Legal Services Directions 2017

made under section 55ZF of the

Judiciary Act 1903

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

The obligation

1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2 The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by:

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

(aa) making an early assessment of:

(i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth's potential liability in claims against the Commonwealth

(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, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

(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

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

(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and

(iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or a Commonwealth agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations

(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.

Note 1: The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and other Commonwealth 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 Commonwealth agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether AGS, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2: In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and Commonwealth 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.

Note 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.

Note 4: The obligation does not prevent the Commonwealth and Commonwealth 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 Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. 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 a Commonwealth 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. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5: The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

3 The obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings.

4 A Commonwealth agency should use its best endeavours to assist the tribunal to make its decision.

Note: The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Commonwealth agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975*.

Alternative dispute resolution

5.1 The Commonwealth or a Commonwealth agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).

5.2 When participating in alternative dispute resolution, the Commonwealth and Commonwealth agencies are to ensure that their representatives:

(a) participate fully and effectively, and

(b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.

GUIDANCE NOTE 1

The Administrative Appeals Tribunal Act 1975: Obligation to assist the Tribunal

1. The obligation on a Commonwealth agency to 'use its best endeavours to assist the tribunal to make its decision' is set out at paragraph 4 of Appendix B to the *Legal Services Directions 2017* (the Directions), and forms part of the model litigant obligation.

2. The obligation in the Directions to assist the tribunal echoes the addition of subsection 33(1AA) to the *Administrative Appeals Tribunal Act 1975* in 2005, which requires Government decision-makers to use their best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

3. The key point under both section 33(1AA) and the Directions is that, rather than seeking to defend their original decision in the Tribunal, agencies need to focus on assisting the Tribunal to arrive at the correct or preferable decision.

What does this mean?

4. The 'duty to assist' recognises that there may be additional actions agencies can take in Tribunal proceedings to ensure the process runs smoothly and the right outcome is reached – and that agencies have a duty to take these actions.

5. This recognises the position of the Tribunal in reviewing the decision; that is, it considers the matter afresh 'in the shoes' of the original decision maker. This is in contrast to court litigation, which is adversarial and based on the review and defence of decisions.

6. Assisting the Tribunal to arrive at the correct or preferable decision may involve taking steps such as:

   - making information easily available to the Tribunal
   - avoiding delays
   - presenting new material where relevant, and
   - providing specialist evidence when it may assist.

7. This list is not intended to be exhaustive, but to provide an example of conduct that would fulfil this obligation. The content of the obligation may change in the circumstances of each proceeding.

8. The courts have also commented that the 'duty to assist' the Tribunal extends to requiring the Commonwealth to furnish the Tribunal with all available evidence that is centrally relevant to the matter, even where it is not raised or advanced by the applicant.[1]

Further guidance on the duty to assist

9. Further guidance on the expected standard of conduct for agencies before courts and tribunals is set out in the remainder of Appendix B to the Directions.[2]

[1] *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1608.
[2] Note that the obligation to act as a model litigant applies to proceedings before tribunals.

Where can I get further information?

10. Further information can be accessed through the OLSC website and the AAT website.

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GUIDANCE NOTE 2

Use of in-house lawyers for court litigation

1. Under paragraph 5 of the *Legal Services Directions 2017*, the Attorney-General's approval is required for a non-corporate Commonwealth entity to use in-house lawyers to conduct court litigation as solicitor on the record or as counsel.

2. Paragraph 5.1 sets out factors relevant to the Attorney's decision, and paragraph 5.2 provides that approvals may be given subject to conditions.

3. The factors relevant to the Attorney's decisions are expressed to include:
    - Whether the entity is able to demonstrate a capacity to conduct the litigation properly and efficiently
    - Whether the entity is able to conduct the litigation at a lower cost than using external solicitors, taking into account accrual accounting and, where relevant, competitive neutrality principles, and
    - Whether the entity has a statutory charter which gives it an operation independent of government.

4. Applicants seeking an exemption should demonstrate what they can bring to litigation, having regard to what an external legal services provider would bring. The following information should be included in a request for approval (while it is not in itself determinative, it greatly assists the consideration process):
    - Information about the size and nature of the entity's legal services area (and, in particular, how many people are involved in court litigation). This goes to the entity's capacity to manage matters and competing priorities and to manage expertise and knowledge, and assists OLSC in developing a picture of how exposed the entity would be if it lost one or more of its lawyers. Points that ought to be addressed include:
        - whether entity lawyers have practising certificates
        - what experience and expertise they have (noting that litigation requires knowledge beyond the legislation an entity administers)
        - what sort of administrative and paralegal support is available to entity lawyers (given that, in litigation, time pressures can be critical), and
        - the degree of access entity lawyers have to specialist litigation tools (for example, so that lawyers can readily access and cross-reference witness statements, evidence, transcripts etc).
    - Information about the nature of supervisory arrangements that are in place for the entity's lawyers, to ensure consistency and the meeting of appropriate standards. The application should address the nature of supervisory arrangements, and how these fit within the overall structure of the entity. For example, the following points should be addressed:
        - Whether the lawyers are supervised by a senior lawyer, and whether that senior lawyer has a practising certificate

- Whether there are procedures for sign-off or second counselling by a supervising lawyer or professional leader on court documents and advices, or whether the lawyers are effectively 'sole practitioners'
- How matters are allocated within the in-house area
- How the legal services unit determines whether to allocate a matter internally or externally
- Whether there is a matter management system (eg to track progress on cases, get reports on cases and on the overall caseload etc), and
- To whom the legal services manager reports if there are issues to be resolved.

- Information about the nature of knowledge management arrangements in place in the entity (for example, how the entity stores and accesses past opinions and its 'corporate memory'). This, too, goes to the entity's ability to provide consistency of service and to attain high standards in the conduct of court litigation. Knowledge management also includes generally collating, recording and accessing the specialist expertise that in-house lawyers may have, how they acquire it, how they share it and how they maintain it for future in-house lawyers. A knowledge management system should ideally address litigation knowledge, jurisdictional knowledge and understanding of relevant legislation. In this regard, entities should refer to the Legal Services Arrangements in Australian Government Agencies Better Practice Guide released by the Australian National Audit Office in August 2006.
- Information about the costs of using in-house lawyers compared to the costs of using external legal services providers. The entity should also ideally address issues such as whether the costs and choice of external counsel are affected by the use of in-house lawyers (for example whether appropriate counsel are prepared to accept direct briefing, whether direct briefing by in-house lawyers has an impact on preparation time etc for counsel). Information should also be provided on how an area costs in-house services during matters (so there can be a proper analysis of cost and benefit).

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GUIDANCE NOTE 3

Compliance with the Legal Services Directions 2017

OLSC's role

1. The Office of Legal Services Coordination (OLSC) is responsible for the administration of the *Legal Services Directions 2017* (the Directions). Under the Directions, Commonwealth agencies have various obligations, including an obligation to act as a model litigant.

2. OLSC aims to encourage and support compliance with the Directions by agencies and their legal service providers through education.

3. OLSC does not conduct reviews or investigations in relation to possible or actual non-compliance with the Directions (including allegations of non-compliance), except in exceptional circumstances, such as where there is evidence of a systemic issue emerging within an agency or in the sphere of Commonwealth legal work generally.

4. Agencies or individuals may have specific questions regarding whether certain conduct is compliant with the Directions. OLSC is able to give policy guidance on the Directions. However, OLSC does not provide legal advice on the application of the Directions to particular circumstances, and does not approve a particular strategy or course of action in a particular matter.

Monitoring of compliance by OLSC

5. OLSC will monitor (and where necessary verify) agency compliance with the Directions in order to address emerging, systemic or significant issues across the Commonwealth.

6. The means of monitoring compliance will be through the mandatory reporting requirements outlined in the Directions, namely through agency compliance notifications and annual compliance certificates

7. The accountable authority of an agency is responsible for ensuring there is comprehensive and accurate reporting of allegations of non-compliance. It is expected that agencies will notify OLSC about possible or actual non-compliance (including allegations of non-compliance) in a comprehensive manner. Of particular importance are the outcomes reached by agencies, including particular strategies adopted in order to minimise the chances of non-compliance in the future.

8. OLSC will consider the agency notifications and in cases where it considers there are inadequacies in the information provided, or the process undertaken, OLSC may require additional information or further steps to be taken.

9. The Attorney-General is briefed on the Commonwealth's non-compliance with the Directions. Statistical information about non-compliance is published on the Attorney-General's Department website.

10. Any finding by an agency that a legal service provider has failed to comply with the Directions will be recorded and considered by OLSC.

The Agency's Role

11. Agencies are responsible for the management and handling of legal issues, claims, and disputes affecting or involving the Commonwealth. This includes having an appropriate awareness of agency obligations under the Directions, and ensuring compliance with the Directions. Under the former Compliance and Enforcement Strategy, agencies were required to have systems and processes in place for ensuring compliance with statutory, regulatory and other requirements, and for dealing with general complaints. Under OLSC's *Compliance Framework*, agencies will be expected to have arrangements in place to ensure compliance with the Directions, consider and appropriately respond to allegations of non-compliance, take necessary remedial action including ensuring better practice compliance with the Directions, and report the outcomes of those activities to OLSC.

12. Due to the divergence in agency structures, and the context within which Commonwealth agencies handle legal issues, claims, and disputes, it will be the responsibility of each agency to determine:

    - what form of compliance arrangement is the most appropriate in the circumstances
    - whether appropriate steps have been taken to satisfy themselves that they have fairly and honestly considered the subject of an allegation, and
    - whether appropriate remedial action has been taken, if necessary.

13. Agencies will potentially receive allegations of non-compliance ranging from the spurious to those of substance. Agencies will need to implement arrangements to ensure they have discharged their responsibilities in considering concerns regarding possible and actual non-compliance (including allegations of non-compliance) appropriately. We note that accountable authorities of non-corporate Commonwealth entities and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 will be required to certify in their annual compliance certificates that their entity has appropriate systems and procedures in place to ensure compliance with the Directions.

14. If a Commonwealth agency becomes aware of possible or actual non-compliance with the Directions (including allegations of non-compliance) involving their legal service provider, it is the agency's responsibly to consider the circumstances, including the level of contribution by the legal service provider, and advise OLSC of their conclusions. The agency may determine there was compliance, or that there was non-compliance contributed to by both the agency and their legal service provider, or non-compliance due solely to the conduct of their legal service provider.

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

Notifications of non-compliance

15. Paragraph 11.1(d) of the Directions requires a non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 to give reports to OLSC or the Attorney-General about any known, possible or apparent breaches of the Directions by the entity, or allegations of breaches of the Directions by the entity. This includes allegations of non-compliance made to the entity, along with circumstances of possible non-compliance of which the entity becomes aware, for example: judicial criticism, media attention, and internal reviews.

16. For each circumstance of possible non-compliance (whether it is a complaint directed at the entity or discovered though internal procedures), an entity should complete the Agency Notification Form that appears at **Attachment A** and is also available from the

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

17. For example, if an allegation is made against an entity, the entity should notify OLSC via an Agency Notification Form that they are reviewing the complaint. Once the review has been finalised, an updated Agency Notification Form should be submitted providing a summary of the outcome of the review, and details of any remedial action taken by the entity, if required.

18. Once the Agency Notification Form is received by OLSC, it will be recorded on our Notification Register. As OLSC will be monitoring entity notifications, OLSC may seek specific updates or information relevant to a particular notification.

Annual compliance certificates for non-corporate Commonwealth entities

19. Paragraph 11.2 of the Directions requires a non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014 to provide a compliance certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the entity has complied with the Directions. The onus is primarily on entities to demonstrate their compliance with the Directions and to show that they have appropriate systems in place for monitoring compliance. There is no prescribed format for the certificate, however OLSC recommends the use of the Compliance Certificate template that can be found at **Attachment B**. Entities are also required to include details of the entity's use of persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* (Judiciary Act) to receive service in proceedings to which the Commonwealth is a party. The details to be provided are outlined in paragraph 11.2(ba) of the Directions.

20. In addition, OLSC has prepared a Compliance Checklist to assist entities when completing the compliance certificate. The document is for internal purposes and is found at **Attachment C**.

21. Signed certificates should be scanned and emailed to the Assistant Secretary of OLSC at olsc@ag.gov.au.

When to notify OLSC of an allegation of non-compliance

22. In circumstances where there is an allegation of non-compliance, entities are not required to notify OLSC of spurious complaints in which there is no particularisation of the allegation.

23. However, entities are required to notify OLSC of all allegations in which the complainant has alleged that specific entity conduct has resulted in non-compliance with a specific part of the Directions (or where it is apparent from their complaint). For example, Mr A alleges that an entity failed to provide discovery by a particular date in accordance with a court imposed deadline and accordingly they have caused unnecessary delay in the litigation, thereby failing to comply with paragraph 2(a) of Appendix B to the Directions.

24. We note that all judicial criticism of an entity's compliance with the Directions should be notified to OLSC.

The Legal Service Provider's Role

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

a. Section 55ZG of the Judiciary Act which provides that *"a legal practitioner or firm of legal practitioners"* that is acting in a matter, for a person or body described in s 55N(1) of the Judiciary Act, must comply with the Directions. Section 55N(1) includes the Commonwealth, companies in which the Commonwealth has a controlling interest, and Ministers.

26. If a legal service provider becomes aware of possible or actual non-compliance (including allegations of non-compliance), it is their responsibility to report it to the Commonwealth agency in the first instance, and then work with the agency to resolve the issue. The agency is responsible under the Directions to notify OLSC of the circumstances and outcome of non-compliance using the Agency Notification Form.

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

27. If you are a party to a claim and/or litigation involving the Commonwealth and you want to make an allegation of non-compliance, you should contact the agency directly and particularise your concerns relating to their compliance with the Directions. OLSC does not resolve complaints from members of the public about agency compliance. If you contact OLSC, you will be advised to forward your complaint to the relevant agency. That agency will notify OLSC of your concerns in accordance with the *Compliance Framework*.

28. Please note, the issue of non-compliance with the Directions cannot be raised in any proceedings except by, or on behalf of, the Commonwealth (see subsection 55ZG(3) of the Judiciary Act).

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Australian Government
Attorney-General's Department

Office of Legal Services Coordination

Attachment A

Agency Notification Form

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

Under paragraph 11.1(d) of the Legal Services Directions 2017 (Directions), an agency must report about any possible or actual non-compliance with the Directions by the agency (including an allegation of non-compliance) of which the agency is aware, and about any corrective steps that have been taken or are proposed to be taken, by the agency.
Please complete this Form and return to OLSC at olsc@ag.gov.au.

