Prosecutions or any statutory rights conferred on agencies concerning the conduct of their legal affairs,

(b) the in-house work currently undertaken by agencies in areas such as the negotiation of bilateral treaties on double taxation and social security agreements (However, this does not extend to agencies using in-house lawyers to undertake constitutional work or, in the absence of approval, court litigation.), and

(c) the role of the Solicitor-General.

ISSUE 10

39. Is the language of paragraph (b) sufficiently clear about the scope of the exception and the manner in which it applies?

Discussion

40. Paragraph (b) was intended to apply only to arrangements that were already in place as at 1 September 1999.

41. With respect to public international law, paragraph (b) could be clarified to allow on-going in-house preparation of bilateral agreements on specific matters (eg social security) in a standard format which did not give rise to the need for international law advice from the Office of International Law in the Attorney-General's Department, the Australian Government Solicitor or the Department of Foreign Affairs and Trade.

42. Some agencies have substantial in-house legal areas with recognised expertise in matters of international law relevant to their portfolio. This section of paragraph (b) could have an additional subparagraph to allow a broader range of in-house international law work where the Attorney-General or delegate had approved such arrangements, in consultation with the Office of International Law. Such arrangements might be conditional upon there being consultation with, or clearance by, the Office of International Law on particular issues.

43. The paragraph could also make it explicit that, where an agency requests advice on a public international law issue from the Australian Government Solicitor, the agency is also to notify the Office of International Law to ensure that the Office of International Law has the opportunity to express a view on the matter (whether from a policy or legal perspective). This is to ensure compliance with Australia's international obligations and avoid any risk that Australia might take inconsistent positions on international matters which might arise from portfolio-specific policy approaches. More sensitive matters might involve the Office of International Law handling the

work or aspects of it. In other matters, it might be sufficient for the agency to inform the Office of International Law that the Australian Government Solicitor is handling the matter.

Directions on the Commonwealth's obligation to act as a model litigant

Appendix B, paragraph 1. Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies must behave as a model litigant in the conduct of litigation.

Nature of the obligation

2. The obligation requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation

(b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid

(c) acting consistently in the handling of claims and litigation

(d) endeavouring to avoid litigation, wherever possible

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

NOTES

1. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth

provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

2. In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

3. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

4. The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.

5. The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs[4].

ISSUE 11

44. Is the model litigant obligation sufficiently clear, or would it assist if examples of model litigant behaviour and commentary were included?

Discussion

45. The Australian Law Reform Commission Report *Managing Justice: a Review of the Federal Civil Justice System* (ALRC89) suggested that the model litigant guidelines should include commentary and examples with respect to 'unnecessary delay', 'technical defences' and avoiding 'taking advantage of a claimant who lacks resources'.[5]

46. The following paragraphs contain both commentary and examples which could be included.

47. Examples of 'unnecessary delay' may include:

[4] On this point (as well as on the issue of limitation periods), see the recent Federal Court decision in ***Wodrow v Commonwealth of Australia [2003] FCA 403*** <http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/403.html>.

[5] Recommendation 23.

- generally holding up proceedings in the hope that circumstances will change in order to obtain an advantage (for example, so the applicant will run out of resources or otherwise discontinue proceedings because of changing circumstances),

- a delay that may disadvantage the opposing party (for example, arranging for an applicant/plaintiff to be examined by a medical specialist in six months' time when other appropriate specialists are available at an earlier date and the delay is not for a legitimate purpose such as updating medical evidence), and

- repeated failure to comply with court timetables or repeated oppressive interlocutory applications.

48. Technical defences involve reliance upon minor procedural issues rather than the substantive issues in dispute. An example of a 'technical defence' may include a situation where a plaintiff names the defendant Department instead of the Commonwealth in a writ. In a case such as this it would be appropriate for the Commonwealth agency to accept an amended statement of claim, rather than requiring the proceedings to be discontinued and recommenced.

49. Not all procedural issues are 'technical defences', however, as they may involve substantive issues such as jurisdiction. For example, a 'technical defence' would not include a situation where the plaintiff fails to adhere to the statutory requirement of section 45 of the *Safety Rehabilitation and Compensation Act 1988* (SRC Act) to elect in writing to commence proceedings, as without a proper election a court lacks jurisdiction to hear a claim.[6]

50. Examples of 'avoiding taking advantage of a claimant who lacks resources' may include:

- relying on an excessively large number of cases when proceeding to hearing and not providing a self-represented claimant with copies of the cases (or giving some indication of how to locate them)

- pleading purely technical points of law, unless the litigation raises those kinds of points directly, and

- requiring a self represented claimant to provide formal discovery of documents or respond to a request for numerous further and better particulars or interrogatories when the information is already held by the Commonwealth (unless the matter is of particular complexity and a need exists to assess the claimant's claim).

51. A "principle-rule-commentary" [7] approach was also proposed in the discussion of ALRC89 with respect to model litigant obligations. While this approach provides clear guidelines for compliance with identified aspects, it may also lead to an over-emphasis on the matters expressly commented upon to the detriment of understanding of and compliance with the obligation generally.

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[6] For example, an action brought under the SRC Act would need to comply with section 45. Subject to section 45, section 44 extinguishes the right of action of a Commonwealth employee against the Commonwealth for any injury sustained in the course of Commonwealth employment. Section 45 sets out an exception to this but requires that if an employee chooses to pursue damages, they give the Commonwealth written confirmation of their election to do so prior to instituting proceedings in a court.

[7] This is where a principle is outlined, a rule is given, and commentary gives examples and provides guidance for the practical interpretation of the rule. The New South Wales legal practice guide takes this approach.

52. The ALRC also suggested that the model litigant obligations should state that agencies and agency representatives have duties in the conduct of federal review tribunal proceedings to assist the tribunal to reach its decision.

53. These duties are well established, although the ALRC concluded that they may be overlooked on occasion. Is there value in specifying these duties in the Directions?

ISSUE 12

54. Should the Directions impose more specific obligations on agencies in relation to the use of Alternative Dispute Resolution (ADR)?

Discussion

55. The model litigant obligation provides general statements of principle that apply to the conduct of litigation. Paragraph 2(d) refers to 'endeavouring to avoid litigation wherever possible'. The intention is that, while it is appropriate for the Commonwealth to protect its rights and interests, in considering how best to do this regard should be had to the full range of possible means to do this, of which litigation is only one.

