

Australian Capital Territory

# Law Officers (General) Legal Services Directions 2012\*

**Notifiable instrument NI2012-292**

made under the

*Law Officers Act 2011, section 11 (Legal services directions – issue)*

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**1 Name of instrument**

This instrument is the *Law Officers (General) Legal Services Directions 2012*.

**2 Commencement**

These directions commence on the day after notification.

*Note* The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

**3 Legal Services Directions – s 11**

I issue the directions set out in the Schedule as legal services directions under section 11 of the Act.

Simon Corbell MLA  
Attorney General  
4 June 2012

\*Name amended under Legislation Act, s 60

## SCHEDULE

### AUSTRALIAN CAPITAL TERRITORY

#### Legal Services (General) Directions

##### 1. Provision of legal services

- 1.1 Subject to paragraphs 1.2, 1.3 and 1.4, all Territory legal work is to be performed by the Government Solicitor.
- 1.2 The Government Solicitor may outsource Territory legal work, or agree to an agency outsourcing Territory legal work, only with the approval of the Chief Solicitor.

*Example* The Chief Solicitor may approve the outsourcing of Territory legal work if there is a reasonable apprehension of a conflict of interest on the part of the Government Solicitor.

- 1.3 Paragraphs 1.1 and 1.2 do not apply to a Territory-owned corporation (TOC).

##### *Use of in-house lawyers by agencies*

- 1.4 Agencies may only engage an in-house lawyer if approved by the Attorney General, on the advice of the Chief Solicitor.
- 1.5 In-house lawyers are to perform a largely managerial function or provide advice and assistance where the availability of legal services on an immediate basis is integral to the delivery of the agency's core services, and cannot be conveniently or appropriately provided by the Government Solicitor.

##### *Charging for legal services by the Government Solicitor*

- 1.6 Subject to paragraph 1.7, the Government Solicitor will provide legal services to the Territory free of charge.
- 1.7 The Government Solicitor may charge legal fees in the following circumstances:
- (1) for legal work undertaken on behalf of a TOC; or
  - (2) for legal work undertaken on behalf of an agency which is part of the public trading enterprise sector; or
  - (3) as otherwise determined by the Chief Solicitor and approved by the Attorney General.

- 1.8 Legal fees under paragraph 1.7 will be charged in the manner, and in accordance with the rates determined by the Chief Solicitor and approved by the Attorney General.

*Legal advice on major government contracts*

- 1.9 The responsible chief executive officer of a Territory entity that is required to submit a procurement proposal to the Government Procurement Board under the *Government Procurement Act 2001* or *Government Procurement Regulation 2007* will instruct the Government Solicitor to advise the entity in relation to any contract that is to be entered into by the Territory entity if the proposal:

- (1) is categorised in the procurement proposal as “high risk”; or
- (2) is valued at \$50 million (including GST) or more; or
- (3) will involve non-routine contractual arrangements (for example, public-private partnership, alliance agreement, or combined goods, services and/or works contract which will require considerable customisation of a template).

*Procurement and briefing of external counsel by the Government Solicitor*

- 1.10 The Government Solicitor may engage external counsel having regard to the following factors:

- (1) any special expertise or skill of counsel in the particular field of law;
- (2) the availability of counsel within the required time frame;
- (3) the efficiency of counsel, including the prior knowledge and experience of counsel in similar matters;
- (4) the importance of the matter, including any special sensitivity;
- (5) the specific request of the client that a particular counsel be briefed and the reasons for that preference;
- (6) government policy – for example regarding the equal opportunity briefing of counsel;
- (7) teamwork – including the ability of senior and junior counsel to work together to ensure the best team is formed to represent the interests of the client; and
- (8) the fee that the relevant counsel proposes to charge.

- 1.11 In selecting counsel, all reasonable endeavours are to be made to:

- (1) identify all counsel in the relevant practice area;

- (2) genuinely consider engaging such counsel, and
- (3) regularly monitor and review the engagement of counsel.

#### *Counsel fees and expenses*

- 1.12 The fees to be paid to counsel must not exceed the current maximum fees approved by the Attorney General, unless otherwise approved by the Attorney General.
- 1.13 The current maximum fees are not to be regarded as the standard or starting point for fee negotiations with counsel. In many cases, particularly in relation to junior counsel, the normal market fees of counsel may be less, and may be considerably less, than the maximum fees approved by the Attorney General.
- 1.14 Counsel are not to be paid more than reasonable costs of accommodation and travel, having regard to the rates applicable to Executives in the ACT Public Service under the Justice and Community Safety Directorate's *Travel and Related Services Guidelines*.

## **2. Claims and litigation by or against the Territory**

- 2.1 Agencies must comply with any instructions from the Attorney General about the handling of claims or the conduct of litigation. In particular, agencies must comply with any instruction to provide information about a particular claim or litigation, or to provide copies of, or access to, material relating to the claim or litigation.
- 2.2 Claims are to be handled and litigation is to be conducted by agencies in accordance with the Model Litigant Guidelines.
- 2.3 Agencies are not to start legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution, and only if they have considered other methods of dispute resolution including mediation or settlement negotiations.
- 2.4 Claims must be handled and litigation conducted by agencies in accordance with legal principle and practice, taking into account the legal rights of parties and the financial risk to the Territory of pursuing or defending its rights.