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

Please provide a brief summary of the background to matter:
Please outline the circumstances of possible or actual non-compliance (including an allegation of non-compliance): *Please attach any relevant documentation including a copy of the document containing the allegation.*
Please provide a brief summary of the steps the agency has taken, or proposes to take, to assess and analyse the circumstance of possible or actual non-compliance: *For example, the agency proposes to undertake a review of the circumstances or the agency has undertaken a review of the circumstances. Please attach any relevant documents including a copy of any review or investigation findings.*
Please outline findings by the agency including whether or not the circumstances were found to be non-compliant with the Directions, or alternatively, if the agency has not yet resolved the circumstances, please provide a subsequent notification form updating OLSC of the outcome.
If an agency has made a finding of non-compliance, please advise who was responsible for the non-compliance: ☐ The agency ☐ The legal service provider ☐ Both the agency and the legal service provider
Corrective steps: *Please outline corrective steps that have been taken or are proposed to be taken, by the agency including steps taken to response to an allegation of non-compliance*
Other comments:

Attachment B

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

[Name of Entity]

Paragraph 11.2 of the *Legal Services Directions 2017* (Directions) requires a non-corporate Commonwealth entity to provide a certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the entity has complied with the Directions. Submitting an appropriately completed Annual Certificate of Compliance satisfies this obligation.

Note 1: Corporate Commonwealth entities (CCEs) only need to complete section (c) of this form. Non-corporate Commonwealth entities (NCCEs) must complete all sections.

Note 2: The Compliance Checklist can assist in determining your entity's compliance with the Directions for this financial year. The Checklist is for entity internal purposes only and does not need to be submitted to OLSC.

I, *[Name of Accountable Authority]*, Accountable Authority of [NAME OF ENTITY], certify under the *Legal Services Directions 2017* that during the financial year [*insert financial year*]:

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

☐ Yes ☐ No

*[If **no**, please list below all previously unreported apparent, possible or alleged instances of non-compliance. Please refer to the Compliance Checklist and paragraph 11.1(d) of the Directions for further detail about the information required.]*

***Note**: If there are no previously unreported apparent, possible or alleged instances of non-compliance with the Directions identified, please tick **Yes**.*

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

☐ Yes ☐ No

[If no, please advise how the entity intends to improve the internal systems and procedures to ensure compliance with the Directions and to respond to apparent, possible or alleged non-compliance.]

(c) this entity has used person/persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* to receive service in proceedings to which the Commonwealth is a party:

☐ Yes ☐ Not applicable

[If yes, please provide details and attach the list to this Certificate. This part refers to where the entity has used a law firm, including the Australian Government Solicitor, who has been appointed under section 63 only to receive service of court documents that name the Commonwealth as a party. Further information is in paragraph 11.2(ba) of the Directions and Guidance Note 9.]

Signed: *[Signature of Accountable Authority]*

[Title]

[day/month/year]

Annual Certificate of Compliance Reporting

Compliance Checklist

This Compliance Checklist can assist you in determining your entity's compliance with the *Legal Services Directions 2017* (Directions) over this financial year for the purposes of completing the Annual Compliance Certificate. It sets out key obligations in the Directions (though not every obligation). It will help you to answer questions (a), (b) and (c) in the Annual Compliance Certificate about whether:

- You reported any alleged, possible or actual non-compliance to OLSC
- You have appropriate management strategies and practices in place to ensure compliance, and
- You have provided details of your entity's use of persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903*.

This checklist is for your entity's internal use only and does not need to be submitted to OLSC.

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

11	Only using in-house lawyers to conduct court litigation as solicitor on the record or as counsel with the approval of the Attorney-General pursuant to Paragraph 5	
12	Engage counsel in accordance with **Appendix D** and Paragraph 6	
13	Comply with the requirements relating to public interest immunity where a request or demand to provide documents or information arises in the conduct of litigation pursuant to Paragraph 7	
14	Waiving obligations in relation to limitation periods pursuant to Paragraph 8	
15	Comply with the requirements of **Appendix E** to the Directions when providing financial assistance to a Commonwealth employee pursuant to Paragraph 9	
16	Comply with the requirements of **Appendix F** to the Directions when procuring legal services from external legal service providers pursuant to Paragraph 9A	
17	Consulting with the administering agency on a request for advice pursuant to Paragraph 10	
18	Taking reasonable steps to share advice that may be significant to other agencies with those agencies pursuant to Paragraph 10.8	
19	Advise the Secretary of the Attorney-General's Department where a request for advice has been made to AGS about a constitutional law matter pursuant to Paragraph 10A	
20	Give reports as soon as practicable to OLSC about possible, apparent or alleged breaches of the Directions pursuant to Paragraph 11.1(d).	
21	All matters required to be approved by, or notified to, the Attorney-General or OLSC are raised promptly.	

Note: Only instances of non-compliance with the Directions *that have not already been reported to OLSC* need to be referenced in the Certificate of Compliance.

Have you used a person or persons appointed by the Attorney-General under s 63 of the *Judiciary Act 1903* to receive service in proceedings where the Commonwealth is a party?
If **yes**, (in accordance with paragraph 11.2(ba)) in respect of each proceeding, please provide the following information in an attachment to the Certificate of Compliance: • name of the persons who received service • proceedings in which the appointed person received service • issues raised in proceedings in which appointed persons received service • nature of each document served on the appointed persons • date on which these documents were served, and • date on which the agency or OLSC was advised of the receipt of service of each document by the appointed person.
[Note - This information should be added to the compliance certificate at question (c).]

Is there any other information relevant to the entity's compliance with the Directions that you have not already provided?
[Note: This information can be provided to OLSC as an attachment to the signed Annual Certificate of Compliance.]

GUIDANCE NOTE 4

Recovery of costs

Legislation

1. Section 11 of the *Public Governance, Performance and Accountability Rule 2014* creates an obligation on accountable authorities of non-corporate Commonwealth entities to actively pursue debts.

2. Appendix B note 5 of the *Legal Services Directions 2017* states that the Commonwealth's obligation to act as a model litigant '*does not prevent [it] from enforcing costs orders or seeking to recover its costs*'.

Criteria

3. There are two general presumptions with regard to the Commonwealth's recovery of costs. The first presumption is that the Commonwealth may seek costs where there is a legal basis for doing so. The second presumption is that the Commonwealth may enforce any costs order in its favour. A range of factors are to be taken into account in deciding whether to do either of these things. Factors that would tend to support seeking or enforcing costs include:
   - that the other party caused unnecessary expense and delay in the proceedings
   - that there is an apparent need to deter vexatious litigation in the future
   - that the debtor is apparently able to pay, and
   - that the anticipated expense in recovering costs does not outweigh the recoverable or potentially recoverable costs.

4. In some cases, it may be appropriate to seek a costs order but to defer a decision on enforcing the order (eg where a person's financial circumstances are unclear or as a deterrent to future vexatious litigation).

Costs for in-house counsel

5. The Commonwealth is entitled to claim costs for its use of in-house lawyers (*Lenthall v Hillson* [1933] SASR 31). However, these costs are limited to the portion of the in-house counsel's or solicitor's salary that was expended on the proceedings, in addition to overheads for the costs of maintenance of premises, legal support staff, photocopying and the like (*Environment Protection Authority v Taylor Woodrow (Aust) Pty Ltd (No2)* (1997) 97 LGERA 368 (Land and Environment Court of NSW)).

Solicitor-General's costs

6. If the Commonwealth is seeking costs and the Solicitor-General has acted for the Commonwealth, costs should be sought for the Solicitor-General's time. OLSC must be contacted if this situation arises.

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GUIDANCE NOTE 5

Principles of Constitutional Litigation involving corporate Commonwealth entities

1. Pursuant to paragraph 12.3(a) of the *Legal Services Directions 2017* (the Directions), corporate Commonwealth entities (other than a government business enterprise) must '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 concerning the conduct of such litigation (including as to the choice of lawyers to be used and the arguments to be put on constitutional issues).' This reflects the particular role and responsibilities of the Attorney-General as First Law Officer of the Commonwealth and the potential 'whole of government' significance of constitutional issues.

2. OLSC has devised the following practical guidelines for entities to follow when a constitutional issue emerges in litigation to which it is a party. These guidelines will help entities comply with their obligations pursuant to paragraph 12.3(a) of the Directions:

    - All entities should, pursuant to paragraph 12.3(a) of the Directions, report to the Attorney-General or OLSC as soon as possible about the details of any litigation (including threatened or proposed litigation) which gives rise to constitutional issues. This will give the Attorney-General's Department and the Australian Government Solicitor (AGS) (at the request of the Department) sufficient time to be involved in any steps concerning the constitutional issues, including giving consideration to draft pleadings, identification of relevant facts, and procedural questions about how and when the constitutional issue might be dealt with.
    - Pending the issue of a *Judiciary Act 1903* section 78B notice and a decision on whether the Attorney-General will intervene in the proceedings, an entity involved in constitutional litigation must comply with any instructions from the Attorney-General or the Attorney-General's Department that could affect the handling or determination of the constitutional issue, including as to the involvement of AGS in handling the matter.
    - If the Attorney-General does not intervene in the proceedings, the entity should (a) clear any submissions on constitutional issues with the Attorney-General's Department, or AGS (at the request of the Department), and (b) comply with any instructions from the Attorney-General or the Attorney-General's Department concerning the conduct of the litigation.
    - If the Attorney-General does intervene in the proceedings, the entity is not to put any submissions on the constitutional issues without the prior approval of the Attorney-General or the Attorney-General's Department. The Attorney-General's Department or AGS (at the request of the Department) will, however, consult closely with the entity in relation to the implications of the constitutional issues for that entity, and will give the body an opportunity to comment on the submissions to be put on behalf of the Attorney-General on the constitutional issues.
    - If the Attorney-General intervenes in a constitutional proceeding, the Attorney-General's Department will usually meet the costs of that intervention. However prior to any decision on intervention being made, or if the Attorney-General does not intervene, the entity involved in the litigation will meet the costs associated with the matter including compliance with these guidelines.

These costs will include any costs arising from the involvement (at the request of the Department) of AGS other than costs associated with the Attorney-General's decision on intervention.

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GUIDANCE NOTE 6

Dispute resolution during caretaker period

1. This guidance note is to be read in conjunction with the Department of the Prime Minister and Cabinet Guidance on Caretaker Conventions 2016.

Background

2. The 'caretaker period' refers to the period between the dissolution of the House of Representatives preceding a Federal election, and continues until the election result is clear or, if there is a change of government, until the new government is appointed.

The caretaker conventions

3. During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. However, successive governments have followed a series of practices, known as the 'caretaker conventions', which aim to ensure that their actions do not bind an incoming government and limit its freedom of action. The conventions are not legally binding, and their application requires judgement and common sense.

4. In summary, the conventions are that the government avoids:

   a. making major policy decisions that are likely to commit an incoming government,

   b. making significant appointments, and

   c. entering major contracts or undertakings.

5. The caretaker conventions may affect the way alternative dispute resolution (ADR) and litigation involving the Commonwealth should be handled. However, they do not displace the Commonwealth's obligation to the courts or tribunals, or the obligations set out in the *Legal Services Directions 2017* to protect the interests of the Commonwealth, to deal with claims promptly, not cause unnecessary delay in litigation or dispute resolution, and keep the costs of litigation to a minimum.[1]

6. Responsibility for observing the caretaker conventions ultimately rests with the agency head and the following principles should be taken into account before making decisions regarding the conduct of ADR and litigation during caretaker period.

ADR during the caretaker period

7. Commonwealth agencies are required to consider ADR prior to initiating court proceedings and continually assess the use of ADR during those proceedings.[2]

8. ADR should generally continue (as part of ordinary matters of administration) but the caretaker conventions may restrain making major decisions, such as sensitive settlements, or the provision of complex or sensitive advice in relation to ADR. The vast majority of ADR would be expected to continue during caretaker periods.

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[1] See Appendix B to the *Legal Services Directions 2017*.
[2] Paragraph 2(d) and 5.1, Appendix B to the *Legal Services Directions 2017.*

9. Seeking to defer ADR may be appropriate where the matter involves a high level of legal risk or sensitivity, and where it is acceptable to non-Commonwealth parties. In circumstances where delay would not be in the interests of justice, agencies should seek ways to progress ADR, being mindful to avoid creating major commitments for an incoming government. Where decisions which would involve major commitments, including significant settlements in either scale or sensitivity, are unavoidable, the relevant Minister should be advised to consult with the relevant Opposition spokesperson.

Litigation during the caretaker period

10. During litigation the Commonwealth has a responsibility to conduct itself in accordance with the highest professional standards.[3] This responsibility is not affected by the commencement of caretaker periods.

11. Court timeframes, including the filing of submissions, evidence, and the scheduling of appearances are not generally adjourned due to the caretaker period. However the deferral or adjournment of steps in legal proceedings that would materially commit an incoming government should be carefully considered, taking into account the circumstances of the matter.

12. In some cases, it may be appropriate to seek an adjournment from the court or tribunal, or seek consent from the other party to delay settlement negotiations, until the result of the election is known.

13. If deferral is not possible or appropriate in the circumstances, the agency should take only those steps that are essential to the further conduct of the litigation. For example, if the Commonwealth's right to appeal needs to be preserved, a protective appeal should be lodged.

14. In cases where some action is essential, the agency should consider whether the caretaker Minister should be advised to consult (or authorise consultation) with the relevant Opposition spokesperson before the action is taken, on the grounds that it would be a significant commitment in terms of scale or sensitivity.

15. If the agency would normally instruct in the matter without reference to the Minister, for example on the basis that relevant government and agency policies are well established, then the agency may be able to issue instructions without consultation, but the agency should still consider whether the significance of the matter, in particular possible tension between the government and the Opposition on a point of policy, is such that consultation would be appropriate.

16. If the agency would need, in accordance with standing arrangements, to seek clearance from the Minister before filing documents or issuing other instructions, then the need for consultation should normally be raised with the caretaker Minister as part of the provision of advice.

17. The caretaker conventions restrict the provision of policy advice. Factual information about litigation involving the Commonwealth can be provided on request. Factual information can be volunteered in certain circumstances, for example where the Minister is a party to litigation, the Minister may be provided with information about a decision handed down (such as where the Commonwealth's arguments were, broadly speaking, accepted or rejected, and a copy of the judgment). Advice on the policy implications of a decision should not be given unless exceptional circumstances might require an urgent

[3] Note 2 of Appendix B to the *Legal Services Directions 2017.*

response. In this situation, agencies should consult with the Department of the Prime Minister and Cabinet.

18. If legal proceedings which may be the subject of an application for Ministerial assistance under the *Parliamentary Business Resources Regulations 2017* are commenced or threatened during the caretaker period, the Attorney-General's Department should be notified as soon as possible.

19. A flowchart is set out at **Attachment A**.

20. Information about the conventions is available in the guidelines issued by the Department of the Prime Minister and Cabinet.

21. If specific advice is required in relation to other issues that arise during the caretaker period, agencies should contact the Department of the Prime Minister and Cabinet.

22. If further advice is required regarding handling litigation during the caretaker period, the Office of Legal Services Coordination should be contacted for further guidance.