56. One way of avoiding litigation is to use ADR processes, which can produce more informal and less resource-intensive resolutions of disputes, which can be more readily participated in and more clearly understood by the parties themselves, and which also have the potential to assist to build on-going relationships.

57. ADR can also be useful to reduce the extent of litigation, by narrowing the issues in dispute even where it is not possible to reach a final settlement of all issues through ADR.

58. Paragraph 2 of Appendix B could make more explicit that agencies should actively consider ADR as one option for dispute resolution. In addition, it could contain requirements for the conduct of ADR processes, in particular, that agencies will conduct them in good faith. Aspects of this might be that, when participating in ADR, agencies should ensure that their representatives have the authority to settle matters, should engage fully with the chosen process by steps such as providing necessary information, and should not use ADR to prolong a dispute.

59. Agencies engaging in ADR could also be required or encouraged to ensure that they use providers who adopt and comply with accepted standards relating to their area of practice, including any applicable codes of practice.

60. The National Alternative Dispute Resolution Advisory Council (NADRAC) advises the Australian Attorney-General on standards for practitioners, including the need for registration and accreditation of ADR practitioners or organisations, and appropriate professional disciplinary mechanisms. In April 2001, NADRAC published a report to the Attorney-General entitled *A Framework for ADR Standards*, which recommended that, as part of an ongoing process, standards for ADR be developed and that ADR providers adopt and comply with applicable codes of practice developed as part of this process, but that the regulation of ADR be based primarily on self-regulation. The report further recommended that compliance with any such codes form part of contracts entered into by Commonwealth agencies that provide for ADR.

61. ALRC89 also recognised the benefits of ADR and encouraged the Commonwealth to develop guidance for the avoidance, management and resolution of disputes.

62. Further guidance that takes into account ALRC89 and the NADRAC recommendations could be provided to Commonwealth agencies in the form of an expanded Appendix B or a separate appendix dealing with alternative dispute resolution.

ISSUE 13

63. Should Appendix B be amended to specify that inappropriate use of the media by Commonwealth agencies in the course of conducting court proceedings is a breach of the model litigant obligations?

Discussion

64. The community has an interest in being informed about litigation that involves the Commonwealth, especially litigation involving Commonwealth regulatory agencies. However this interest needs to be balanced with the community interest in protecting the fairness of trials and hearings, and ensuring that any publicity does not prejudice those trials or hearings. In the recent Federal Court case of *Electricity Supply Assoc of Australia v ACCC* [2001] FCA 1296 (12 September 2001), a Federal Court judge commented on the ACCC making statements in the media about the merits of a legal argument of the opposing party in the proceedings. The report on the *Review of the Competition Provisions of the Trade Practices Act 1974* (the Dawson Report) further considered the use of the media by the ACCC, and recommended that a code of conduct be developed[8]. The ALRC has also recently made a more general recommendation that guidelines on the use of publicity prior to, during and following the exercise of penalty powers by Australian federal regulators should be developed by regulators.[9]

65. Agencies generally exercise considerable caution in commenting on litigation. In discharging regulatory and other functions, however, agencies may see a need to comment on issues the subject of litigation where those issues bear on the general public's compliance with or understanding of a law or a measure. The key issue is whether some express inhibition on agency comment is nevertheless desirable in light of the comments of the Federal Court, the Dawson Report and the ALRC, referred to above.

ISSUE 14

66. Should the Directions apply to third parties in contractual arrangements?

Discussion

67. The Directions can apply to providers of legal services through contractual arrangements. However, the application of the current Directions to a third party in a contractual arrangement is not explicit. Where a Commonwealth agency has outsourced a service to a private company, the company or the company's insurer may conduct proceedings on behalf of the Commonwealth under a right of subrogation. In this situation, while the Commonwealth's financial interest is protected by the third party bearing the loss, the risk is that the third party may not accept direction from the Attorney-General, and may take action contrary to the model litigant principle or other Commonwealth interests. In this regard, Appendix B could be amended to apply expressly to third parties conducting legal proceedings on behalf of the Commonwealth.

[8] See Chapter 12, recommendation 12.1. The Committee noted that principles regarding the use of the media could be considered for inclusion in the Directions (particularly the model litigant policy).

[9] ALRC 95 *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, recommendation 16.4 (reproduced at Attachment B).

68. This suggestion raises issues concerning an appropriate or effective penalty or remedy for a breach of the Directions. The provisions currently in the Directions concerning the steps the Attorney-General may take in the event of a breach are effective where the Commonwealth has a direct role in the litigation. Where litigation has been conducted under a contractual right of subrogation, for example, the removal of the brief from the legal services provider or the direct involvement of the Attorney-General in the litigation may in practice be impossible.

69. The inclusion of appropriate contractual provisions requiring compliance with the Directions could be sought in contract negotiations, but may come at a cost or be entirely resisted. An explicit requirement in the Directions that agencies must insert contractual clauses providing for compliance with the Directions by contractors may, however, assist in contract negotiations by clarifying the application of the Directions.

Directions on Handling Monetary Claims

Appendix C: 1. This policy concerns the handling of monetary claims against the Commonwealth or an agency, other than claims that need to be determined under a legislative mechanism (for example, a Comcare benefit) or under a mechanism provided by contract (for example, an arbitration of a disputed contractual right)….

3. Settlements for amounts not exceeding $10,000 may be approved by the Chief Executive of the agency (as defined under the *Financial Management and Accountability Act 1997*) (or the Chief Executive's authorised officer) on the basis of a common sense view that the settlement is in accordance with legal principle and practice. However, if a claim, together with any related claim, cannot be settled for $10,000 or less, it is to be treated as a major claim.

4. Major claims may only be settled if:

(a) written advice is received from the Australian Government Solicitor (AGS) or other legal adviser external to the agency that the settlement is in accordance with legal principle and practice, and

(b) the Chief Executive (or authorised officer) agrees with the settlement….

ISSUE 15

70. Should Appendix C be amended to also apply to the handling of claims *by* the Commonwealth?

Discussion

71. As presently worded, paragraph 1 of Appendix C only applies to the handling of monetary claims *against* the Commonwealth. In accordance with paragraph 3 of Appendix C, claims that cannot be settled for $10,000 or less are treated as a major claim. Major claims against the Commonwealth may only be settled if the criteria set out at subparagraphs 4(a)-(b) are satisfied unless the exceptions in paragraph 1 apply.