## **3. Reliance on limitation periods**

- 3.1 Where reasonably available agencies must plead the expiry of an applicable limitation period as a defence to a claim, unless approval not to do so is given by the Attorney General. Approval will normally be given only in exceptional circumstances, for example, where the Territory has through its own conduct contributed to the delay in the plaintiff bringing the claim.

- 3.2 Agencies must oppose applications for extension of limitation periods, unless approval to consent to the application is given by the Attorney General. Approval will normally be given only in exceptional circumstances which would justify not pleading a limitation defence or where it is expected that the application will succeed (in which case not consenting would be likely to result in unnecessary costs and delay).
- 3.3 Paragraphs 3.1 and 3.2 do not prevent the agency from settling a claim involving an expired limitation period without the approval of the Attorney General in the following circumstances:
- (1) where legal advice has been obtained recommending settlement of a claim, based (among other things) on an assessment of the plaintiff's prospects of success regarding the limitation period issue, and
  - (2) to the extent that there are perceived to be weaknesses in the plaintiff's position in that regard, these weaknesses are taken into account when determining an appropriate amount of the settlement.
- 3.4 Reference to the term 'limitation period' in paragraphs 3.1, 3.2 and 3.3 above means a statutory limitation on the time for the commencement of legal proceedings where the court or tribunal is exercising original jurisdiction. It is not intended to cover, for example:
- (1) time limits applicable to procedural steps in litigation (e.g. time for filing a statement of claim or providing discovery); or
  - (2) periods in which to appeal (e.g. from a single judge of the Supreme Court to the Court of Appeal).

#### **4. Settlement of claims against the Territory**

- 4.1 Claims against the Territory are to be settled in accordance with legal principle and practice.
- 4.2 A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established. In particular, settlement is not to be effected merely because of the cost of defending a claim that is clearly without merit. If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include:
- (1) the prospects of the claim succeeding in court;
  - (2) the costs of continuing to defend or pursue the claim; and
  - (3) any prejudice to the Territory in continuing to defend or pursue the claim (e.g. a risk of disclosing confidential government information).
- 4.3 A claim may only be settled if:

- (1) written advice is received from the Government Solicitor that the settlement is in accordance with legal principle and practice, and
- (2) the Director-General (or authorised officer or chief executive officer), having regard where relevant to the views of ACTIA, agrees with the settlement.

4.4 Paragraph 4.3(1) does not apply if:

- (1) the Chief Solicitor has agreed to an alternative process in respect of a claim or class of claims; or
- (2) the Attorney General is satisfied that exceptional circumstances exist which justify a departure from the process for settling a claim set out in this guideline.

4.5 It should be a condition of any settlement involving the payment of money to a claimant that the claimant sign a suitable release and, where appropriate, an indemnity against claims by third parties that arise from the event or circumstances giving rise to the settlement.

4.6 Except with the approval of the Chief Solicitor, agencies may only agree that the terms of settlement are confidential and cannot be disclosed where this is necessary to protect the Territory's interests. Before imposing or agreeing to such a condition, the agency must be satisfied, including by raising the matter with a party requesting the condition, that the condition is necessary. The agency should also seek to incorporate an exception to enable voluntary disclosure of the settlement (in whole or in part) as required by law and to the Auditor-General, the Legislative Assembly or an Assembly Committee. Where practicable, the responsible Minister is to be consulted before an agency agrees to a settlement inhibiting voluntary disclosure to the Legislative Assembly or to an Assembly Committee.

4.7 The agency is to tell the other party to a confidential settlement that disclosure of the settlement may nevertheless be required by law; in particular, to the Legislative Assembly or to an Assembly Committee which has power to compel disclosure.

*Note* An example of when it may be in the Territory's interests to agree to confidential settlement is if the Territory seeks to settle a claim against it on condition that the terms of settlement not be disclosed, with a view to avoiding prejudice in responding to other similar claims against it.

## **5. Legal Professional Privilege**

5.1 Legal professional privilege, including client legal privilege under the *Evidence Act 2011*, in relation to any document or advice provided in the course of any Territory legal work belongs to the Territory and may not be waived, except with the express approval of the Attorney General or the Chief Solicitor on behalf of the Attorney General.

5.2 This direction (legal professional privilege) does not apply to a TOC or a body discharging an independent statutory function.

**6. Provision of assistance to Territory Ministers and Members in relation to legal proceedings**

6.1 Legal assistance may be provided to Territory Ministers and Members in accordance with the *Guidelines for the provision of assistance to Ministers and Members in relation to legal proceedings* administered by the Attorney General.

**7. Provision of assistance to public employees in relation to legal proceedings**

7.1 This direction concerns requests for assistance from the Territory by individual public employees in relation to legal or disciplinary proceedings, or proceedings associated with an employee's professional obligations or qualifications, in which the actions or omissions of that employee are under scrutiny.

7.2 This direction also applies to a person that has been employed by the Territory, whether before or after the proceedings commenced.