Office of Legal Services Coordination
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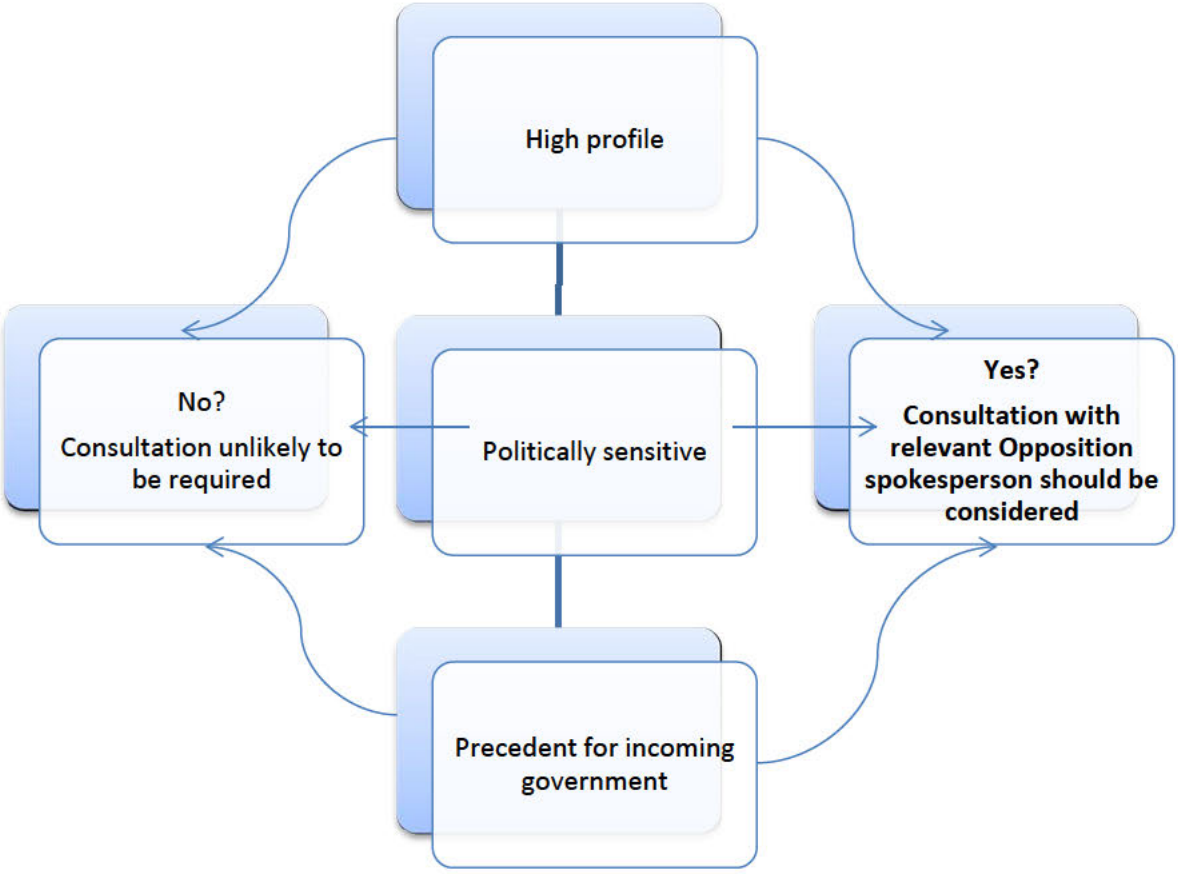
Re-issued: June 2018

Flowchart: Dispute Resolution in Caretaker Period



GUIDANCE NOTE 7

Reporting and Settlement of Significant issues

Paragraph 3 of the Legal Services Directions 2017

1. Paragraph 3 of the *Legal Services Directions 2017* (the Directions) requires non-corporate Commonwealth entities and a corporate Commonwealth entity that was an Agency (within the meaning of the *Financial Management and Accountability Act 1997*) on 30 June 2014, to report to OLSC on significant issues that arise in the provision of legal services, including in relation to handling of claims, litigation and involvement in dispute management.

2. Failure to report a significant issue is a breach of the Directions and the Attorney-General may impose sanctions for non-compliance with the Directions.[1]

3. Reporting should not be confined to reporting of litigated matters and should include the early reporting of significant legal issues and trends.[2]

4. A request to brief the Solicitor-General, consultation undertaken with another area within the Attorney-General's Department or a claim submitted to Comcover **does not** satisfy the requirement in paragraph 3 of the Directions to report a significant issue to OLSC.

5. A separate Guidance Note, Guidance Note 11, deals with briefing the Solicitor-General and outlines entities' responsibilities in relation to briefing the Solicitor-General.

6. This Guidance Note applies unless other arrangements are approved by OLSC in relation to the entity's portfolio or work.

Purpose of reporting significant issues

7. The purpose of paragraph 3 of the Directions is to:
   - promote a greater understanding of the special role and responsibility of the Attorney-General, as First Law Officer, in relation to Commonwealth legal matters
   - ensure that the Attorney-General, as First Law Officer, and the Solicitor-General, as Second Law Officer, are appropriately informed of the most important legal issues affecting the Commonwealth, and
   - protect the whole-of-government interests of the Commonwealth as opposed to an entity working exclusively in its own interests.

8. Our reporting framework is designed to ensure accurate information about significant legal issues can be provided to the Attorney-General in a timely way, and to allow for the consideration of significant legal issues involving the Commonwealth by the Significant Legal Issues Committee. OLSC relies on accurate and timely reporting by entities that are best placed to identify and explain the significance of the matters that they have conduct of to the Attorney-General.

[1] Refer to paragraph 14 of the Directions.
[2] Entities should report significant legal issues as soon as they emerge, even if a claim has not yet been made.

Issues considered to be significant

9. Entities are responsible for identifying significant issues, and reporting them to OLSC. An issue may be considered significant for one or more reasons and at various stages as a matter progresses. For the purposes of the Directions, an issue will be considered 'significant' in a range of circumstances, including if:

    - an entity is considering whether to apply to the High Court for special leave
    - any proceedings that involve an entity have been filed in the High Court (including matters which an entity is monitoring whilst considering intervention)
    - it involves constitutional issues (in which case paragraph 10A of the Directions may also apply)
    - it is large in size or complex, whether this is due to the number of parties or the potential liability or cost to the Commonwealth
    - it has, or potentially has, whole-of-government implications, or may have future implications for another entity and/or the Commonwealth
    - it raises legal, political or policy issues that receive or are likely to receive media attention[3] or cause a significant adverse reaction in the community
    - it involves a test case or requires the Commonwealth to intervene in private litigation
    - it involves a dispute or disagreement between the Commonwealth and a Commonwealth entity or between different Commonwealth entities (other than matters arising under legislation which contemplates that the Commonwealth or Commonwealth entities may be on different sides in a case), including a dispute between a Commonwealth entity and an agency of a State or Territory government
    - it affects more than one Commonwealth entity, requiring a significant level of coordination or high-level consultation between Commonwealth entities
    - it has the potential to have a significant precedent for the Commonwealth or other Commonwealth entities could be established, either on a point of law or because of its potential significance for the Commonwealth or other Commonwealth entities, and
    - the tort of misfeasance in public office is in issue.

10. The above list is not exhaustive and other matters may need to be reported as significant.

11. If an entity is uncertain whether an issue is 'significant' for the purposes of the Directions, the entity should contact the Significant Issues Team within OLSC as soon as possible to discuss the significance of the issue and requirement to report.

12. If an entity has reported a matter as significant, and the entity subsequently considers the matter may no longer be significant, the entity should consult OLSC. An entity should not cease providing regular updates on reported matters without the prior approval of OLSC.

[3] 'Likely to receive media attention' includes where an entity has been approached to comment on an issue/matter by a media group or has been notified by a media group that a particular issue/matter is likely to receive media attention.

Significant Issue Reporting Template

13. The significant issue reporting template is the standard reporting template which is to be utilised for all issues or matters, and at all stages of an issue or matter. The template is at **Attachment A**.

Initial Reporting

14. A significant issue should be reported to OLSC as soon as the significance of the issue becomes apparent. Reporting of a significant issue to OLSC must be done by completing the Significant Issues Reporting Template located on the OLSC website. When completing the Significant Issues Reporting Template, entities must ensure that they have clearly expressed all relevant legal risks and sensitivities.

15. An entity should submit the completed template to OLSC by emailing it to the OLSC mailbox: OLSC@ag.gov.au.

16. Importantly, the content of the Significant Issues Reporting Template should be confined to discussion of the significant issue. Requests for other approvals or exemptions under the Directions should not be contained in the report; and should be raised independently via the OLSC mailbox: OLSC@ag.gov.au.

Ongoing-Reporting

17. Entities are required to update all reported significant issues quarterly using the same template as used for the initial reporting of the matter (**Attachment A**). OLSC will contact all entities who have reported significant issues and request updates to be provided by a specified date every quarter which aligns with Significant Issues Coordination Committee meetings. OSLC will notify entities when reports are due.

Significant Developments

18. Importantly, if there is a significant development in a matter or an issue between reporting dates, the entity **must** update the report and provide it via email to the OLSC mailbox: OLSC@ag.gov.au as soon as the entity learns of the development. For example, if an entity learns that a judgment is to be delivered in a significant matter, the entity should alert OLSC to the impending judgment date. When the judgment is handed down, the entity should provide OLSC with an updated report outlining the decision, using the standard reporting template, as soon as possible.

More Frequent Reporting

19. OLSC may require more frequent updates from a particular entity in relation to a specific matter or group of matters. When this occurs, OLSC will liaise with the relevant entity to arrange a more frequent reporting schedule for that particular matter.

Settlement of Significant Issues

20. Under paragraph 3.2 of the Directions, a claim that has been reported to OLSC by an entity as raising a significant issue must not be settled without the agreement of the Attorney-General or the Attorney-General's delegate.

21. Failure to obtain the Attorney-General's agreement for a settlement is a breach of the Directions and the Attorney-General may impose sanctions for non-compliance with the Directions.

22. Entities are encouraged to engage with OLSC as soon as possible when settlement of a matter which raises significant issues is contemplated. Entities should also ensure that

important issues requiring further consideration or consultation by OLSC which may arise in certain settlements are identified with OLSC early. For example, where it is proposed the settlement terms remain confidential, or where the settlement may impact on other entities or similar matters.

23. When requesting agreement for the settlement of a claim that has been reported to OLSC as significant, entities will need to complete the Significant Issues Settlement Request Template (**Attachment B)**.

24. An entity should submit the completed template by emailing it to the OLSC mailbox: OLSC@ag.gov.au.

25. OLSC will respond as quickly as reasonably practicable to assess settlement proposals. Timely assessment of a request for agreement of a proposed settlement can only occur when relevant and complete information about the matter is provided to OLSC as soon as possible. Consideration of a request for settlement agreement will be facilitated when the application for approval is accompanied by:

    - legal advice obtained by the entity that canvasses the possibility of settlement in a matter
    - the completed Significant Issues Settlement Request template outlining any risks to the Commonwealth, effect of the settlement on other Commonwealth agencies or matters, and a clear statement of the settlement proposal the entity is seeking agreement of.

Other Information

26. For further information about reporting significant issues, please contact the Significant Issues Team at OLSC on 02 6141 3642 or via the e-mail at OLSC@ag.gov.au.

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E-mail: olsc@ag.gov.au
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SIGNIFICANT ISSUES REPORTING TEMPLATE

MANDATORY FIELDS – SECTION A:

Name of matter	***If litigated matter: A v B [Court] [Court Number]*** ***If not litigated: Insert title to describe legal issue, and name(s) of claimant/other party***
Commonwealth Instructing entity	
Other Commonwealth Stakeholders	
Handling Instructions	***<DRAFTING NOTE: Please ensure your report complies strictly with any suppression or confidentiality orders or other non-disclosure obligations. Please detail any other handling instructions for OLSC to follow in this section, such as close hold, secrecy provisions, etc.>***

<DRAFTING NOTE: As a general guide, we recommend the discursive part of the report would be between two to five pages in length.>

CURRENT STATUS ***<DRAFTING NOTE: For example: listed for hearing on X; scheduled for mediation on X; s 78B notices issued on X, submissions filed on X, etc.>***

LEGAL ISSUES ***<DRAFTING NOTE: Explain why this matter is significant and which legal issues it raises.>***

LEGAL OR OTHER RISKS ***<DRAFTING NOTE: For example: What might an adverse outcome mean for your entity, and/or the broader Commonwealth.>***

SUMMARY OF FACTS ***<DRAFTING NOTE: Outline key factual background.>***

CLAIM OR LITIGATION HISTORY ***<DRAFTING NOTE: Insert in table below.>***

[Date]	**[Important events or developments only]**

	Legal Representatives
Commonwealth	• Solicitors: • Counsel:
[Insert other party details]	• Solicitors: • Counsel:
[Insert other party details]	• Solicitors: • Counsel:
Consultation with Solicitor-General's Chambers	[Please specify]
Entity Contact officer	[Name] [Position or title] [Agency][Email] [Phone]
Report prepared by	[Name] [Position or title] [Agency][Email] [Phone]
Report approved by	[Name] [Position or title] [Agency] [Email] [Phone]
Report date	

OPTIONAL FIELD – SECTION B:

Approved Matter Summary for Sharing with Commonwealth Entities:

The contents of this report, other than as expressly provided for in this Section B, will not be disclosed or disseminated without approval from the reporting Commonwealth entity and OLSC. Information contained in the *following field only* may be shared with other Commonwealth entities. If preferable or necessary you may de-identify this information, and may include as much or as little information as appropriate. If completing this field please provide entity contact and approval details.

Matter Name / Title	
Significant Legal Issues	
Reporting Entity	
Entity Contact	[Name] [Position] [Email] [Phone]
Approval Granted By	[Name of Approver] [Position] [Date Approved for sharing]

Significant Issue Settlement Request Template

Matter name: (As listed on court record)	
Entity:	
Court and matter number:	
Parties:	
Entity Contacts:	
Entity legal representation: solicitor and counsel:	
Entity solicitor contact lawyer and contact details:	
Other Relevant Commonwealth Stakeholders: (please specify if Comcover is instructing in this matter)	
Date request prepared:	

Agreement Required by:

[Please provide relevant timeframes]

Background

[Please provide a brief description of the background facts and issues in this matter]

Outline of Potential Risk to the Commonwealth

[Please provide an outline of any potential risk to the Commonwealth in proceeding with a hearing]

Reasons advanced for settlement of this claim

[Please provide reasons for settlement, including providing copies of any relevant legal advices on which you have relied in formulating this settlement proposal, as well as a listing any advantages to the Commonwealth if this matter is settled]

Effects on other agencies within the Commonwealth

[Please list the effects, or potential effect, on other Commonwealth agencies of the proposed settlement, including any potential precedent established (if settlement is not limited to the facts of the claim) or any wider exposure to other claims or proceedings]

Consultation/ministerial approval

[Please provide a brief description of any consultation you have undertaken, and a brief description of any ministerial approvals you have obtained in relation this matter. Please also note if your Minister has been briefed on the impending settlement]

Outline of any prior settlement offers/counter offers

[Please provide an outline of any prior settlement offers or counter offers which have been made in relation to this matter]

Settlement terms

[Please provide a brief description of the settlement you wish to be approved. Please note that we do not require a copy of the deed of settlement, rather we ask that entities provide us with a brief summary of the settlement proposal and figures that make up any offers they intend to make]

In accordance with Legal Principle and Practice

[Please confirm that you have advice that the offer you have recommended is in accordance with proper legal principle and practice (see paragraph 4.3 of the Directions, and is in accordance with your entities obligations more broadly under the Legal Services Directions 2017 including in accordance with Appendix C to the Directions (Handling Monetary Claims), if applicable]

Has the Solicitor-General been briefed to advise in this matter: Y/N

SENSITIVE: LEGAL
This document may be protected by legal professional privilege
This document is not to be disclosed or disseminated without express written approval from the reporting Commonwealth entity and OLSC

GUIDANCE NOTE 8

Reporting of legal services expenditure (for reporting period 2023-24)

1. This Guidance Note provides information on how entities are to calculate expenditure for the purposes of reporting under the *Legal Services Directions 2017* (the Directions) for the financial year ending 30 June 2024.