72. Major claims *by* the Commonwealth should also receive the same scrutiny, to ensure that the Commonwealth is similarly acting appropriately in settling such claims.

73. It has also been suggested that the relationship between Appendix C of the Directions, the scheme relating to Compensation for Detriment Caused by Defective Administration (CDDA Scheme), and act of grace payments is unclear. A reference to Finance Circular 2001/01 could be included in a note (the Circular deals with both the CDDA scheme and act of grace payments).

ISSUE 16

74. Should the threshold amount of $10,000 be increased?

Discussion

75. Under paragraph 3 of Appendix C, a claim is treated as a major claim if it cannot be settled for $10,000 or less. However, the costs of seeking legal advice in relation to settling a claim only marginally greater than $10,000 may themselves be comparatively significant.

Directions on Engagement of Counsel

Appendix D, paragraph 2. Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women. While the selection of counsel needs to take into account the interests of the Commonwealth in securing suitable and expert counsel in a particular case, this should not occur in a manner which results in a narrow pool of counsel who regularly undertake Commonwealth work.

ISSUE 17

76. Model Briefing Policies to promote equal opportunity have been promoted by the Women Barristers' Association (WBA) and Australian Women Lawyers. Such policies have been adopted by a number of professional bodies in Australia including the Victorian and Western Australian Bar Councils, the Law Institute of Victoria and the Law Society of Western Australia. Should Appendix D be amended to promote equal opportunity along the lines of the Model Briefing Policy adopted by the Victorian Bar Council (available on the Victorian Bar Council website at <http://www.vicbar.com.au/2_6_3.html>), or the *Uniform Equitable Briefing Policy* (available at http://www.womenlawyers.org.au/equitable_briefing_policy.htm), or a modified version of one of these? What recording, reporting and compliance measures, if any, should be required to demonstrate compliance by Commonwealth departments, FMA agencies and their legal service providers with such a model briefing policy?

Discussion

77. The Attorney-General is committed to equal opportunity for women barristers providing legal services to the Commonwealth. At the Standing Committee of Attorneys-General meeting in November 2003, Ministers endorsed the principle that government entities should engage legal services with regard to equality of opportunity and noted that the Law Council of Australia intended to develop and adopt a national equal opportunity briefing policy

78. The Legal Services Directions encourage FMA agencies to brief a broad range of counsel and, in particular, women. Consideration is being given to a proposal that the Commonwealth

adopt a Model Briefing Policy and that providers of legal services report annually on their compliance with this policy. The aim of such a Model Briefing Policy would be to eliminate discriminatory briefing practices and promote acceptance of the principle of the equality of male and female barristers.

79. The main elements of the Model Briefing Policy adopted by the Victorian Bar Council are that all barristers should be selected for their skills and competency independently of their gender, and that the person responsible for selecting a barrister should ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers.

80. In order to demonstrate compliance with such a model briefing policy, agencies might be asked to complete an annual checklist of the kind proposed in the Victorian Model Briefing Policy (see **Attachment A**).

81. The Equal Opportunity Committee of the NSW Bar Association is also of the view that barristers should be selected for their skills and competency, but advocates a broader inclusive policy (ie all barristers in minority groups should be considered – regardless of their sex, racial origin or disability).

82. Another suggestion has been that a Model Briefing Policy be included in the *Draft Contract Clauses for FMA Agencies Acquiring Legal Services*. As currently worded, these draft clauses state that the agency and legal services provider will agree to comply with the Directions. The clauses provide examples of undertakings by the legal services provider and provisions in the event of a breach. The document is published on the Department's website at <http://www.ag.gov.au/Archived/agd/olsc/modelcontractclauses.rtf>.

83. Reporting compliance with a Model Briefing Policy would need to balance two needs: the need to promote compliance in an effective manner, and the need to ensure that any reporting should not impose a disproportionate resource burden. This might be done as follows. The in-house legal team of an FMA agency could track the following details with respect to barristers briefed by the in-house team directly:

- the gross amount and percentage of fees paid to male and female barristers
- the number of matters briefed to male and female barristers, and
- the number of each key type of matter briefed to male and female barristers, in accordance with the:
  - number of briefs to appear by name of court or tribunal
  - number of briefs to advise
  - number of briefs delivered to senior counsel and junior counsel, and
  - number of briefs to appear according to type of appearance (for trial; for appeal; for directions; for interlocutory hearing; to receive judgment; for mention; other appearance).

84. The external legal services provider for an agency could track the same details with respect to barristers they brief on behalf of the agency. The requirement to do so might be contained in model contract clauses.

85. Reporting could be to the Chief Executive of the agency, reflecting the fact that the primary obligation for agency compliance with the Direction rests upon Chief Executives, or it could be in an external form such as in Annual Reports or to OLSC.

86. The introduction of quotas is not supported. Quotas are regarded as an ineffective tool for achieving progress in this area, mainly because they generate opposition to the policy they are supposed to promote, rather than building support for that policy. Merit should remain the essential criterion for allocating the Commonwealth's legal work and quotas are in conflict with this principle.

Directions on Assistance to Commonwealth Employees for Legal Proceedings

Appendix E, Criteria for assistance to employees in civil and criminal proceedings

Paragraph 8. The indemnification of an employee against any costs or damages payable to another party by the employee (including as a result of agreeing to a reasonable settlement) is only to be approved on condition that the employee has agreed that their defence will be controlled by the Commonwealth and that they will provide all assistance required by the Commonwealth in the conduct of the defence.

ISSUE 19

87. Should Appendix E be modified to clarify that, in the case of a Commonwealth official defending criminal proceedings, it is not a condition for assistance that the Commonwealth controls the official's defence?

Discussion

88. Where a Commonwealth official is defending criminal proceedings, it is not required as a condition for assistance that the Commonwealth control the official's defence. In criminal proceedings any penalty will be imposed directly upon the official, who therefore has a very significant personal interest notwithstanding any indemnification. By contrast, it is a requirement that the Commonwealth control the defence in civil proceedings of an indemnified Commonwealth official, as the Commonwealth will meet the civil penalty.

Appendix E - Level of assistance for civil and criminal proceedings

Paragraph 11. The assistance may involve approval to pay:

(a) the costs of an employee's legal representation or related costs of their involvement in the proceedings (for example, to travel to attend the proceedings)

(b) any damages and legal costs awarded against the employee

(c) a reasonable amount payable by the employee in settlement of the proceedings, and

(d) a fine or penalty imposed on the employee.