7.3 Subject to this direction, a public employee acting in the ordinary course of his or her employment in good faith will generally be indemnified by the Territory in respect of any liability to third parties arising from such action (including omission).

7.4 A decision whether to provide assistance to a public employee under this direction is a matter for the employing agency in consultation with the Chief Solicitor.

7.5 In cases where the Territory provides assistance and indemnification to an employee, the Territory (represented by the Government Solicitor) will assume conduct of any claim on behalf of the employee and meet all relevant costs including any award of damages.

7.6 The indemnification of an employee against any costs or damages payable to another party by the employee (including as a result of agreeing to a reasonable settlement) in civil proceedings is only to be agreed on condition that the employee has agreed that the employee's defence will be controlled by the Territory and that the employee will provide all assistance required by the Territory in the conduct of the defence.

7.7 Indemnification may be refused if an employee has failed to notify the Territory or employing agency of the proceedings within a reasonable time of becoming aware of them and the delay may prejudice the employer's position.

7.8 Payment of any amount by way of assistance may nevertheless be refused if all assistance is not provided as required by paragraph 7.6.

7.9 The Territory will not indemnify a public employee in circumstances where, because of the criminal, malicious or reckless or unreasonable

nature of the employee's conduct, the actions in question are not reasonably considered to be within the scope of the person's employment.

- 7.10 If it is not clear whether a public employee has acted within the scope of his or her employment in good faith in relation to an incident the subject of a request for assistance:
- (1) the decision whether to provide assistance to a public employee under this direction may be deferred until the conclusion of the proceedings; or
  - (2) assistance may be provided to the employee in the conduct of the proceedings but a decision on whether to fund any costs or damages payable to another party by the employee may be deferred until after the facts are ascertained, for example, by a court or tribunal.
- 7.11 Assistance will generally not be provided to a public employee in relation to:
- (1) a personal interest, such as pursuing a defamation claim; or
  - (2) defending professional or personal disciplinary investigation or action, whether by the Territory or another person or body; or
  - (3) a complaint, application, action, proceeding or any other similar process by the employee against the Territory, a Minister, a Member or another public employee.
- 7.12 Any request by a public employee for legal advice or representation will be considered on its merits. The Territory will not generally meet the costs of independent legal advice or representation obtained by a public employee unless:
- (1) the Government Solicitor is in a position of a conflict of interest, i.e.: there is a reasonable apprehension that the interests of the employee in relation to the proceedings will or may materially diverge from those of the Territory; or
  - (2) the matter involves an apparently personal interest on the part of the employee, in relation to which the Government Solicitor would not ordinarily advise, but which, in the circumstances, it is considered necessary and appropriate to provide assistance. In such a case, assistance from the Government Solicitor may involve facilitating independent preliminary advice if necessary and appropriate, or may extend to further assistance depending on the nature and circumstances of the matter; or
  - (3) there are other compelling reasons which justify funding by the Territory of independent advice or representation for the employee.

## 8. Agency responsibility

- 8.1 The Director-General, or chief executive officer, of an agency to which these Directions apply is responsible for ensuring that appropriate management strategies and practices are adopted so as to achieve compliance with these Directions.

## 9. Chief Solicitor Guidelines

- 9.1 The Chief Solicitor may make Guidelines to further explain any matter in these directions.

## 10. Interpretation

In these Directions:

**ACTIA** means the Australian Capital Territory Insurance Authority established under the *Insurance Authority Act 2005*.

**administrative unit** – see Dictionary to *Legislation Act 2001*, part 1.

**agency** includes:

- (1) an administrative unit;
- (2) a body established by a law of the Territory; or
- (3) a company in which the Territory has a controlling interest.

**Chief Solicitor** – see section 28, *Law Officers Act 2011*.

**cost** includes expenses.

**damages** includes compensation.

**Government Solicitor** – see section 26, *Law Officers Act 2011*.

**in-house lawyer** means a person employed under the *Public Sector Management Act 1994*, however described, as a legal practitioner but who is not an authorised person under section 29 of the *Law Officers Act 2011*.

**legal proceedings** includes a proceeding, inquest or inquiry (whether final or interlocutory, actual or potential) in a court, tribunal, royal commission or board of inquiry or the conduct of a dispute resolution process, such as mediation or arbitration.

**Member** means a member of the Legislative Assembly.

**Minister** means a person who holds office or has held office as a Minister for the Territory.

**Model Litigant Guidelines** means the model litigant guidelines made under the *Law Officers Act 2011*, section 11(2).

***public employee*** - see the Dictionary to the *Legislation Act 2001*, part1.

***public trading enterprise sector*** – see the Dictionary to the *Financial Management Act 1996*.

***responsible chief executive officer*** means, for a directorate, the responsible director-general of the directorate – see section 2 (Dictionary) *Government Procurement Act 2001*.

***Territory*** means the body politic established by section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (C'th).

***Territory entity*** – see section 3, *Government Procurement Act 2001*.

***Territory legal work*** – see section 10, *Law Officers Act 2011*.

***Territory-owned corporation*** – see the *Territory-owned Corporations Act 1990*, Schedule 1.