Entity obligations

2. All non-corporate Commonwealth entities and most corporate Commonwealth entities regulated by the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) are required to report on legal services expenditure to the Office of Legal Services Coordination (OLSC) within 60 days of the end of financial year using the OLSC approved reporting template provided annually to entities.

    - The accountable authority of a non-corporate Commonwealth entity is responsible for ensuring the entity reports its legal services expenditure to OLSC (subparagraph 11.1(da) of the Directions).

    - This is extended to corporate Commonwealth entities by subparagraph 12.3(f) of the Directions.

3. A non-corporate Commonwealth entity must publish its legal services expenditure for the previous year by 30 October each year (subparagraph 11.1(ba) of the Directions).[1] There is no required format for publication. Entities are not required to publish the same level of detail as they provide in the OLSC approved reporting template. Most entities publish this data in their annual report or on their website. Where an entity publishes this data on its website, the information should continue to be available indefinitely or until a sufficient time has passed where it can be substantiated that the public no longer has an interest as to the content of those records. The annual Legal Services Expenditure Report published by OLSC cannot be used to fulfil this obligation.

4. The reporting and publishing obligations do not apply to corporate Commonwealth entities which are Government Business Enterprises, Commonwealth companies, or entities that are otherwise exempt from complying with the Directions.

Information to be reported

5. Entities are required to report on the following, using the OLSC approved reporting template:

    - total internal legal services expenditure;

    - total value of disbursements (excluding counsel);

[1] When publishing legal services expenditure data, entities are also encouraged to publish, in a manner that does not disclose the rates paid to individual counsel, information that allows assessment of whether equitable briefing targets are being met (see Note under paragraph 4D of Appendix D of the Directions).

- total value of counsel briefs, broken down by method of brief (direct or indirect), gender,[2] and seniority (junior or senior barristers);[3]
- total number of counsel briefs, broken down by method of brief, gender and seniority;
- total value of professional fees, broken down by legal services provider;
- total value of professional fees under use of the Whole of Australian Government Legal Services Panel (WoAG Panel) flexibility mechanisms, broken down by 10% off-Panel allowance and where an Exemption from using the WoAG Panel has been granted by AGD (in relation to the duration of the entity's participation in the WoAG Panel during the financial year);[4] and
- total value of professional fees under use of the Provision of Tax Technical Legal Services Panel, and the ACCC/AER Competition and Consumer Law Panel 2019.

6. In the OLSC approved reporting template all entities may provide any additional commentary or analysis about the data provided. Commentary is required for the explanation of a significant change in expenditure from the previous financial year where:
    - total legal services expenditure increased by at least $2 million,
    - total legal services expenditure increased/decreased by at least $500,000 AND at least 5% of total expenditure, or
    - total legal services expenditure increased/decreased by at least 30% (excluding entities with total legal services expenditure under $850,000 and entities with no spend in the previous financial year).
7. No information will be drawn by OLSC from the WoAG Panel expenditure reports, submitted by legal services providers, for the purposes of completing the OLSC approved reporting template.
8. To complete the OLSC approved reporting template, no input cells should be left blank (including commentary if required), any affirmative checks confirmed and the final summary page displaying all information correctly. All figures reported must be **GST exclusive** and **rounded to the nearest dollar**.

Calculating reportable information

Internal legal services expenditure

9. Internal legal services expenditure is the total amount of expenditure within an entity on legal work undertaken by in-house lawyers. Such work can be undertaken either by a dedicated legal unit (for example, the Legal Services Branch in an entity), or by individual lawyers working within business lines.
10. If there is a dedicated legal unit within an entity, OLSC expects that the entire costs of that unit will be included in the entity's internal legal services expenditure. (See below for information about fully costing internal legal services.)

[2] In accordance with the Australian Government Guidelines on the Recognition of Sex and Gender, entities will report gender data in three categories: 'M', 'F' and 'X' (indeterminate/intersex/unspecified).
[3] Please note the terms 'junior barristers' and 'senior barristers' have different meanings to 'Junior Counsel' and 'Senior Counsel': see Equitable Briefing section.
[4] See Panel Guidance Material.

11. If an entity has legally qualified officers engaged in non-legal roles (for example, they are embedded with operational teams), the entity should determine whether the officer is allocated work because of their legal qualifications or skills, or the work is allocated regardless of legal qualifications or skills. If work is allocated due to legal qualifications and skills (or partially so) the cost of that officer (or a pro rata amount) is to be included in the total internal legal services expenditure for the entity.

12. OLSC requires entities to calculate the full cost of internal legal services. The full cost of an internal legal unit must include:

    - direct salary costs (administrative staff, paralegals, General Counsel etc). Costs should be calculated by reference to workplace agreements
    - indirect salary costs (superannuation, leave entitlements, other salary contributions)
    - direct overhead (costs of desks, computer, stationery)
    - indirect overhead (apportioned rent, electricity)
    - legal unit overhead (specialist software licences, cost of law library), and
    - learning and development overhead of officers – including training in legal and non-legal skills.

13. The methodology for calculating internal legal services is set out in the Australian National Audit Office Better Practice Guide *Legal Services Arrangements in Australian Government Agencies* (the ANAO Guide) of August 2006.

Direct and indirect overhead

14. Direct overhead costs should be captured within the legal unit cost centre. This should include costs such as:

    - organisational services costs, such as office consumables, travel and accommodation costs, postage, courier services, publishing and printing, management overheads, and taxi and car hire charges
    - average cost per employee for the provision of corporate IT
    - professional development, and
    - the average cost per employee workers' compensation premiums (using the actual premium paid by the entity).

15. Indirect overhead data may not be easily accessible within an entity's financial system. However, entities should interrogate their systems, with reference to cost centres and other means of recording/categorising expenditure, to calculate the cost of indirect overheads as accurately as possible. Indirect overheads include:

    - property operating expenses including apportioned rent/lease costs, related utility service charges, repairs and maintenance, and building security services, and
    - desktop information and communication technology services (operation and maintenance) costs, including desktop computer rental/lease costs (as opposed to purchase costs), standard bulk software user licence costs, standard help desk services, routine maintenance costs, and telecommunications costs.

Legal unit overhead

16. Legal unit overhead costs should be captured within the relevant legal unit cost centre. It is expected that this category will include costs such as:

    - staff training and development specific to the legal unit
    - developing/maintaining a law library, and any specialist software licences, and
    - software/database systems for knowledge and matter management purposes.

Number of government lawyers

17. This information is sought to understand the number of government lawyers working in Commonwealth entities. Accordingly, we seek information on the number of people, and not FTE or ASL figures.

18. Entities are to use the definition of a government lawyer adopted by the Australian Government Legal Service. In short, a government lawyer is a person who is admitted or is eligible to be admitted to the legal profession, is employed in a non-corporate Commonwealth entity or corporate Commonwealth entity, and provides legal services as a material part of their employment. The definition includes military or similar personnel even though their engagement is not strictly one of employment. However, the definition does not include secondees, contractors or labour-hire personnel, who are not employed by the entity.

19. Entities are asked to provide the number of government lawyers employed by the entity as at 30 June 2024, and to break down the number of government lawyers employed in the following classifications (or equivalent): (a) SES Bands 1-3; (b) Executive Level 2; (c) Executive Level 1; and (d) APS levels 1-6.

External legal services expenditure

20. External legal services expenditure is the expenditure associated with work undertaken by providers external to the entity. It has 3 constituents: disbursements; professional fees paid to legal services providers; and counsel fees.[5]

21. Expenditure should be reported using **accrual-based accounting**.[6] Accrual accounting brings items to account as they are earned or incurred (and not as cash received or paid) and includes them in financial statements in the related accounting period. Accrual accounting tracks your true financial position. Accordingly, entity reporting should include work undertaken (incurred) during the financial year, rather than work paid for during the financial year. Using accruals accounting is consistent with the general Commonwealth financial and accounting frameworks.

22. Engagements under the WoAG Panel are always considered legal services. Legal services may also be engaged outside of the WoAG Panel. Based on the definitions below, expenditure associated with each legal services engagement should be reported.

[5] In situations where entities have a fixed fee arrangement which covers professional fees and counsel fees, entities may find it difficult to disaggregate these expenses for the purposes of reporting. In those cases, OLSC will accept an entity's best estimate of the breakdown between professional fees and counsel.

[6] Accrual-based accounting is consistent with the external reporting standards set out in the *Charter of Budget Honesty Act 1998* (Cth). The Government Finance Statistic (GFS) reporting framework is an accrual financial measurement and reporting system designed to support economic analysis of the public sector.

Disbursements (excluding counsel)

23. Disbursements are costs incurred for goods and services that are neither professional fees nor counsel fees. For example, disbursements may include fees paid to expert witnesses, court fees, travel and accommodation costs and administrative fees such as binding and copying. Only report disbursements, not any counsel fees or professional fees.

24. OLSC appreciates there may be difficulties in determining the exact amount of disbursements, depending on how legal services providers invoice and how financial systems capture this information. We ask that details of disbursements be provided where possible, and where it would not require a significant diversion of resources from other tasks. Where appropriate, further details on disbursements can be provided in the commentary section of the OLSC approved reporting template.

Professional fees (for solicitors and similar)

25. Professional fees are the fees chargeable for work undertaken by external legal services providers for their professional services; that is, the work done by the provider lawyers. This includes work done by solicitors and similar service providers (not barristers – which is reported separately under counsel) and covers government legal services providers such as AGS, as well as engagements of legal services in secondment or labour hire type arrangements. Only report professional fees for solicitors or similar providers, not any counsel fees or disbursements.

26. Domestic external legal services providers conduct their business in Australia. Each domestic external legal services provider's professional fees should be entered separately in the OLSC approved reporting template. Either enter the expenditure against a provider that is listed, use the drop-down menu to select a provider, or manually type-in the provider's name (only if the provider is not listed or in the drop-down menu). Carefully check the name of a provider as a firm may have changed its name or merged.

27. For other government legal services providers, such as the Office of Parliamentary Counsel (OPC), only services that attract a charge should be recorded as a professional fee. This is because these services are provided on a contestable, user-pays basis.

28. Some entities incur professional fees by engaging external legal services providers overseas (that is, not domestic). OLSC does not require the name of each overseas legal services provider. Instead provide one consolidated value for these professional fees.

29. Entities should report the total amount of professional fees incurred in relation to the use of the WoAG Panel flexibility mechanisms, broken down by 10% off-Panel Allowance expenditure and Exemptions expenditure (in relation to the duration of the entity's participation in the WoAG Panel during the financial year), as well as total amount of professional fee expenditure under the 'Provision of Tax Technical Legal Services Panel' and the 'ACCC/AER Competition and Consumer Law Panel 2019'. This expenditure should also be included when reporting the professional fees for each legal services provider. In order to prevent double counting when calculating total legal expenditure for entities, the WoAG Panel flexibility mechanism expenditure as well as ATO and ACCC Panel expenditure will not be included in the total.

Counsel

30. The definition of Counsel includes barristers at the private bar or legal practitioners (in a jurisdiction like the Australian Capital Territory where the profession is fused) who are briefed as counsel to advise or appear in tribunal or court proceedings. AGS in-house counsel who may not be members of an independent State or Territory bar association are also included.

31. Counsel may be briefed either directly or indirectly. Direct briefing is when an entity briefs a barrister directly, rather than through a law firm.[7] Indirect briefing is when a legal services provider briefs a barrister. The OLSC approved reporting template seeks information on the value and number of both direct and indirect briefing of counsel (broken down by gender and seniority for the purposes of gender equitable briefing).

32. Include details only for the current reporting period:

    - **Number of briefs** – If counsel was newly briefed on a matter in the current reporting period, that brief should be included in the number of briefs (do not include briefs from previous reporting periods as they will have already been counted). Count each brief separately (for example, if one counsel is direct-briefed 6 times, the number of briefs is 6). A brief to the same counsel in an appeal is to be counted as a new brief.

    - **Value of briefs** – If counsel undertook work during the current reporting period, report any expenditure (counsel may have been newly briefed in this or in a previous reporting period). Only report counsel fees, not any professional fees or disbursements.[8] Counsel must have an approved Commonwealth rate in order to be briefed for Commonwealth work.

33. The Solicitor-General is not included when counting counsel for legal expenditure reporting purposes.[9]

Equitable Briefing

Target

34. As of 1 July 2018, the Directions include Commonwealth targets for briefing female barristers. This supports the objectives of the Law Council of Australia's Equitable Briefing Policy (Law Council Policy). The targets are a means of encouraging consideration being given to briefing practices, with a view to increasing female participation at the bar.

35. Subparagraph 4D(d) of Appendix D of the Directions requires Commonwealth entities to use all reasonable endeavours to select female barristers with relevant seniority, expertise and experience in the relevant practice area, with a view to increasing briefing rates so that:

    - senior female barristers account for at least 25% of all briefs, or 25% of the value of all brief fees paid to senior barristers; and

    - junior female barristers accounting for at least 30% of all briefs, or 30% of the value of all brief fees paid to junior barristers.

36. The inclusion of these targets reflect the Government's strong commitment to increasing the briefing rates for female barristers. The Government strongly supports the career progression and retention of female barristers for Commonwealth legal work and seeks to ensure a more equitable, diverse and inclusive legal profession in Australia.

37. OLSC notes that some entities have already formally adopted the Law Council Policy. This is open to individual Commonwealth entities. Where an entity adopts the Law

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[7] Note the restriction on in-house lawyers acting as solicitor on the record (paragraph 5 of the Directions).

[8] In situations where entities have a fixed fee arrangement which covers professional fees and counsel fees, entities may find it difficult to disaggregate these expenses for the purposes of reporting. In those cases, OLSC will accept an entity's best estimate of the breakdown between professional fees and counsel.

[9] Refer to Guidance Note 11 for further information.

Counsel Policy, the entity will also have separate reporting obligations to the Law Council of Australia.

Determining counsel seniority

38. The OLSC approved reporting template asks Commonwealth entities to provide information about their gender equitable briefing practices for the relevant financial year. Information on the number and value of briefs to counsel is requested.

39. For the purposes of reporting on gender equitable briefing only, the definitions of senior barrister and junior barrister are as follows:

    - A senior barrister includes:

        - a barrister of 10 or more years standing at the private bar
        - counsel who has 10 or more years' experience in being briefed as a barrister to advise or appear,[10] or
        - a barrister who is King's Counsel or Senior Counsel.