ISSUE 20

89. Should Appendix E be amended to clarify that an approval of assistance under Appendix E may extend to an appeal in those proceedings and that no further approval would be necessary?

Discussion

90. Assistance approved for particular proceedings has been taken to extend to any appeal proceedings. Appendix E could be amended to expressly state this.

91. Alternatively, separate approval could be required for any appeal, on the grounds that, until a primary judgment has been delivered, it may not be apparent whether there would be grounds to initiate or defend an appeal.

ISSUE 21

92. Should Appendix E be amended to expressly exclude intra-Commonwealth disciplinary proceedings?

Discussion

93. Appendix E concerns the handling of requests for assistance in relation to legal proceedings (including potential legal proceedings) as well as inquests, inquiries and subpoenas, by a Commonwealth employee (including a former employee). The intention has always been that Appendix E not include intra-Commonwealth disciplinary proceedings. Where assistance is being considered in such matters, agencies have a discretion to provide it under section 73 of the *Public Service Act 1999*.

Compliance with the Directions

ISSUE 22

94. Should the Directions be amended to clarify that sanctions exist for non-compliance?

Discussion

95. Recommendation 24 in ALRC89 states that:

> *The federal Attorney-General should provide the Office of Legal Services Coordination with authority to investigate complaints relating to non compliance with the model litigant rules. The model litigant rules should state non compliance could justify termination of a legal services contract, disciplinary measures in relation to an employed lawyer or agency representative, or a direction that the lawyer or agency representative undertake specified legal education and training.*

96. The Directions could be amended to include a reference to the *Compliance Strategy for the Enforcement of the Legal Services Directions* developed by OLSC and published on the OLSC website at <http://www.ag.gov.au/Archived/agd/olsc/COMPLIANCE_STRATEGY-FOR_ENFORCEMENT_OF_THE_LEGAL_SERVICES_DIRECTIONS.htm>. This would clarify that a breach of particular obligations may result in remedial action (for example, termination of a legal services contract).

Attachment A: Checklist
EQUALITY OF OPPORTUNITY

Compliance checklist with Model Briefing Policy
[Please tick the box]

1. Did you ensure that you selected the barrister for their skills and competency independently of their gender? Yes ☐ No ☐

2. If there was a male and female barrister of equal merit, did you ensure that arbitrary and prejudicial factors did not operate to exclude engagement of the female barrister? Yes ☐ N/A ☐

3. Did you seek a recommendation from a barrister's clerk? Yes ☐ No ☐

4. If you sought a recommendation from a barrister's clerk, did you ensure the list of names included some female barristers? Yes ☐ N/A ☐

5. Please ensure you are familiar with the Women Barristers Directory at the Victorian Bar which is available on the Internet at www.vicbar.com.au Yes ☐

6. If you briefed senior counsel and a preference was expressed for an identified junior counsel, ensure that you are satisfied that the junior barrister is being recommended and selected for his or her skills and that stereotypical assumptions are not being relied upon. Yes ☐ N/A ☐

7. In selecting the barrister, did you avoid stereotypical assumptions about the capacities and aptitude of female and male barristers and encourage your client to identify the particular skills required by the advocate? Yes ☐ No ☐

8. Name of Barrister Briefed: _____

9. Area of law/expertise: _____

10. Matter (eg hearing/ advice) _____

11. Name of Operator/Lawyer _____

12. Date and Signature _____

13. File Number _____

Attachment B: Extract

ALRC 95 *Principled Regulation: Federal Civil and Administrative Penalties in Australia*

Recommendation 16–4. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on the use of publicity prior to, during and following the exercise of penalty powers, including guidelines on the reporting of court and tribunal proceedings, in accordance with the following statements of principle:

(a) These guidelines should cover the circumstances in which a regulator will comment on commenced or proposed investigations, having regard to privacy issues, confidentiality and secrecy obligations, its functions and powers, the law of defamation and the public interest.

(b) Any media release or statement in relation to an investigation should make it clear that the investigation concerns alleged breaches, and that liability or guilt is a matter for the courts.

(c) These guidelines should cover the circumstances in which a regulator will comment on commenced or pending court proceedings having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pre-trial publicity, contempt laws, its functions and powers, the law of defamation and the public interest.

(d) Regulators should not provide details of evidence to be used in court proceedings against an alleged offender when providing information to the media.

(e) In general, where it is appropriate for the regulator to comment on court proceedings prior to their resolution, such comment should be restricted to the outcome of particular steps in the court process, and should refer to any statement made by the alleged offender denying the allegations.

(f) Unsuccessful prosecutions, civil penalty actions and other civil enforcement action taken by the regulator should also be the subject of media releases or statements by the regulator where the commencement or progress of the prosecution or the civil penalty action or the civil enforcement action has been the subject of prior publicity, and (so far as practicable) to the same degree as the earlier media releases or statements by the regulator.

(g) Regulators should not inform the media of details relating to the execution of search warrants prior to or during their execution, or relating to the exercise of any of their compulsory powers on any person prior to or during the exercise of such compulsory powers.

(h) These guidelines should cover the circumstances in which a regulator will comment following the execution of search warrants or the exercise of compulsory powers on particular persons, having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pre-trial publicity, contempt laws, the regulator's functions and powers, the law of defamation and the public interest.

(i) No media release or statement should be issued or made in relation to the issue of an infringement notice by a regulator, its payment or non-payment. Any media release or statement, if issued contrary to this Recommendation, should make it clear that:

(i) the issue of the infringement notice amounts to no more than an allegation by the regulator;

(ii) payment of the amount specified in the infringement notice does not amount to an admission of any breach of the law or of any liability for any purpose;

(iii) non-payment of the amount specified in the infringement notice should be treated as a denial of the allegations by the person to whom the notice was issued.

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 under 'Legal services policy'.

Further information

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

Tel: 02 6250 6424

Fax: 02 6250 5968

Email: olsc@ag.gov.au

Guidance Notes and other materials concerning the Directions can be found at 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) . 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.

EXPLANATORY STATEMENT

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

Judiciary Act 1903

Legal Services Directions

Legislative background

Under section 55ZF of the *Judiciary Act 1903*, the Attorney-General may issue legal services directions applying generally to Commonwealth legal work (as defined in that section) or in relation to Commonwealth legal work performed in relation to a particular matter. The power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its agencies, including Commonwealth litigation, and for the provision of legal advice to Cabinet.