    - A junior barrister means all other barristers or counsel.

40. For the purposes of reporting on gender equitable briefing when categorising a barrister as having 10 or more years' experience, an entity is not required to determine the date a barrister signed the Bar Roll. Counsel in their tenth anniversary year (for 2023-24 this includes those called to the bar in 2014) may be recorded as 'senior' (whether or not the event occurred before or after 30 June 2024). This is intended to simplify reporting for entities.

Machinery of Government Changes

41. Entities should report consistently with the Department of Finance's Resource Management Guide *Reporting requirements following machinery of government changes* (RMG 119).

42. In preparing the legal services expenditure report for a function/activity/program subject to a Machinery of Government change:

    - the gaining entity (the entity nominated by the Minister for Finance, or the new entity if no entity is nominated) should report in relation to the transferred function/activity/program for the full reporting period (including that part of the reporting period prior to the transfer of functions);

    - if an entity ceases to exist and the entity's functions/activities/programs are not transferred to one or more other entities, the entity nominated by the Minister for Finance should report for the old entity on the function/activity/program for that part of the reporting period prior to the function/activity/program ceasing.

[10] This will include an AGS lawyer/counsel or other counsel (in jurisdictions with a 'fused profession') who may also be briefed to appear or advise as counsel.

Publication of Legal Services Expenditure Report

43. OLSC publishes an annual report of Commonwealth legal services expenditure on the Attorney-General's Department website.

44. This report includes information about the following:

    - total legal services
    - total external legal services
    - total internal legal services
    - professional fees for external legal services providers
    - total number of counsel briefs
    - total value of counsel briefs, broken down by direct/indirect, gender and seniority
    - total disbursements, and
    - whether entities have met the targets set out in subparagraph 4D(d) of Appendix D of the Directions.

Frequently asked questions

General questions		
1.	Does 'legal services expenditure' include briefs for court appearances and legal advice?	Yes. Legal services expenditure includes costs related to appearance in litigation in courts and tribunals, obtaining legal advice, and costs of counsel and disbursement costs, and the costs attributed to in-house lawyers.
2.	Do professional fees include counsel fees and/or other disbursements?	No. 'Professional fees' is used as a short hand reference for the professional fees of solicitors and similar providers.
3.	Should I report fees incurred by an entity for external lawyers who are outside Australia?	Yes, refer to the Professional fees section.
4.	Should an award of costs to an entity be deducted from an entity's legal expenditure, and should costs ordered against an entity be added to an entity's legal expenditure?	No.
5.	Should an entity report expenditure where another body has paid the legal fees (otherwise than through the payment of costs awarded or agreed to in a dispute)?	No.
Reporting Figures – Counsel		
6.	When counting counsel, is the Solicitor-General included?	No.
7.	Are individual entities able to adopt the Law Council of Australia's Equitable Briefing Policy?	Yes, entities that adopt the Policy will also have separate reporting obligations to the Law Council of Australia.
8.	Is the definition used for determining junior counsel and senior counsel the same as the Law Council's Equitable Briefing Policy?	Yes, see determining counsel seniority in the Equitable Briefing section.
Submitting the Report		
9.	In what form should the reports be sent?	The reports must be completed using the OLSC approved reporting template and submitted to LSER@ag.gov.au in excel format. Please do not change the file format of the report for submission (e.g. do not PDF the report).
10.	When is the report due?	The report is due within 60 days after the end of the financial year. This is usually by 29 August, but if 29 August falls on a weekend, the report is due the next business day.

11.	What are the consequences of failing to report to OLSC in time?	A breach of the Directions may be recorded against entities that fail to report 60 days after the end of the financial year. The Attorney-General retains a discretion to impose sanctions for breaches.
12.	Can I apply for an extension?	Yes, contact OLSC at LSER@ag.gov.au to request an extension from the LSER and/or for publishing, detailing reasons for the delay and date the information will be provided. If an extension is granted prior to the reporting date, no breach will be recorded.

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Telephone: (02) 6141 3642
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Re-issued: June 2024

GUIDANCE NOTE 9

Appointment to receive service under section 63 of the *Judiciary Act 1903* (Cth)

What does 'receive service' mean and how does an appointment under section 63 of the Judiciary Act work?

1. When a court proceeding is initiated, the court rules in each jurisdiction require that the originating documents are to be served on the responding party. Court rules may also require service of certain other documents through the course of proceedings. Receiving service is the formal acknowledgement of the receipt of those documents by the responding party.

2. Section 63 of the *Judiciary Act 1903* (Cth) provides that where the Commonwealth is named as a party to a suit, any documents in the proceeding required to be served are to be served on the Commonwealth Attorney-General, or upon a person appointed by the Attorney to receive service.

3. To ensure that complex applications are directed to the most appropriate Commonwealth agency (and considered swiftly by the appropriate person within that agency); there are restrictions on who may receive service on behalf of the Commonwealth.

4. The Attorney-General's appointment of persons under s 63 of the Judiciary Act has the effect that the appointed person is authorised to receive service of documents on behalf of the Commonwealth. Most often they will be the originating documents in a matter, such as the Claim or Application, but depending on the court rules in each jurisdiction, can include interlocutory applications, submissions and affidavits.

5. Service on "the Commonwealth" as a party to a suit should be distinguished from service on a specifically named "Department" or "Minister". The Commonwealth may become involved in proceedings where a Department or Minister has also been named as a respondent to the proceeding, or a Department or Minister may be the subject of a subpoena, or an order for third party discovery.

Consequences of receiving service on behalf of the Commonwealth

6. The consequences of effective service under s 63 are:

   - the relevant court deadlines immediately start to run
   - there is an immediate need to identify the appropriate Commonwealth agency to take any relevant action on behalf of the Commonwealth, and
   - there may be an immediate need to take measures to protect the Commonwealth's interests in the litigation.

7. People taking action against the Commonwealth may not be represented by lawyers, and also may not be aware of the technicalities of service of process. In these circumstances, the Commonwealth should rarely take issue with service where it has not been effected within the rules of court and the Judiciary Act, provided that the relevant part of the Commonwealth has been made aware of the proceedings in sufficient time to protect its interests.

8. When service of documents is effected on someone appointed by the Attorney-General under s 63, and it is not clear which agency the documents should be directed to, the person who has received service should immediately contact OLSC. OLSC will then determine which agency, on behalf of the Commonwealth, is to take responsibility for the matter in line with the Guidelines on Litigation involving the Commonwealth, as issued by the Attorney-General.

Relevant Considerations in appointments under s 63

9. Law firms and individual private sector lawyers providing legal services to the Commonwealth or its agencies may apply to OLSC to be appointed by the Attorney-General under s 63 of the Judiciary Act.

10. In determining whether to appoint a firm, and lawyers within a firm, to receive service on behalf of the Commonwealth, the Attorney-General will consider (although this is not an exhaustive list) the following:

    - Whether the firm and lawyer seeking appointment have sufficient professional experience, and whether individual lawyers are appropriately senior (the equivalent of SES / Senior Associate / Partner).
    - Whether the firm and lawyer seeking appointment have experience in handling Commonwealth claims and litigation, and are ordinarily able to identify the relevant Commonwealth agency to manage the matter, and
    - Whether the firm and lawyer have the administrative resources to ensure that notice is given to the correct responding party properly and efficiently, as soon as possible after receipt of service.

11. Paragraph 12A.1 of the *Legal Services Directions 2017* (the Directions) requires persons appointed to receive service to provide a standard Notice to the relevant Commonwealth agency confirming receipt of service and forwarding the process documents. The Notice should include words to the following effect:

    *Although **[Name of Law Firm]** has accepted service of these documents, you are not required to instruct **[Name of Law Firm]** to act in this matter. Now that service has been effected on the Commonwealth, it is open for you to instruct the law firm of your choice (which may include **[Name of Law Firm]**) to handle the matter.*

How can my firm or I apply to be appointed under s 63?

12. Requests for appointment should be made to the Attorney-General, via OLSC, in the first instance.

13. The application should:

    - provide the curricula vitae of the lawyers nominated for appointment, detailing their professional experience and experience in handling Commonwealth claims and litigation
    - address the capacity of other staff with the firm (such as mailroom attendants and receptionists) to deal with service of documents correctly and promptly, and
    - describe the processes and procedures to be put in place to ensure that service is dealt with properly, swiftly and efficiently.

14. The above list is not an exhaustive list, and OLSC may request further information in relation to the application to assist in the decision-making process.

15. The decision to appoint an applicant under s 63 has not been delegated by the Attorney-General.

Locations to effect service of court documents on the Commonwealth

16. The AGD website provides a list of locations to effect service on the Commonwealth in each capital city.

Reporting requirements under the Directions

17. Within 60 days after the end of each financial year, accountable authorities of non-corporate Commonwealth entities and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014, must provide to OLSC a Certificate of Compliance which outlines, amongst other things, the entity's use of persons appointed under s 63 of the Judiciary Act to receive service in proceedings to which the Commonwealth is a party (subparagraph 11.2(ba)). Similarly, subparagraph 12.3(f) of the Directions extends this aspect of the compliance reporting to most corporate Commonwealth entities.

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GUIDANCE NOTE 10

Advice on constitutional law matters (paragraph 10A of the *Legal Services Directions 2017*)

1. Paragraph 10A of the *Legal Services Directions 2017* (the Directions) requires non-corporate Commonwealth entities to provide a copy of a request for legal advice on a constitutional law issue to the Secretary of the Attorney-General's Department (AGD). It also requires the Australian Government Solicitor (AGS) to give a copy of any final advice it gives on a constitutional law issue to AGD and to the Solicitor-General. This Guidance Note gives further details in relation to these requirements.
2. The Attorney-General and AGD are responsible for constitutional law under the Administrative Arrangements Order. Paragraph 10A is intended to ensure that AGD is aware of requests for advice, and advice, about constitutional law issues. This will enable AGD to better coordinate requests for advice across entities where appropriate, avoid unnecessary duplication and ensure the Attorney-General and AGD have up-to-date information about advice on constitutional law issues. It will also ensure that the Solicitor-General is appropriately involved.
3. A copy of the written request for advice or written confirmation of an oral request is to be sent to the Secretary of AGD by forwarding it to the following e-mail address: AGD.conrequests@ag.gov.au at the same time as the request or written confirmation is sent to AGS. Any final advice on a constitutional issue is to be copied by AGS to AGD and the Solicitor-General by forwarding it to the following e-mail address: AGD.conadvice@ag.gov.au at the same time as the final advice is given.
4. Where an entity becomes aware that a matter involves a constitutional law issue after advice has been requested, that should be brought to the attention of the Secretary of AGD as soon as possible.
5. Paragraph 10A.2 provides that AGD or AGS may consult with the Solicitor-General about whether the advice should be given by the Solicitor-General or AGS. The Secretary of AGD may require advice to be provided by the Solicitor-General rather than AGS. Generally, only very complex or otherwise significant requests for advice would be dealt with by the Solicitor-General.
6. Any action by AGD in relation to a request for advice, including redirection of the advice to the Solicitor-General, will be undertaken as quickly as possible. These requirements are not expected to result in any delays in the provision of advice on constitutional law issues.
7. The requirements in paragraph 10A reflect existing tied work arrangements and therefore do not affect legal professional privilege in relation to either requests for advice or advice (see also section 55ZH, *Judiciary Act 1903*).

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GUIDANCE NOTE 11

Briefing the Solicitor-General

1. This Guidance Note sets out the manner in which the Solicitor-General is to be briefed in order to perform the functions of his or her office.

2. This Guidance Note applies to those persons and bodies listed in s 12(a) of the *Law Officers Act 1964* (the **Act**), being:
   - the Crown in right of the Commonwealth;
   - the Commonwealth;
   - a person suing or being sued on behalf of the Commonwealth;
   - a Minister;
   - an officer of the Commonwealth;
   - a person holding office under an Act or a law of a Territory;
   - a body established by an Act or a law of a Territory; and
   - any other person or body for whom the Attorney-General requests the Solicitor-General to act.

Functions of the Solicitor-General

3. The Solicitor-General's functions, as Second Law Officer, are found in s 12 of the Act. These functions include acting as counsel for the persons and bodies listed in paragraph 2 above (s 12(a)) and furnishing opinions on questions of law (s 12(b)).

Requests to brief the Solicitor-General in court matters: s 12(a)

High Court proceedings

4. The solicitors representing a person or body referred to in paragraph 2 above must provide the Solicitor-General with a request to be briefed to appear in every civil matter where the person or body:
   - is a party to, or intervener in, an appeal before the High Court;
   - is a party to, or intervener in, a proceeding within the original jurisdiction of the High Court, other than:
     - proceedings of a kind that are routinely remitted; or
     - proceedings that appear likely to be disposed of by a single Justice (noting that, if circumstances change and the matter is referred to a Full Court, the Solicitor-General must receive a request to be briefed to appear).

Significant legal proceedings

5. In addition, the solicitors representing a person or body referred to in paragraph 2 above must provide the Solicitor-General with a request to be briefed to appear in every civil matter that raises novel or difficult points of legal principle of very high precedential or other importance to the Commonwealth, including matters that:
    - relate to the implementation of Government policy or decisions of the highest importance;
    - raise legal issues resulting in conflict between agencies; and/or
    - have significant financial implications or other very important whole-of-Government implications.

Applications for special leave

6. The following steps should be taken by the solicitors representing a person or body referred to in paragraph 2 above who is contemplating seeking special leave to appeal to the High Court:
    - *first*, the solicitors must notify the Solicitor-General, as soon as possible, that the person or body is contemplating seeking special leave. This should generally occur within a few days of the judgment sought to be appealed being handed down;
    - *secondly*, following notification of the contemplated special leave application, the solicitors must provide the Solicitor-General with a copy of the judgment under appeal and, as soon as practicable thereafter, the advice of junior or senior counsel briefed in the matter on the prospects of special leave being granted and the prospects of success on appeal; and
    - *thirdly*, if, having received counsel's advice, the person or body intends to make a special leave application, the solicitors must provide the Solicitor-General with a draft special leave application prepared by counsel and a request to be briefed.

7. When the Solicitor-General is provided with a draft special leave application, he or she will form an independent view in relation to whether the application should be made. However, in appropriate cases the Solicitor-General may advise, prior to receiving a copy of the draft special leave application, that a special leave application should not be made.

8. Where a person or body referred to in paragraph 2 above is the respondent to a special leave application, it will be sufficient for the solicitors representing the person or body to notify the Solicitor-General, and to provide a request to be briefed, in:
    - all cases of the kind referred to in paragraph 5 above (significant legal proceedings), which should be brought to the Solicitor-General's attention as soon as possible after the special leave application is served on the person or body;
    - any special leave application which is to receive an oral hearing; and
    - any matter where special leave is granted without an oral hearing (which, on the grant of special leave, becomes a matter falling within paragraph 4 above).

Requests to brief the Solicitor-General for opinion on questions of law: s 12(b)

9. In accordance with s 12(b) of the Act, the functions of the Solicitor-General include furnishing his or her opinion on questions of law referred to the Solicitor-General by the Attorney-General.