Legal Services Directions were initially issued under this provision in 1999. They are administered by the Attorney-General with the assistance of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department. OLSC provides assistance and advice to agencies about the operation of the Directions. OLSC also publishes relevant information about the Directions (such as Guidance Notes on their interpretation and emerging issues) on its website: http://www.ag.gov.au/olsc.

Policy background to the Legal Services Directions

The Directions set out requirements for sound practice in the provision of legal services to the Commonwealth.

The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

For example, the rules about the conduct of tied work ensure that the Commonwealth minimises the risk that portfolio-specific approaches to questions of public international law or constitutional law (for instance) will impair the Commonwealth advancing and maintaining a consistent and clear position on such matters.

Another example of how the Directions provide support for good practice can be found in paragraph 10 which sets out requirements for consultation with an agency in relation to a request for advice concerning the interpretation of legislation administered by that agency. Such requirements minimise both the chance for unnecessary and inefficient duplication of work and the chance of inconsistent positions being taken by agencies on the same legislative provisions.

The Directions are a legislative instrument and have the force of law. Sanctions can be imposed for non-compliance. These sanctions may include the issue of a specific Direction by the Attorney-General, in relation to the conduct of a particular matter or the use of a particular legal services provider. They may also include adverse comment on an agency or a provider being made to the Attorney-General or the relevant Minister.

Review of the Directions

In 2004, the Attorney-General initiated a review of the Directions. The review did not revisit the fundamental nature and purpose of the Directions issued in 1999. Instead, it sought to address issues that had arisen in the five years during which the Directions had operated. An Issues Paper was circulated to a variety of agencies, legal services providers and other stakeholders. Thirty submissions were received in response to the Paper. The comments made in those submissions have been carefully considered in developing recommendations to the Attorney-General about changes to the Directions.

For clarity and ease of use, the Attorney-General has decided not to amend the existing Directions, but to issue a new instrument which comprises certain changes to the Directions in their previous form.

This Statement explains the provisions of the Directions, and draws attention to aspects of the Directions which differ from those issued in 1999.

Snapshot of the Directions

The Legal Services Directions apply to *Financial Management and Accountability Act 1997* agencies. Certain provisions also apply to other Commonwealth entities (see paragraph 12). Examples of the matters governed by the Directions in relation to agencies are as follows. The following list is not exhaustive – it merely illustrates some of the major topics governed by the Directions.

- Efficient and effective services: An agency must ensure arrangements concerning legal services deliver efficient and effective services. See paragraph 1 of the Directions.

- Tied work: Certain types of legal work for Australian Government agencies, such as constitutional, public international law, Cabinet, national security and legislative drafting work, can only be performed by 'tied' providers of legal services (for example the Attorney-General's Department or the Australian Government Solicitor, depending on the nature of the tied work). Exemptions from these requirements can be granted in appropriate cases. See paragraph 2 and Appendix A to the Directions. One purpose of the tied work rules is to ensure a consistent and coherent legal position is taken in key strategic areas of law.

- Reporting: Agencies are to report to the Attorney-General or OLSC on significant matters arising in relation to claims, litigation or legal services matters. See paragraph 3 of the Directions.

- Claims/ model litigant: Claims and litigation are to be handled in accordance with certain rules, including the obligation on the Australian Government to act as model litigant. See paragraph 4 of the Directions and Appendices B and C. The obligation to act as a model litigant extends to litigation before courts, alternative dispute resolution procedures, settlement negotiations, and merits reviews proceedings before tribunals.

- In-house lawyers: In-house lawyers may only be used as solicitor on the record or in court litigation with the approval of the Attorney-General. See paragraph 5 of the Directions. This rule is to ensure that the Commonwealth only appears in court with a legal team with sufficient expertise and support to properly advance its case and assist the court.

- Counsel: There are restrictions as to terms of which counsel may be engaged, including a requirement that payment of new rates above specified thresholds require the approval of the Attorney-General. See paragraph 6 of the Directions and Appendix C. A key objective is to ensure a broad range of counsel are skilled in undertaking work for the Australian Government.

- Public Interest Immunity: Issues concerning public interest immunity must be handled in consultation with relevant agencies. See paragraph 7 of the Directions.

- Limitation periods: The general rule is that the Commonwealth is to assert any applicable limitation period. See paragraph 8 of the Directions.

- Legal assistance to employees: Legal assistance may be provided to employees in specified circumstances. See paragraph 9 of the Directions and Appendix E.

- Advice on legislation: Where legal advice is sought on legislation administered by another agency, that agency must be consulted before requesting that advice, subject to certain exceptions. See paragraph 10 of the Directions.

- Agency responsibility: Agency chief executives have a range of specific responsibilities for matters concerning the handling of legal services and compliance with the Legal Services Directions. See paragraph 11 of the Directions. An annual certificate concerning compliance with the Directions must be provided to OLSC.

- Third parties: Where the Commonwealth agrees to a right of subrogation in favour of a third party, the Commonwealth should require the third party to meet certain obligations namely to act as a model litigant in subrogated matters and to consult the agency on tied work matters and interpretation of Commonwealth legislation. See paragraph 11A of the Directions.

- Sanctions: Non-compliance with the Directions can result in sanctions. See paragraph 14 of the Directions.

Contacting OLSC

Questions about the interpretation and operation of the Directions can be directed to OLSC. Contact details are as follows.

Telephone (02) 6250 6611

Facsimile (02) 6250 5968

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

Email: olsc@ag.gov.au

Website: http://www.ag.gov.au/olsc

SECTIONS

Section 1

Section 1 of the instrument sets out the name of the instrument.

Section 2

Section 2 specifies that the instrument commences on 1 March 2006.

Section 3

Section 3 provides for the repeal of the previous Directions which were issued to take effect from 1 September 1999, as amended from time to time.

Section 4

Section 4 provides that Schedule 1 to the instrument sets out Directions given by the Attorney-General under section 55ZF of the Judiciary Act.

SCHEDULE 1: LEGAL SERVICES DIRECTIONS

Paragraphs 1 – 11A of the Directions apply to Commonwealth agencies (including Departments of State and Parliamentary Departments) which are subject to the Financial Management and Accountability Act, unless special provision is made in accordance with paragraph 13.