10. Requests for such an opinion should be reserved for the most significant questions of law, including circumstances where the matter in issue:

    - raises novel, difficult or important points of legal principle;
    - relates to the implementation of Government policy or decisions of high importance;
    - is likely to become the subject of a constitutional challenge, or of a challenge in the High Court;
    - concerns draft legislation that was the subject of previous advice from the Solicitor-General, if the draft legislation has been materially amended since the provision of that previous advice;
    - raises legal issues resulting in conflict between agencies; and/or
    - has significant financial implications or other very important whole-of-Government implications.

11. Any person or body listed in paragraph 2 above who wishes to seek the opinion of the Solicitor-General on a question of law should, in the first instance, email Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au), copying the Attorney-General's office (attorney@ag.gov.au) and the Office of Legal Services Coordination (olsc@ag.gov.au), indicating:

    - the proposed question or questions of law on which the Solicitor-General's opinion is sought; and
    - the date by which the opinion is required, together with the reason any such date has been selected.

    Note: To the extent that the request includes copies of, or otherwise reveals the content of, advice to a former Government, this material should be sent under cover of a separate email and not be included in the email copied to the Attorney-General's office.

12. Following such an approach, Counsel Assisting will discuss whether the Solicitor-General is available to provide an opinion, the form of the proposed question or questions, and the material with which the Solicitor-General should be briefed if he or she agrees to provide the opinion requested.

13. Following such consideration, Counsel Assisting will provide the proposed questions to the Attorney-General's office and seek the Attorney-General's consent to the referral or will direct the person or body requesting the opinion and consent to do so through the Office of Legal Services Coordination.

14. The Solicitor-General will provide a copy of written opinions to the Attorney-General.

Process for briefing the Solicitor-General

15. Any request to brief the Solicitor-General to appear as counsel or to provide an opinion on a question of law should be made as early as possible.

16. All briefing requests must:

    - provide an overview of the factual and legal background to the matter;
    - set out clearly the key issues in dispute or the legal question or questions that need to be answered, and the reasons why the matter is considered to warrant the involvement of the Solicitor-General;
    - set out the key dates in the matter; and
    - attach any documents which will allow the Solicitor-General to form an opinion on whether he or she should accept a brief (including existing advice, pleadings, cases and correspondence).

17. Briefing requests should be made by email to Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au), copied to the Attorney-General's Office (attorney@ag.gov.au).

    Note: To the extent that the request includes copies of, or otherwise reveals the content of, advice to a former Government, this material should be sent under cover of a separate email and not be included in the email copied to the Attorney-General's office.

18. The Solicitor-General may agree to a briefing request on the condition that he or she is briefed with one or more other counsel.

19. If the Solicitor-General accepts a request to be briefed, he or she must be briefed to the standard that would be required by any senior counsel. Unless the Solicitor-General has otherwise agreed, briefs to the Solicitor-General must be prepared by the Australian Government Solicitor or an external legal services provider.

20. Every brief must at a minimum:

    - provide an analysis of the main issues in the matter;
    - summarise and include copies of any previous legal advice (including previous Solicitor-General advice);
    - include copies of relevant legislation, cases or journal articles; and
    - provide any other relevant information.

21. All briefs should be provided electronically. Generally, only core documents should be provided in hard copy. Authorities should not be provided in hard copy. Two copies of the hard copy component of a brief should be provided: one to the Solicitor-General in his Melbourne chambers, and one to Counsel-Assisting the Solicitor-General in the Solicitor-General's Canberra chambers.

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Solicitor-General's Chambers
Robert Garran Offices
3–5 National Circuit
Barton ACT 2600

Melbourne
Solicitor-General's Chambers
c/- Level 34
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Melbourne Vic 3000

22. Any questions about the content of a briefing request or a brief should be directed to Counsel Assisting the Solicitor-General by email to S-G_Briefing@ag.gov.au or by phone on (02) 6141 4118.

Fee on brief

23. The Solicitor-General's services are budget-funded. Persons or bodies are not billed for the Solicitor-General's work. Should counsel from the private bar or the Australian Government Solicitor be briefed jointly with the Solicitor-General, the engagement will be subject to the usual arrangements for engagement of counsel as set out in Appendix D to the *Legal Services Directions 2017*.

24. In the event that a costs order is made in favour of a person or body referred to in paragraph 2 above, the solicitors for the person or body must consult Counsel Assisting the Solicitor-General about the amount of time the Solicitor-General has spent on the matter. For the purpose of calculating costs in favour of the person or body, the daily rate for the Solicitor-General is $5,000 (including GST). The hourly rate is calculated at one-sixth of the daily rate (including GST).

Confidentiality of Solicitor-General opinions

25. Opinions of a Solicitor-General are confidential to the Australian Government. The Office of Legal Services Coordination and the Solicitor-General's chambers must be consulted before any opinion of the Solicitor-General, or a former Solicitor-General, is provided to a person or body outside the Australian Government (including external counsel and solicitors retained by the Commonwealth).

26. A request to share an opinion of the Solicitor-General or a former Solicitor-General should be made by email to Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au) and the Office of Legal Services Coordination (olsc@ag.gov.au). The request should clearly indicate:

    - the name of the person(s) or body(ies) with whom the opinion is proposed to be shared;
    - the reasons why the opinion should be shared;
    - any conditions to the proposed sharing of the opinion; and
    - confirmation that consent has been received from the client(s) to whom the opinion was furnished.

27. In considering a request made under paragraph 26 above, the Office of Legal Services Coordination may seek the views of any other relevant Commonwealth entity including, for example, the entity which has administrative responsibility for the relevant area of law.

28. If the Solicitor-General or the Office of Legal Services Coordination identifies that a request made under paragraph 26 above raises particular sensitivities (which generally will not be the case with a request to share an opinion with external counsel briefed to advise or appear with the Solicitor-General), the decision on whether it should be so shared will be referred to the Attorney-General. Sensitivities may arise from, amongst other things, the nature of the advice, the identity of the client(s) to whom the opinion was furnished and/or the identity of the person(s) or body(ies) with whom the opinion is proposed to be shared.

29. Any approval to share an opinion is subject to such conditions as may be imposed by the Solicitor-General, the Office of Legal Services Coordination and/or the Attorney-General, and is limited to the person(s) and/or body(ies) named in the approval as an authorised recipient.

Significant Issues Reports

30. The requirement in paragraph 3 of the *Legal Services Directions 2017* to report on significant issues is not satisfied by a request to brief the Solicitor-General. In all matters in which the Solicitor-General has been briefed, the briefing agency must report to the Office of Legal Services Coordination if the matters raise a significant issue for the purpose of paragraph 3. Guidance on significant issues is contained in Guidance Note 7—Reporting on Significant Issues.

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GUIDANCE NOTE NO 12

Use of Alternative Dispute Resolution (ADR)

Key Points

1. **Always consider alternatives to litigation:** steps to resolve disputes, including using ADR processes, should be taken as early as possible and both before and throughout any court or tribunal proceedings

2. **Proactively manage disputes:** effective use of ADR includes seeking independent legal advice early on, to identify when decisions should be elevated to senior levels, what issues and potential settlement terms could be discussed in ADR and when pre-approval of possible settlement terms should be sought

3. Build an evidence base about how disputes are managed and resolved: this will help inform consistent adoption of best practice

What is ADR?

4. Alternative Dispute Resolution or ADR is an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also mean *assisted* or *appropriate* dispute resolution. The main types of ADR are mediation, conciliation and arbitration.

ADR and Commonwealth Agencies

5. The use of ADR by Commonwealth agencies has been strongly encouraged by successive Governments and is consistent with:
   - the *Strategic Framework for Access to Justice*, which encourages a broad understanding of Australia's justice system and focuses on disputes being resolved early and at the most appropriate level, and
   - the strong encouragement for agencies to adopt a strategic approach to dispute management, such as by reviewing existing or developing new dispute management strategies or plans.

6. The Commonwealth Attorney-General has policy responsibility for ADR, which falls under the broader policy focus on access to justice.

Legal Services Directions

7. Paragraph 4.2 of the *Legal Services Directions 2017* (the Directions) requires Commonwealth agencies to act in accordance with the Commonwealth's obligation to act as a model litigant at Appendix B (the Model Litigant Obligation). The obligation relates to the handling of claims and the conduct of litigation.

8. The Directions (including the Model Litigant Obligation) were amended in 2008 to emphasise the value of using ADR to resolve disputes where appropriate. Appendix B sets out the requirement for agencies to consider using ADR to resolve their disputes, as an alternative or in addition to legal proceedings.

9. The Model Litigant Obligation specifically requires agencies to:

   - not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (Paragraph 4.2) after considering other methods of dispute resolution (Appendix B, Paragraph 5.1). This obligation requires agencies to actively consider the most appropriate process for resolving a particular dispute, which may include ADR processes.
   - try to avoid, prevent and limit the scope of legal proceedings wherever possible, including consideration of and participation in ADR before commencing legal proceedings and participating in ADR where appropriate (Appendix B, Paragraph 2(d)).
   - monitor the progress of litigation and use appropriate methods to resolve the litigation, including settlement offers, payments into court or ADR (Appendix B, Paragraph 2(e)(iii)).
   - ensure that representatives of the Commonwealth and Commonwealth agencies participate fully and effectively in ADR and have authority to settle the dispute (Appendix B, Paragraph 5.2).

Obligations under the Civil Dispute Resolution Act 2011

10. Early consideration of dispute resolution options by Commonwealth agencies, including use of ADR, is consistent with the objective of the *Civil Dispute Resolution Act 2011*. The Act, which commenced on 1 August 2011, encourages parties to take genuine steps to resolve disputes before commencing certain proceedings in the Federal Court of Australia and the Federal Magistrates Court of Australia.

11. The Civil Dispute Resolution Act requires agencies to file a 'genuine steps' statement indicating what steps (if any) they have taken to resolve a dispute before commencing legal proceedings. What action constitutes a 'genuine step' is up to the parties to determine within the context of their particular dispute and could include participating in an ADR process. The Act allows the Court to take this into account when exercising its discretion to award costs, as well as impose other consequences (for example, through case management) for agencies who do not comply with their obligations.[1]

12. More information about the Civil Dispute Resolution Act is available on the Attorney-General's Department's website.

The benefits of ADR

13. Using ADR to resolve disputes may assist Commonwealth agencies to:

   - tailor the process to suit the needs of the agency and the other disputants, including addressing concerns about privacy and confidentiality and accommodating special needs.
   - provide the opportunity for direct communication between the agency and the other disputants.

[1] The Civil Dispute Resolution Act allows the Court, when exercising its powers and performing its functions, to consider whether:

- a genuine steps statement was filed, and
- genuine steps were taken.

The Federal Court decision of *Superior IP International Pty Limited v Ahearn Fox Patent and Trade Marks Attorneys* [2012] FCA 282 indicates that courts are prepared to impose consequences for parties who do not comply with their obligations under the Act.

- create an environment that may be less formal and more relaxed.
- foster better relationships between the agency and the other disputants (particularly where the emphasis is on joint problem solving and communication rather than a more narrow focus on investigation and advice).
- narrow the issues in dispute.
- enhance the reputation of government generally and the agency, including the Commonwealth Government's reputation as a model litigant.
- allow the consideration of a wider range of remedies, including both legal and non-legal remedies.
- resolve the dispute at a comparatively lower cost than legal proceedings.

What should Commonwealth agencies consider when entering into and undertaking ADR?

Considerations under the Legal Services Directions

14. A starting point for Commonwealth agencies deciding whether to use ADR to resolve a dispute is that the Directions require agencies to:
    - not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute (Paragraph 4.2), and
    - consider other methods of dispute resolution (Appendix B, Paragraph 5.1).

15. Other considerations stemming from the Directions include:
    - **Reporting of significant issues:** A non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the *Financial Management and Accountability Act 1997*) on 30 June 2014 are required to report to OLSC any significant issues that arise in the provision of legal services (Paragraph 3.1).
    - **Settling disputes generally:** When a non-corporate Commonwealth entity (or a corporate Commonwealth entity (other than a government business enterprise) under paragraph 12A) settles a dispute, an entity is only to agree that the terms are confidential and cannot be disclosed where this is necessary to protect the Commonwealth's interests (Paragraph 4.5).
        - If confidentiality is required, entities must inform the other parties to the settlement that disclosure of the terms may still be required by law, such as to Parliament or a Parliamentary Committee (Paragraph 4.5A).
    - **Settling monetary claims:** Non-corporate Commonwealth entities (or corporate Commonwealth entities (other than a government business enterprise) under paragraph 12A) considering settling monetary claims must do so in accordance with legal principle and practice (Appendix C, Paragraph 2).
        - This requires, before a monetary settlement can be reached, the establishment of the existence of at least a meaningful prospect of liability (Appendix C, Paragraph 2).
        - Entities cannot enter a monetary settlement merely due to the costs of defending a clearly spurious claim (Appendix C, Paragraph 2).
        - Entities may only enter into monetary settlements over $100,000 if they have received written advice from AGS (or an external legal adviser) that the

settlement accords with legal principle and practice and the accountable authority, or the accountable authority's delegate, agrees with the settlement terms (Appendix C, Paragraph 4).[2]

- **Engagement of counsel:** The rules surrounding engagement of counsel apply to counsel representing an agency in an ADR process (see Appendix D).
    - These rules do not apply to counsel who are engaged to act in the capacity of an ADR practitioner – eg:, counsel who are acting as a mediator or arbitrator.

Caretaker Convention

16. OLSC has prepared Guidance Note No. 6 *Dispute Resolution during the caretaker period* to advise agencies on the considerations as to whether they should continue ADR processes during a caretaker government.

General Considerations

17. When deciding whether ADR is appropriate, Commonwealth agencies should consider obtaining early independent legal advice on whether there is a legitimate basis to settle a matter and, if so, what range of possible settlement terms exists. For matters to which Appendix C of the Directions apply,[3] such advice would address:
    - whether at least a meaningful prospect of liability could be established (i.e. that there is at least an arguable case that the Commonwealth would be found to be liable)
    - that any proposed settlement would be in accordance with legal principle and practice.

18. Agencies should note that:
    - advice from counsel can be especially helpful for larger or more contentious matters.
    - not all facts or evidence may need to be finalised in order for an agency to obtain advice that a meaningful prospect of liability exists, and that any proposed settlement is is in accordance with legal principle and practice.
    - the legal advice should identify what, if any, further information is needed to formulate a reasonable range of possible settlement terms.
    - the legal advice should be used to weigh the foreseeable costs and benefits in pursuing the matter through the court process as opposed to reaching an early settlement within an appropriate range.
    - the legal advice may assist agencies in determining whether the decision to seek settlement, engage in ADR, or proceed to litigation, should be elevated to senior levels at an early stage of the dispute.

19. Additionally, agencies could consider whether the subject matter of the dispute and its context are appropriate for ADR (such as who the other parties are, how the dispute arose etc). It is important that agencies consider the views of the other parties involved, including on the matters outlined below, when deciding whether to undertake ADR.

20. Some general matters agencies should consider include:

[2] The threshold value for a major claim at Appendix C of the Direction was raised from $25,000 to $100,000 as of 1 July 2018.
[3] That is, monetary claims

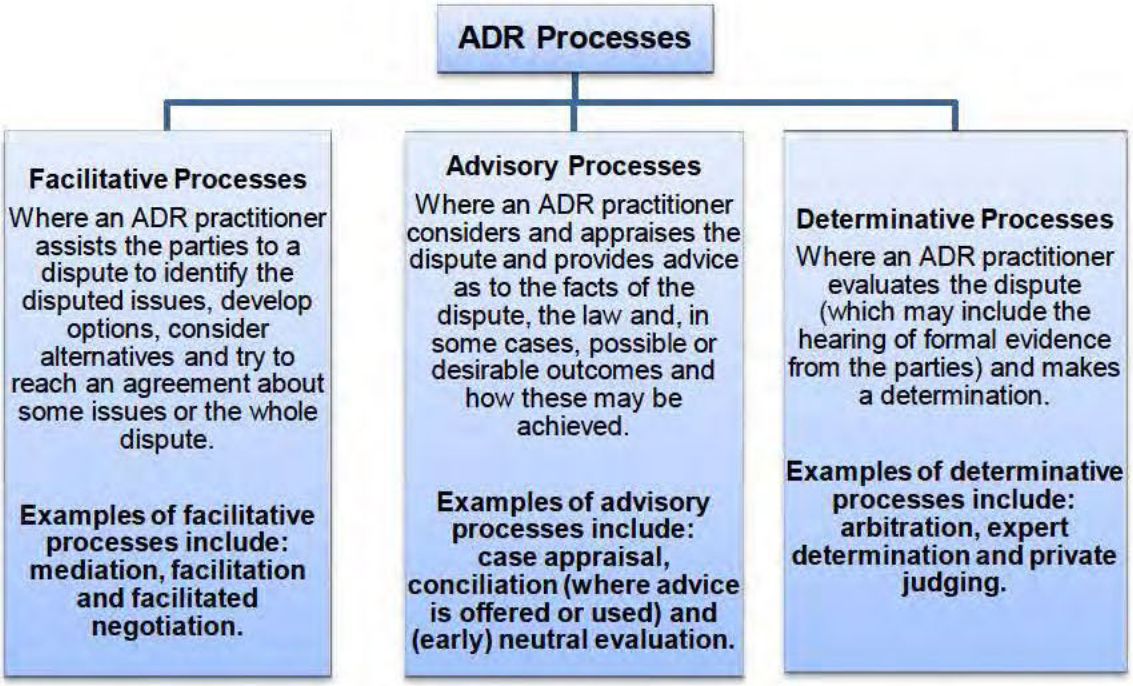
- the nature of the dispute – is the dispute about a matter that could be resolved by ADR or is a judicial decision needed?
- the sensitivity of the dispute.
- what issues to take to ADR. Agencies could discuss with their legal areas whether the whole dispute could be considered in an ADR process or only some issues.
- what settlement terms might be discussed in the ADR process. Agencies could discuss possible terms of agreement with their legal areas and also consider seeking pre-approval at the appropriate level for these terms, to enable a final agreement to be reached if ADR is successful.
- who the other parties involved in the dispute are and the importance and type of relationship the agency wants to have with them.
- the capacity of the other parties to participate effectively in ADR. For example:
    - Are the other parties from a non-English speaking background?
    - Are there other cultural factors that may play a role in an ADR process?
    - Is the dispute a highly complex matter (such as very technical or legal)?
- whether the other parties involved are willing to commit to an ADR process and any outcome it achieves.
- what level of control the agency and the other parties want over the process.

Choosing an ADR process

21. ADR processes can vary greatly in terms of:
    - the responsibilities of the parties
    - the responsibilities and qualifications of the ADR practitioner, and
    - the possible outcomes.

22. Commonwealth agencies may find it beneficial to consider the different categories of ADR in deciding which ADR process would work best for their dispute:
    - facilitative,
    - advisory or
    - determinative.

23. The views of the other parties involved should also be considered.



24. For more information about the different categories of ADR and the various ADR processes within each category, see Appendix A to NADRAC's *A Framework for ADR Standards*.

Choosing an ADR provider or practitioner

25. Generally, in choosing an ADR provider or practitioner Commonwealth agencies should consider:
    - the type of ADR process they and the other parties have agreed to use.
    - whether there are any guidelines within the agency about choosing ADR practitioners, for example in an agency's dispute management plan.
    - whether there is any particular knowledge or skills the ADR practitioner will need.

Rules for engagement of counsel under the Legal Services Directions

26. The rules surrounding engagement of counsel (see Appendix D) do not apply to:
    - ADR practitioners, and
    - counsel who are engaged to act as an ADR practitioner.

Mediators

27. Agencies are strongly encouraged to use mediators who are accredited under the National Mediator Accreditation System (NMAS). Mediators accredited under NMAS will:
    - comply with the NMAS Approval Standards and the Practice Standards and any relevant legislation
    - have appropriate competence, in terms of their qualifications, training and experience
    - be insured

- be of good character, and
- have a process for receiving your feedback or complaint.

28. Information about finding an NMAS-accredited mediator is available on the Mediator Standards Board website.

29. The Law Council of Australia has prepared guidelines for parties and lawyers using mediation.

Resources to find ADR practitioners

30. The Australian Government Access to Justice website may assist agencies looking for an ADR practitioner.

31. Peak ADR membership bodies may also be able to assist agencies to find an ADR practitioner:
    - Australian Mediation Register
    - LEADR & IAMA

32. Many State and Territory law societies and bar associations also maintain lists of their members who offer ADR services in addition to legal services.

Keeping track of how things are going

33. Commonwealth agencies are encouraged to build an evidence base about how disputes are managed and resolved. This could assist to highlight the extent to which better dispute management practices save time and money and lead to more consistent adoption of best practice. The proper use of Dispute Management Plans can also assist individual agencies to develop a better information base.

Further Information

34. For further information about ADR and its impact on Commonwealth agencies, please visit Attorney-General's Department Access to Justice website.

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Re-issued: June 2018

GUIDANCE NOTE 13

Guiding Principles for Commonwealth entities responding to civil claims involving institutional child sexual abuse

Purpose and Application

The principles below guide Commonwealth entities when responding to civil claims concerning allegations of institutional child sexual abuse (the principles).[1]

The purpose of these principles is to ensure that Commonwealth entities:

- adopt a consistent approach when responding to these types of claims, and
- instruct their lawyers to take into account the sensitivities involved in handling claims by institutional child sexual abuse survivors.

These principles have been developed to reflect the understanding that the process of civil litigation may be a traumatic experience for survivors of institutional child sexual abuse.

These principles apply to all Commonwealth entities and complement the Commonwealth's general obligation to act as a model litigant which requires that the Commonwealth and its entities act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth entity.[2]

Fundamental principle: *Commonwealth entities are to be mindful of the potential trauma that survivors of institutional child sexual abuse may experience during the claims and/or litigation process.*

In the **handling of claims** concerning allegations of institutional child sexual abuse, Commonwealth entities should:

1. acknowledge and consider claims without delay and aim to resolve them as quickly as possible, including paying legitimate claims without recourse to formal litigation[3]

2. be mindful of any cultural sensitivities and communicate regularly with claimants and/or their legal representatives about how their claim will be managed and the progress of their claim

3. provide information regarding access to services and support for claimants, including access to counsellors

[1] The principles were developed in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in the *Redress and Civil Litigation Report* released on 14 September 2015.
[2] This obligation is set out in paragraph 4.2 and Appendix B of the *Legal Services Directions 2017*.
[3] This mirrors the model litigant obligation, particularly paragraphs 2(a) and 2(b) of Appendix B to the *Legal Services Directions 2017.*

4. where possible and in accordance with relevant laws, facilitate access for claimants and their legal representatives to records and information relating to the claim and the allegations made by the claimant, and

5. acknowledge and act upon existing obligations to report claims of any serious indictable offences to the relevant law enforcement agency.

In the approach taken to the management and resolution of any claim (litigated or non-litigated) concerning allegations of institutional child sexual abuse, Commonwealth entities should:

6. where possible and appropriate, consider resolving matters without requiring claimants to make a formal statement of claim or in the case of more than one claimant, a separate statement of claim

7. not disputing claimed facts which the Commonwealth considers are likely to be correct, or which it does not consider is necessary to have proven in order to properly resolve the claim

8. assist claimants and their legal representatives to identify the proper defendant/s if they have not already been identified

9. consider the most appropriate Alternative Dispute Resolution processes in the circumstances of each claim and facilitate an early settlement, where possible

10. not rely on a defence based on the expiration of a statutory limitation period[4]

11. consider claimants' requests for apology, acknowledgement or redress including by offering a written apology in appropriate circumstances

12. pursue a contribution to the settlement amount from the alleged abuser/s or other liable defendant/s, where practical and appropriate, and

13. consider the use of confidentiality clauses on a case by case basis, having regard to the nature of the claim, the preferences of the claimant/s and paragraph 4.5 of the *Legal Services Directions 2017*.

The above principles are intended to guide Commonwealth entities and be applied flexibly with regard to the circumstances of each particular claim. The principles do not prevent action to protect the proper and legitimate interests of the Commonwealth or its entities. They do not preclude all legitimate steps being taken to defend claims, including where a claim is vexatious, unmeritorious or an abuse of process.

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[4] On 4 May 2016 the Attorney-General issued a Direction pursuant to section 55ZF(1) of the *Judiciary Act 1903* and paragraphs 8.1 and 8.2 of the *Legal Services Directions 2005* (as in force at the time) that Commonwealth agencies are not to plead a defence based on the expiration of a limitation period or oppose an application for an extension of a limitation period in relation to these types of claims. The Direction ceases to apply after 30 April 2019.

Public Governance, Performance and Accountability Act 2013

No. 123, 2013

Division 6—Annual report for Commonwealth entities

46 Annual report for Commonwealth entities

(1) After the end of each reporting period for a Commonwealth entity, the accountable authority of the entity must prepare and give an annual report to the entity's responsible Minister, for presentation to the Parliament, on the entity's activities during the period.

Note: A Commonwealth entity's annual report must include the entity's annual performance statements and annual financial statements (see paragraph 39(1)(b) and subsection 43(4)).

(2) The annual report must be given to the responsible Minister by:

(a) the 15th day of the fourth month after the end of the reporting period for the entity; or

(b) the end of any further period granted under subsection 34C(5) of the *Acts Interpretation Act 1901*.

(3) The annual report must comply with any requirements prescribed by the rules.

(4) Before rules are made for the purposes of subsection (3), the rules must be approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

Part 11 — Investigations and complaints

Version 1.5, February 2021

OAIC

Contents

Information Commissioner investigations

11.1 Under Part VIIB of the FOI Act, the Information Commissioner can investigate an action taken by an agency in the performance of its functions or the exercise of its powers under the FOI Act. This involves investigating complaints (s 69(1)), as well as conducting investigations at the Commissioner's initiative (Commissioner initiated investigations (CIIs)) (s 69(2)).[1]

11.2 The Information Commissioner cannot investigate a minister's handling of FOI matters..

11.3 The complaints process set out in Part VIIB is intended to deal with the way agencies handle FOI requests and procedural compliance matters. Examples include:

- a complaint that an agency did not provide adequate assistance to an FOI applicant to make an FOI request
- a complaint by a third party that an agency failed to consult them before deciding to release a document
- a complaint that an agency did not make a decision on their FOI request within the applicable statutory timeframe
- a complaint alleging a conflict of interest by the decision maker.

11.4 Under Part V of the FOI Act, a person has the right to apply for amendment or annotation of an incorrect record of personal information used by an agency for administrative purposes (see Part 7 of these Guidelines). As part of a CII or complaint investigation, the Information Commissioner is able to recommend that incorrect records be amended, except if the affected individual is, or has been, entitled to have the amendment determined by the agency, the Information Commissioner (using the Information Commissioner's powers under Part VII), a court or a tribunal. Further, the Information Commissioner cannot recommend amendment of court or tribunal decisions (s 89D).

Relationship with IC reviews

11.5 The Information Commissioner's view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.[2]

11.6 There may be some instances where the Information Commissioner may consider it appropriate to conduct both an IC review and an investigation into an FOI complaint. An example is when the outcome sought by the applicant is both access to documents, and a remedy to address procedural or processing issues, including non-compliance with statutory timeframes or a breach of specific legislative requirements. In such circumstances, the investigation of a complaint may be put on hold until the IC review has been finalised. This

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[1] The OAIC has issued a *Freedom of Information Regulatory Action Policy* which provides guidance on the Information Commissioner's approach to the exercise of FOI regulatory powers, including the investigation of complaints and conducting CIIs. See *Freedom of Information Regulatory Action Policy* on the OAIC website https://www.oaic.gov.au/about-us/our-regulatory-approach/freedom-of-information-regulatory-action-policy/ ..

[2] See *What is the difference between a complaint and an application for review of a freedom of information decision?* on the OAIC website, https://www.oaic.gov.au/freedom-of-information/frequently-asked-questions/what-is-the-difference-between-a-complaint-and-an-application-for-review-of-a-freedom-of-information-decision/.

may be appropriate when it seems likely that processing deficiencies will be addressed during the IC review and will require no further investigation.

Power to investigate

11.7 The Information Commissioner may investigate an agency's actions in performing its functions or exercising its powers under the FOI Act in response to a complaint made under s 70 of the FOI Act (s 69(1)), or at the Information Commissioner's own initiative (s 69(2)).[3] The investigation may look at a single agency decision or action, at a systemic problem or recurring pattern in an agency's practices and processes in handling FOI matters, or at a practice or problem occurring in more than one agency. The issue to be investigated may come to the attention of the Information Commissioner as a result of an IC review, a series of applications for IC review, or in some other way.

11.8 When deciding whether to commence an investigation, the Information Commissioner will take into consideration:[4]

- the objects of the FOI Act
- the risks and impact of non-compliance
- whether the practice complained of is systemic
- whether significant issues are raised
- whether there has been non-compliance with statutory timeframes
- the outcome sought.

How to make a complaint

11.9 A person may complain to the Information Commissioner about an action taken by an agency under the FOI Act (s 70(1)).[5] A complaint must be in writing and identify the agency against which the complaint is made (s 70(2)). The OAIC must give 'appropriate assistance' to anyone who wishes to complain and needs help to formulate their complaint (s 70(3)). This need may arise, for example, if a person has language or literacy difficulties or otherwise needs assistance ascertaining the scope of an agency's obligations under the FOI Act or making a complaint against an agency.

Decision to investigate

Preliminary inquiries

11.10 The Information Commissioner may make preliminary inquiries for the purpose of determining whether or not to investigate a complaint (s 72). This can be done, for example,

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[3] See for example the following CII reports (referred to as own motion investigations): *FOI at the Department of Human Services*, published on 2 December 2014, and *Processing of non-routine FOI requests by the Department of Immigration and Citizenship*, published on 26 September 2012, on the OAIC website, https://www.oaic.gov.au/freedom-of-information/foi-reports/.

[4] For further information about the Information Commissioner's regulatory approach see '*Freedom of information regulatory action policy*' on the OAIC website www.oaic.gov.au.