The Directions are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly referred to, nor to override any legislative requirement or authority concerning an agency's functions (in particular, the role of the Director of Public Prosecutions).

PART 1 FMA Agencies

Paragraph 1 (Arrangements for legal services)

Paragraph 1.1 of the Directions provides that arrangements for the provision of legal services to Financial Management and Accountability Act agencies are to ensure they are delivered efficiently and effectively.

Previous paragraph 1.2 has been relocated to paragraph 10.7, because it is closely related to the sharing of information within Government.

Previous paragraph 1.3 has been moved to become new paragraph 11A.2, because it is closely related to the imposition, on third parties, of obligations in relation to the provision of legal services.

Paragraph 2 (Tied work)

This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as

'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

Previously, paragraph 2 allowed the Attorney-General or the Attorney-General's delegate to approve, either in a specific case or generally, a non-tied provider doing work that would otherwise be tied. This provision is now located in Appendix A, which imposes further requirements and provides more information about the conduct of tied work. The provision allows flexibility (for example, through the imposition of conditions) while managing the sensitivities of tied work in particular cases.

A new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

Paragraph 3 (Reporting on significant issues)

This paragraph imposes on Financial Management and Accountability Act agencies an obligation to report, as soon as possible, to the Attorney-General or OLSC about significant issues arising in the provision of legal services. The paragraph indicates factors which are to be taken into account in determining whether an issue is 'significant' for the purposes of the Directions.

The purpose of imposing the obligation is to facilitate the development of a whole of government approach to matters of broad legal or policy significance.

A series of notes has been added to paragraph 3 to provide agencies with additional guidance in meeting the reporting obligation.

Paragraph 4 (Claims and litigation by or against the Commonwealth or FMA agencies)

Paragraph 4 imposes on Financial Management and Accountability Act agencies various obligations concerning how they deal with claims and litigation. Paragraph 4 includes rules about settling claims and litigation. These obligations reflect the need to protect the legal and financial interests of the Commonwealth, while acting in accordance with the model litigant obligation, which is explained in greater detail in Appendix B to the Directions. The model litigant obligation on the Commonwealth has been recognised by the common law since the earliest years of the Commonwealth, and requires the Commonwealth to deal fairly and honestly with other litigants. It does not, however, prevent the Commonwealth from acting firmly to protect its interests.

A new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

A further new note has been added following paragraph 4.3. The note draws to agencies' attention the obligations placed on Chief Executives concerning the recovery of amounts owing to the Commonwealth under the Financial Management and Accountability Act. The presence of this note reflects the importance of agencies' awareness of the range of constraints and accountabilities imposed on conduct relating to claims and litigation concerning the Commonwealth.

Three new subparagraphs are included in these Directions. Paragraph 4.6A has been added to clarify the relationship between paragraph 4 and paragraph 3.1 (f). Paragraph 4.7 has been added to require written legal advice before the commencement of court proceedings by a Financial Management and Accountability Act agency. This provision reflects the importance of the Commonwealth not commencing court action without a sound basis for doing so, and provides

transparency and accountability of decision-making. New paragraph 4.8 makes explicit the power to make guidelines about the allocation of responsibility for litigation. These guidelines can be found at www.ag.gov.au/olsc.

Paragraph 5 (Use of in-house lawyers for court litigation)

This provision restricts the use by agencies of in-house lawyers as solicitor on the record or as counsel. This restriction is a measure which provides an assurance, first, that independent legal advice is being obtained by agencies. Second, by requiring (in effect) the use of specialist litigators, the provision is aimed at maintaining a high level of quality litigation assistance. However, if an agency demonstrates that its in-house lawyers are able to provide assistance of the requisite independence and quality, the Attorney-General may grant an exemption from this provision. Exemptions have been granted in the past, where the relevant criteria were fulfilled.

No change has been made to this provision.

Paragraph 6 (Engagement of counsel)

This provision imposes requirements on engagement of counsel, by reference to Appendix D to the Directions. The purpose of this provision is to ensure that counsel briefed by or on behalf of the Commonwealth are selected on merit, comply with the model litigant obligation, and provide services that offer value for money.

No substantive change has been made to this provision. However, a new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

Paragraph 7 (Public interest immunity)

This provision imposes requirements about the handling of possible public interest immunity claims. It is intended to ensure that claims in relation to particular documents are dealt with in a consultative way between the agency making the claim and the agency with administrative responsibility for the ground on which the immunity is claimed. The provision also provides a mechanism for resolving disputes about claims of public interest immunity. This reflects the importance placed by the Commonwealth on a whole of government approach to litigation, and on the making of public interest immunity claims, in particular.

No substantive change has been made to this provision. However, the language of the provision has been clarified and a new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

Paragraph 8 (Reliance on limitation periods)

This paragraph provides that the Commonwealth is entitled to rely on limitation periods, and provides an approval mechanism for circumstances in which it may be inappropriate to do so. Paragraph 8 also provides for responding to applications for extending a limitation period.

A new paragraph 8.3 has been added, to clarify the relationship between the rules imposed by paragraph 8 and the rules concerning the settling of claims. This paragraph emphasises the importance of there being a sound legal basis for the settling of a claim.

A new paragraph 8.4 has been added, to clarify the scope of the term 'limitation period' in paragraphs 8.1 and 8.2, by identifying certain matters (such as time limits applicable to procedural steps in litigation) to which the term does not apply in the context of paragraph 8.

Paragraph 9 (Assistance to Commonwealth employees in legal proceedings)

Paragraph 9 refers agencies to Appendix E to the Directions for rules about the provision of legal assistance to Commonwealth employees (including persons to whom the *Members of Parliament (Staff) Act 1984* applies).

No change has been made to this provision.

Paragraph 10 (Sharing of advice within Government)

This provision imposes on agencies a requirement to consult on, and share, advices obtained on legislation administered by other agencies. This provision serves two principal purposes. First, it is intended to reduce the incidence of duplication in advices obtained by agencies, thus facilitating the efficient and effective use of resources. Second, it facilitates a whole of government approach on legislation.

Paragraphs 10.1 has been amended to clarify and expand upon the obligation to consult on a request for advice concerning the interpretation of legislation administered by another agency. The new requirements are to provide a copy of the request for advice to the administering agency and to provide a copy of advice in draft form to that agency for comment.

Paragraphs 10.2 and 10.3 have been amended to make clear that where an exception to the requirement to consult is applicable (eg urgency or confidentiality) the administering agency is still to be consulted and informed as far as circumstances allow.

Similarly paragraph 10.4 has been amended to highlight circumstances in which an administering agency should be consulted in seeking advice on legislation, even if the advice is or is expected to be 'routine' in nature. This is designed to effectively 'capture' important insights gained from requesting and obtaining advice, so that the administering agency has the benefit of these.

A new paragraph 10.5 has been inserted to impose on an administering agency an obligation to consider advice that is given about its legislation, and whether that advice indicates that action should be taken to clarify its interpretation. This provides reciprocity, so that an administering agency takes appropriate advantage of insights gained from advice including to overcome difficulties or deficiencies highlighted by the advice, and the maximum advantage is obtained from the Commonwealth's expenditure on the advice.

A new paragraph 10.6 has been inserted to provide a mechanism by which to resolve disputes about the correct interpretation of legislation. The provision requires that agencies seek OLSC's advice before referring unresolved issues to the Solicitor-General.

New paragraph 10.7 is the previous paragraph 1.2.

New paragraph 10.8 has been inserted to further enhance arrangements for the sharing of information between agencies.

New paragraph 10.9 provides for the making of specific exemptions from the requirements of paragraph 10.

Three notes have also been included to provide additional assistance to agencies. Note 1 explains the purpose of paragraph 10, while Note 2 explains how to determine which is the 'administering agency' in a given instance.

Paragraph 11 (Agency responsibility)

Paragraph 11.1 sets out the obligations imposed on Chief Executives of agencies by the Directions. In part, they reflect the obligations imposed on Chief Executives by the Financial Management and Accountability Act, and emphasise the general requirement that Commonwealth resources be used efficiently and effectively. Paragraph 11.1 also imposes on Chief Executives the responsibility to ensure their agency complies with the Directions. This is consistent with the general responsibilities of agency chief executives for efficient and effective expenditure of their budget.

A new paragraph 11.1 (ba) has been added to require Chief Executives to take responsibility for the proper recording, and public reporting, of agencies' legal services expenditure. This is partly in response to the findings of the Australian National Audit Office in its report on legal services arrangements in the Commonwealth public sector. Proper recording will enhance the ability of Chief Executives to engage in decision-making about legal resources that complies with their legal obligation to use resources efficiently and effectively. Making publicly available records about expenditure will enhance transparency.

Paragraph 11.1 (d) now makes it clear that it is not sufficient for an agency merely to remedy a breach. It must also promptly report any possible or apparent breach corrective steps, whether proposed or already undertaken, to the Attorney-General or to the OLSC. This clarification emphasises the importance that the Government places on compliance with the Directions, and on the need for the Attorney-General to be aware of instances where there has been non-compliance by agencies or their legal services providers.

A new note is also included, directing agencies and legal services providers to the *Protective Security Manual* and to information about that Manual. The note is intended to enhance the awareness of agencies and legal services providers of the requirements for the handling of classified material, and to encourage agencies to include in legal services contracts obligations on providers to comply with those requirements.

A new paragraph 11.2 imposes on Chief Executives a responsibility to certify, on an annual basis, the compliance of their agencies (and their legal services providers) with the Directions. This provision has been inserted in accordance with recommendations made by the Australian National Audit Office, which are aimed at enhancing the confidence that the Australian Government can have in the compliance of agencies with the Directions.

PART 2 Extended or modified application of the Directions

Paragraph 11A (Third parties)

This paragraph is new to the Directions. It is directed to ensuring that where possible third parties who enter into relationships with the Commonwealth are bound by the Directions when exercising a right of subrogation. This provision has been inserted to address the situation in which third parties are entering into litigation in circumstances in which there may be a perception (or a reality) that they represent the Commonwealth. To the extent that the legal, financial or reputational interests of the Commonwealth are at stake, it is desirable to bind such third parties to act as a model litigant

and to consult the Commonwealth on tied work (eg constitutional) issues and requests for advice on the interpretation of Commonwealth legislation.

Paragraph 12 (Extended application of Directions to non-FMA bodies)

This paragraph has been completely re-written, to clarify how and when the Directions apply to entities other than Financial Management and Accountability Act agencies. The purpose of this paragraph is to provide for the application of a set of rules to bodies that are not Financial Management and Accountability Act agencies. These rules, while modified to reflect the different character of the bodies to which they apply, are designed to protect the legal, financial and reputational interests that underlie the rest of the Directions.

Paragraph 13 (Exemptions from complying with Directions)

This paragraph is closely based on the former paragraph 12.3 and provides that the Attorney-General can decide to exempt a body from complying with all or part of the Directions, or modify the application of the Directions to a body. This provision is intended to allow for some flexibility to recognise that their may be exceptional circumstances warranting the extended or curtailed application of the Directions.

PART 3 Sanctions for non-compliance

Paragraph 14 (Sanctions for non-compliance)

This new paragraph draws agencies' attention to the range of sanctions available for non-compliance with the Directions. It also requires agencies to provide penalties for breach of the Directions when contracting with legal services providers.

PART 4 Dictionary

This paragraph contains definitions of four terms used in the Directions: 'Directions', 'FMA agency', 'litigation' and 'OLSC'.

PART 5 General notes

The notes in Part 5 provide examples, interpretive assistance and further information on issues concerning or closely relating to the Directions.

Note 1 draws agencies' attention to obligations under the *Financial Management and Accountability Regulations 1997*, and how those obligations impact upon the purchase of legal services.

Note 2 draws agencies attention to section 61 of the Judiciary Act which concerns institution of proceedings on behalf of the Commonwealth.

Note 3 draws agencies' attention to other rules and policies that may be relevant to the provision of legal services.

Appendix A (Tied areas of Commonwealth legal work)

This Appendix amplifies the rule set out in paragraph 2 of the Directions, by providing greater detail about the nature of tied legal work and the rules governing the doing of tied legal work for an agency.

Clause 1 listing categories of legal work is unchanged.

Clauses 2 and 3 setting out the scope of public international law and drafting work respectively are unchanged.

Clause 3A has been inserted to expand on the meaning of 'tied work' and 'tied provider'.

Clause 3B has been inserted to more fully set out the existing power of the Attorney-General, to give approval for a legal services provider other than a tied provider to undertake tied work. An approval may be given subject to conditions.

Clause 4, concerning the briefing of counsel in relation to tied matters is unchanged.