[5] See *Make an FOI Complaint* on the OAIC website www.oaic.gov.au.

to determine whether the complaint relates to an action taken by an agency under the FOI Act or whether the process to which the complaint relates has been rectified by the agency.

Deciding not to investigate

11.11 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint in the following circumstances (set out in s 73):

- the action is not related to an agency performing its functions or exercising its powers under the FOI Act (s73(a))
- the complainant has or had a right to have the action reviewed by the agency, a court or a tribunal, or by the Information Commissioner under Part VII of the FOI Act, and has not exercised that right when it would be reasonable to do so (s 73(b))
- the complainant has or had a right to complain to another body and has not exercised that right when it would be reasonable to do so (s 73(c))
- the agency has dealt, or is dealing, adequately with the complaint, or has not yet had an adequate opportunity to do so (s 73(d))
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e))
- the complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f)).

11.12 Where a person has applied for IC review and made an FOI complaint and the issues raised are more appropriately dealt with in the IC review, it is open to the Information Commissioner to decline to investigate the FOI complaint under s 73(b) of the FOI Act on the basis that the IC review has not had a reasonable opportunity to be conducted. The Information Commissioner may exercise this discretion prior to the commencement of an investigation or during the course of an investigation.

11.13 If the Information Commissioner decides not to investigate, or not to continue to investigate, a complaint, the Information Commissioner must give a written notice (with reasons) to the complainant and to the agency (s 75). An agency must also be notified if the Information Commissioner discontinues a Commissioner initiated investigation (s 75(2)(b)).

11.14 The Information Commissioner does not have the same power as the Commonwealth Ombudsman to decline to investigate a complaint that relates to action that occurred more than 12 months previously (see s 6(1)(a) of the *Ombudsman Act 1976*). However, this is a matter that the Information Commissioner will take into account in formulating the investigation results following completion of an investigation (see [11.33]–[11.38] below).

Transfer to Commonwealth Ombudsman

11.15 Under the *Ombudsman Act 1976*, the Commonwealth Ombudsman retains authority to investigate a complaint about action taken by an agency under the FOI Act (s 89F). However this is qualified by s 6C(2) of the *Ombudsman Act 1976* which requires the Ombudsman to consult the Information Commissioner before deciding to investigate a complaint about a matter that is the subject of a completed investigation by the Information Commissioner, or that is or could be the subject of a complaint to the Information Commissioner which could be dealt with more appropriately or effectively by the Information Commissioner. The Ombudsman and the Information Commissioner must consult with a view to avoiding the

same matter being investigated by both offices. If the Ombudsman decides not to investigate a complaint on this basis, the Ombudsman must transfer the complaint and all relevant documents and information to the Information Commissioner and notify the complainant in writing (with reasons for the decision) (s 6C(3) of the *Ombudsman Act 1976*). The Information Commissioner must then deal with the matter as a complaint under Part VIIB of the FOI Act (s 6C(4) of the *Ombudsman Act 1976*).

11.16 The Information Commissioner has a similar power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that it could be dealt with more effectively or appropriately by the Ombudsman (s 74). Two examples of such situations are given in the FOI Act:

- when the complaint is about how the Information Commissioner dealt with an IC review
- when the FOI complaint is part of a wider grievance about an agency's actions.

11.17 The factors that the Information Commissioner may consider when deciding whether to transfer a complaint to the Ombudsman include:

- whether the complaint is about actions by the OAIC, including how the OAIC has dealt with:
  - an IC review
  - an FOI complaint
  - a vexatious applicant declaration application
  - an FOI request, or
  - an extension of time application
- whether there may be a perceived or actual conflict of interest in the Information Commissioner considering the complaint, including where:
  - the complainant has complaints under the Privacy Act in which the Information Commissioner is the respondent
  - the complaint relates to specific functions exercised by the Information Commissioner under the Privacy Act
  - the complainant has matters in other forums, including the Administrative Appeals Tribunal or Federal Court and the Information Commissioner is the respondent
- whether the issues raised relate to other active complaints lodged with the Commonwealth Ombudsman.

11.18 The Information Commissioner must consult the Ombudsman to avoid any overlap in inquiries, and may decide not to investigate or not to continue to investigate, after consulting (s 74(2)). If the Information Commissioner decides not to investigate a complaint on this basis, the Information Commissioner must transfer the complaint and all relevant documents and information to the Ombudsman, and notify the complainant in writing (with reasons for the decision) (ss 74(3) and 74(4)).

Giving notice of an investigation

11.19 The Information Commissioner must notify the agency before investigating a complaint or a Commissioner initiated investigation is commenced (s 75(1)). The investigation notice may ask the agency to provide information to the Information Commissioner, for example, copies of correspondence, an explanation or reasons for a particular course of action being

adopted, the agency's procedures and practices in relation to the complaint issues, or submissions in response to the issues raised.

11.20 Similarly, the Information Commissioner must give written notice (with reasons) to the agency and the complainant (if there is one) if the Information Commissioner decides not to investigate, or not to continue to investigate (ss 75(2)–(4)).

Investigation procedure

Conduct of investigations

11.21 The FOI Act sets out rules that apply to the conduct of the Information Commissioner's complaint investigations. The guiding principle is that an investigation shall be conducted in private and in a way the Information Commissioner thinks fit (s 76(1)).

11.22 The Information Commissioner may decide to prioritise the investigation of a complaint because it informs issues being investigated in a CII, or other FOI complaints have been made to the Information Commissioner which raise the same issues and it is more efficient and effective to deal with these complaints at the same time.

General powers

11.23 The Information Commissioner may obtain information from any officer of an agency, and make any inquiry, that he or she thinks is relevant to the investigation (s 76(2)). The request for information may include:

- procedural documents such as a processing manual or relevant guidance provided to staff and/or decision-makers
- documents relating to the process followed in processing relevant FOI request(s)
- statistical information relevant to the issues under investigation
- submissions in response to the allegations made by the complainant (if any).

11.24 The request for information will specify a timeframe for provision of information and/or documents. The period of time given will depend on the nature of the issues under investigation, the type of information required to be produced and the volume of documents requested.

11.25 Where an agency fails to provide information and documents within the initial or extended timeframe, the Information Commissioner may require the provision of information and documents pursuant to s 79 of the FOI Act. The Information Commissioner also has specific powers to compel the production of information by agencies (discussed below at [11.31]–[11.32].

Entering premises

11.26 The Information Commissioner has a limited power to enter premises to carry out an investigation or to inspect documents on the premises. This can be done, for example, to inspect agency documents, or to investigate whether an agency conducted a proper search for documents (s 77).

11.27 An *authorised person* may enter premises occupied by an agency, or premises occupied by a contracted service provider that are used predominantly for the purposes of a

Commonwealth contract (ss 77(1), (2)). An authorised person means an information officer (the Information Commissioner, the FOI Commissioner or the Privacy Commissioner, as defined in the *Australian Information Commissioner Act 2010*), or an APS employee at Executive Level 2 or above in the OAIC who has been authorised by the Information Commissioner for the purposes of s 77 (s 77(6)).

11.28 The power to enter premises is conditional on the consent of the principal officer of the agency or, in the case of a contracted service provider, the person in charge (s 77(3)). The authorised person must leave the premises if the consenting person asks (s 77(4)).

11.29 Entry to certain places requires written ministerial approval (s 78(1)). These are:

- a place referred to in s 80(c) of the *Crimes Act 1914* (mainly defence-related places)
- a place that is a prohibited area for the purposes of the *Defence (Special Undertakings) Act 1952*
- a restricted area declared under s 14 of the *Defence (Special Undertakings) Act 1952*.

11.30 The Attorney-General may also prohibit entry to a place by declaration if satisfied an investigation at that place may prejudice the security or defence of the Commonwealth (ss 78(3) and (4)). These requirements are consistent with the rules applying to the Ombudsman's powers of entry for an investigation (*Ombudsman Act 1976* ss 14(2) and (3)).

Obliging production of information and documents

11.31 The Information Commissioner has certain compulsory powers:

- to require production of information and documents
- to require production of exempt documents
- to require a person to attend to answer questions and to take an oath or affirmation.

11.32 Each of these powers is discussed below. The powers are the same as the Information Commissioner's powers when conducting an IC review (see ss 55R–55U and 55W–55X and Part 10 of these Guidelines).

Production of information and documents

11.33 The Information Commissioner can, by written notice, require the production of information and documents in connection with an investigation (s 79). This power ensures the Information Commissioner can obtain all the material relevant to an investigation. Failure to comply with a production notice is an offence punishable by six months imprisonment (s 79(5)).

11.34 The Information Commissioner can take possession of the documents, make copies, take extracts and hold the documents as long as is necessary for the investigation (s 80(1)). While the Information Commissioner holds the documents, the Information Commissioner must permit a person to exercise any right they might otherwise have to inspect the documents (s 80(2)).

Exempt documents

11.35 The Information Commissioner has the same power to require production of exempt documents in conducting investigations as in exercising the IC review function (s 81). The limitations that apply to the exercise of this power under the IC review function, including in relation to national security and cabinet documents, also apply to investigations. These

include the requirement to return exempt documents and to ensure they are not disclosed to people other than OAIC staff in the course of performing their duties. For more information about these limitations, see Part 10 of these Guidelines.

Obliging persons to appear

11.36 The Information Commissioner can, by written notice, require a person to attend to answer questions for the purpose of an investigation (ss 82(1) and (2)). Failure to comply with a notice is an offence punishable by six months imprisonment (s 82(3)).

11.37 A person who appears before the Information Commissioner pursuant to a notice under s 82 can be required to take an oath or affirmation that their answers will be true (ss 83(1) and (2)). Refusing to take an oath or affirmation, refusing to answer a question, or giving false evidence are offences punishable by six months imprisonment (s 83(3)).

Protections for those involved

11.38 A claim for legal professional privilege is preserved in respect of information or a document given to the Information Commissioner in connection with an investigation (s 84).

11.39 A person is immune from civil proceedings and from criminal or civil penalty, for the action of giving information, producing a document or answering a question in good faith for the purposes of an investigation (s 85). The protection applies even if the person did not produce information in response to the exercise by the Information Commissioner of powers to compel production of information (a person can voluntarily give information under s 76(2) which gives the Information Commissioner the power to obtain information from any officer of an agency that he or she thinks is relevant to the investigation).

11.40 A person who complains to the Commissioner under s 70 is also immune from civil proceedings, provided the complaint is made in good faith (s 89E).

Outcome of an investigation

Notice on completion

11.41 On completing an investigation, the Information Commissioner must provide a 'notice on completion' to the agency and to the complainant (if there is one) (s 86). The Information Commissioner's notice on completion must include the investigation results, the investigation recommendations (if any), and the reasons for those results and any recommendations (s 86(2)). A notice on completion must not include exempt matter or information about the existence or non-existence of a document that would be exempt under ss 33, 37(1) or 45A (ss 89C and 25(1)).

11.42 The investigation results under s 87 are:

- the matters the Information Commissioner has investigated
- any opinion the Information Commissioner has formed in relation to those matters
- any conclusions the Information Commissioner has reached
- any suggestions the Information Commissioner believes might improve the agency's processes, and
- any other information of which the Information Commissioner believes the agency should be aware.

11.43 The Information Commissioner will provide the agency with an opportunity to provide comments about the notice (agency comments) (s 86(3)). The agency will be given a reasonable period of time, generally two weeks from the date of issue, to provide comments.[6]

11.44 The complainant will be given the following in accordance with s 86(4):

- the notice of completion under s 86
- agency comments (if any) 7
- any further comments the Information Commissioner may wish to make.

Publication of the outcome of an investigation

11.45 After providing the complainant with a copy of the finalised notice (with exempt material or material to which s 25(1) applies removed, see s 89C(2)), the Information Commissioner may publish a summary of the notice on the OAIC website. Any notice will include the name of the agency but not the name of the complainant (where there is one).

11.46 The Information Commissioner may also publish a copy or extract of the agency's comments made in response to the s 86 notice on completion.

Failure to implement investigation recommendation

11.47 In addition to including opinions, conclusions or suggestions in a notice on completion, the Information Commissioner may also make investigation recommendations, which are 'formal recommendations to the respondent agency that the Information Commissioner believes that the agency ought to implement' (s 88).

11.48 The agency will be given a timeframe in which to consider the recommendations and take action that is adequate and appropriate in the circumstances to implement the recommendation(s). The agency will be asked to advise the information Commissioner of the action taken to respond to the formal recommendations made in the notice of completion by the end of the timeframe given for implementation.

11.49 If the Information Commissioner is not satisfied the agency has taken adequate and appropriate action to implement the formal recommendation(s), the Information Commissioner may issue a written 'implementation notice' requiring the agency to provide within a specified time particulars of any action the agency will take to implement the Information Commissioner's recommendations (s 89). The Information Commissioner will take agency comments into account in deciding whether to take further action.

11.50 The implementation notice will require the agency to outline particulars of any action the agency proposes to take to implement the investigation recommendations.

11.51 In the implementation notice, the Information Commissioner will give the agency a specified time to respond. This will normally be 30 days, but this can be extended depending on the nature of the investigation recommendations.

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[6] See for example the Department of Home Affairs' response to the Commissioner-initiated investigation: *Department of Home Affairs' compliance with the statutory processing requirements under the Freedom of Information Act 1982 in relation to requests for non-personal information* (Attachment C) on the OAIC website www.oaic.gov.au .

[7] If the agency does not provide comments in response to the Information Commissioner's conclusions in the notice on completion within the specified period, the notice on completion will be provided to the complainant.

11.52 The agency must comply with the implementation notice (s 89(3)).

Report to responsible Ministers

11.53 The Information Commissioner may subsequently report to the minister responsible for the agency and the minister responsible for the FOI Act if the Information Commissioner is not satisfied the agency has taken adequate and appropriate action to implement formal recommendations, or has not responded to the implementation notice within the specified time (s 89A). The minister responsible for the FOI Act must table the report before each House of the Parliament (s 89A(5)).

11.54 Section 89B prescribes the matters that must be addressed in a report to ministers. A report to the minister must contain the following:

- the notice on completion
- the implementation notice
- any agency response to the implementation notice
- a statement by the Information Commissioner that the Information Commissioner is not satisfied, in the circumstances, that the agency has taken adequate and appropriate action to implement the investigation recommendations
- a statement by the Information Commissioner detailing the action that the Information Commissioner believes, if taken by the agency, would be adequate and appropriate in the circumstances to implement the investigation recommendations.

11.55 The report to the minister must not include exempt matter or information about the existence or non-existence of a document that would be exempt under ss 33, 37(1) or 45A (ss 89C and 25(1)). If a report to the minister contains such information, the Information Commissioner must prepare a copy of the report that does not contain this information.

11.56 In deciding whether to exercise the power to report , the Information Commissioner will have regard to relevant factors in the circumstances including whether the action would:

- facilitate and promote public access to information
- increase the promptness of public access to information
- facilitate public access to information at the lowest reasonable cost.

11.57 If the Information Commissioner gives a report to the responsible Minister, a copy of the report must be also given to the FOI Minister. The FOI Minister is the Minister responsible for the administration of the FOI Act.