Clause 5, concerning categories of work not subject to the tied work rules has been re-written for clarity.

New clause 6 inserted to amplify the kinds of in-house legal work not subject to the tied work rules under clause 5(b).

New clause 7 has been included to explain the mechanism by which an approval can be granted under clause 5 (c) for in-house legal areas to do public international law work.

New clause 8 imposes a requirement for consultation with the Office of International Law in relation to public international law matters, to ensure perspectives derived from treaty negotiations and other matters in which the Office is involved are taken into account in formulating advice on public international law. Notes have been included to remind agencies and legal services providers about the importance of minimising the risk of agencies taking inconsistent positions on international law, and to provide an example of circumstances in which approval may be granted to allow in-house lawyers to do certain tied work.

New clauses 9 and 10 have been inserted to ensure that the Commonwealth has a central repository of all advice on tied work matters, by requiring that where a non-tied provider is given approval to give advice on tied matter, the advice is to be provided to OLSC, and may be shared with tied providers.

Appendix B (The Commonwealth's obligation to act as a model litigant)

This Appendix explains the nature and scope of the Commonwealth's obligation to act as a model litigant, which has received long-standing recognition in Australian common law.

New clause 2(d) has been inserted to draw agencies' attention to the need, in accordance with the obligation, to consider and participate in alternative dispute resolution.

Note 4 has been clarified to include information about the Commonwealth's obligations and discretions in relation to cases of public interest.

New clauses 3 and 4 and the note following have been inserted to make explicit the requirement that the model litigant obligation extends to agencies involved in merits review processes, and to provide information about the requirement to act as a model litigant in the merits review context.

New clause 5 has been inserted to elaborate on the requirement of the Commonwealth to act as a model litigant in merits review proceedings. These provisions reflect the Government's commitment to the appropriate use of alternative dispute resolution.

Appendix C (Handling monetary claims)

This Appendix imposes rules about how to handle monetary claims. This includes rules about the circumstances in which settlement might be reached. One important difference between these Directions and their predecessor instrument is that these Directions will apply to claims by the Commonwealth, as well as claims against the Commonwealth.

Clause 3 of the Appendix imposes a threshold, above which claims are considered major claims, to be dealt with by specific rules. Under that threshold, the Chief Executive may approve a settlement. Previously, this threshold was $10,000. During the consultation process, various representations were made to the effect that, over time, this threshold had ceased to represent a meaningful distinction between minor and major claims. Accordingly, the threshold is increased in these Directions to $25,000.

The previous note about the expenditure of money has been relocated to Note 1 following paragraph 25 of Appendix E.

A new note (Note 2) has been inserted at the end of the Appendix to clarify the scope of the Appendix, by excluding actions to enforce penalties imposed under Commonwealth legislation.

Appendix D (Engagement of counsel)

This Appendix imposes rules about the engagement of counsel by or on behalf of the Commonwealth. It is intended to ensure that the Commonwealth obtains high quality legal services while receiving value for money that reflects the Government's position as a major purchaser of legal services.

New clauses 4A and 4B have been included to address the Government's concern that it not brief counsel who have used bankruptcy to avoid taxation obligations. They provide a mechanism for ensuring that proper consideration is given to whether counsel have made improper use of the bankruptcy system to evade taxation or other liabilities, in the decision whether to engage counsel.

New clauses 4C and 4D have been included to give effect to the Government's policy of encouraging agencies to brief a wide range of counsel, with the aim of ensuring that the Government obtains legal services of a high quality. By encouraging the briefing of a wide pool of counsel, the Commonwealth it is better able to ensure that there will always be appropriately qualified counsel to be instructed in Commonwealth matters. The note following clause 4D encourages agencies to report annually on the number and gender of counsel engaged, and on the comparative value of briefing for each gender.

New clause 4E has been inserted to require agencies to ask the OLSC to approve an initial rate for all counsel who have not previously performed Commonwealth work. The clause requires OLSC to deal with such requests promptly. This will help to ensure a consistent application of the counsel fees policy from the first occasion on which counsel acts for the Commonwealth.

The threshold at which the Attorney-General's approval is required has been increased. Previously, counsel could not be paid a daily rate of more that $3800 (including GST) without the Attorney-General's approval. Following consultation with stakeholders, this threshold will be increased to $5000 (see clauses 9 and 14).

Appendix E (Assistance to Commonwealth employees for legal proceedings)

This Appendix imposes rules about how to handle requests for assistance in relation to legal proceedings by persons who are, or who have been, employees of Financial Management and Accountability Act agencies or employees covered by the *Members of Parliament (Staff) Act 1984*. It explains the circumstances in which such persons are eligible for assistance, the kinds of assistance that may be given, the level of assistance and the relationship between these rules and rules imposed elsewhere in the Directions (for example, by Appendix C).

The former clause 1 has, effectively, been split into three provisions in this new instrument, to make plainer the basis for eligibility under this Appendix. There is no underlying change of policy.

A new clause 2A has been inserted to give effect to the Government's intention that Appendix E not provide a basis for assistance in relation to disciplinary proceedings taken against an employee by the employee's employing body. This policy was strongly supported by respondents to the Issues Paper.

Clause 8 provides that, in relation to defence against *civil* proceedings, the Commonwealth must control the proceedings and the employee must assist the Commonwealth in its conduct of the defence. New clause 8A limits the control that the Commonwealth has in relation to *criminal* proceedings. The Directions now draw a distinction between the Commonwealth's role in defending civil and criminal proceedings. This reflects the fact that any penalty imposed as a result of criminal proceedings will be imposed on the employee personally. This can be contrasted with the situation in civil matters, where the Commonwealth can meet any civil penalty.

New clause 11A has been inserted to ensure that the scope of approvals given under Appendix E are made clear to the employee.

New clause 11B has been inserted to allow the Commonwealth to revoke approval of assistance in relation to an appeal. This provision will give the Commonwealth flexibility to deal with appeals on a case-by-case basis, having regard to the merits (or otherwise) of the appeal, which may not have been apparent when the initial approval was given.

New clause 16A has been inserted to clarify the circumstances in which expenditure will be approved in relation to inquiries.

Clause 20 now makes clearer the circumstances in which assistance will not be granted in connection with defamation cases.

Clause 21A no longer requires the approval of the Minister for Finance and Administration as a precondition of providing assistance to an employee to whom the Members of Parliament (Staff) Act applies. This is expected to streamline the approval process.