

Australian Capital Territory

Law Officers Legal Services Directions 2023

Notifiable instrument NI2023-60

made under the

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

1 Name of instrument

This instrument is the Law Officers Legal Services Directions 2023.

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.

4 Revocation

I revoke NI2010 -88 and NI2012-292

Shane Rattenbury MLA
Attorney-General

6 February 2023

SCHEDULE

AUSTRALIAN CAPITAL TERRITORY

Part 1

Legal Services (General) Directions

1. Provision of legal services

- 1.1. Subject to paragraphs 1.2 and 1.3 all Territory legal work is to be performed by the Government Solicitor.
- 1.2. An agency may, with the approval of the Chief Solicitor, engage a legal services provider other than the Government Solicitor to undertake Territory legal work.
- 1.3. Paragraphs 1.1 and 1.2 do not apply to:
 - (1) a Territory-owned corporation (TOC);
 - (2) the ACT Integrity Commission;
 - (3) the University of Canberra;
 - (4) the ACT Legal Aid Commission;
 - (5) the Legislative Assembly and the Office of the Legislative Assembly; and
 - (6) any agency declared by the Attorney-General.
- 1.4. The Attorney-General may decide, that an agency not be required to comply with some or all of the Directions or is to comply with modified obligations.

2. In-house lawyers undertaking Territory Legal Work

- 2.1. An agency may only engage a person who is a legal practitioner to undertake Territory legal work approved by the Attorney-General, on the advice of the Chief Solicitor.
- 2.2. Any person approved as an in-house lawyer under paragraph 2.1, may only perform the Territory legal work described in that approval.
- 2.3. Requests for approval of persons to undertake Territory legal work under paragraph 2.1 must address the need for availability of legal advice and/or representation on an immediate basis and how this assistance is integral to the delivery of the agency's core services, including why this cannot be conveniently or appropriately provided by the Government Solicitor.

3. Charging for legal services by the Government Solicitor

- 3.1. Subject to paragraph 3.2, the Government Solicitor will provide legal services to the Territory free of charge.
- 3.2. The Government Solicitor may recover from an agency the cost of Territory legal work:
 - (1) undertaken on behalf of a TOC; or
 - (2) 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.
- 3.3. The cost of legal work undertaken pursuant to paragraph 3.2 will be recovered by the Government Solicitor at rates and arrangements for legal services determined by the Chief Solicitor and approved by the Attorney-General.

4. Legal advice on major government contracts

- 4.1. The responsible Director-General or chief executive officer of 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* must seek the advice of the Government Solicitor prior to, or at the time of that submission, where a contract that is to be entered into by the agency:
 - (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).

5. Engagement and briefing of external Counsel

- 5.1. 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.
- 5.2. In selecting counsel, all reasonable endeavours are to be made to:
- (1) identify counsel in the relevant areas of practice;
 - (2) consider the aims of the Law Council of Australia Equitable Briefing Policy; and
 - (3) regularly monitor and review the engagement of counsel.
- 5.3. The fees to be paid to counsel should not exceed the maximum fees approved by the Attorney-General, unless otherwise approved by the Attorney-General and consistent with any guidelines made by the Chief Solicitor.
- 5.4. Counsel must act consistently with the Model Litigant Guidelines in Part 2.
- 5.5. The Chief Solicitor will report annually on the engagement of counsel.

6. Engagement of Experts

- 6.1. In undertaking Territory legal work, the Government Solicitor may from time to time engage experts, including witnesses and neutral persons, with relevant expertise to provide opinions as well as to give evidence on behalf of the Territory.
- 6.2. Experts must hold appropriate expertise and be able to comply with the relevant requirements of the rules of the court, tribunal or other legal fora, in which the expert is required to give evidence.
- 6.3. The Government Solicitor will retain appropriate records regarding the terms and basis for engagement.
- 6.4. If the Territory arranges travel or accommodation for counsel, experts, witnesses and neutral person's, travel entitlements and arrangements will be determined with reference to those applicable under ACTPS Executive entitlements and/or other Territory travel policies.

7. Consultation and sharing of legal advice within Government

- 7.1. To ensure consistency in application of statutory interpretation, if a request for legal advice is made in relation to legislation administered by another agency, the requesting agency must consult with the relevant agency prior to the request for legal advice being made.
- 7.2. If an agency seeks legal advice that it considers is likely to be significant to another agency, it is to advise the Government Solicitor that the administering agency should be provided with the advice by the Government Solicitor.
- 7.3. Sharing of legal advice is not required where advice is of a routine nature which does no more than advise on the application of the law to particular facts, by relying on the settled interpretation of the legislation.
- 7.4. Consultation is not required on a request for advice and the advice does not have to be shared with the administering agency, if:
 - (1) disclosure would constitute a breach of the law;
 - (2) a Cabinet, law enforcement or national security matter would be inappropriately disclosed; or
 - (3) the Attorney-General has granted an exemption from sharing.
- 7.5. The Attorney-General may obtain a copy of any legal advice obtained by an agency.

Note: Client legal privilege or any duty of confidence is not breached by providing advice to the Attorney-General. See section 13 *Law Officers Act 2006*.

8. Claims and litigation by or against the Territory

- 8.1. An agency 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.
- 8.2. Claims are to be handled and litigation is to be conducted by an agency in accordance with the Model Litigant Guidelines detailed in Part 2 of these Directions.
- 8.3. An agency is not to start legal proceedings unless it has received the advice of the Government Solicitor and is 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.

- 8.4. Claims must be handled and litigation conducted by an agency 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.

9. Reliance on limitation periods

- 9.1. 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.
- 9.2. An agency 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).
- 9.3. Paragraphs 9.1 and 9.2 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.
- 9.4. Reference to the term 'limitation period' in paragraphs 9.1, 9.2 and 9.3 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).

10. Settlement of claims against the Territory

- 10.1. Claims against an agency are to be settled in accordance with legal principle and practice.
- 10.2. 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 affected 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.
- 10.3. 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.
- 10.4. Paragraph 10.3(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.
- 10.5. 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.
- 10.6. An agency may only agree that the terms of settlement are confidential and cannot be disclosed if the agency approves and the Chief Solicitor is satisfied the condition is necessary.
- 10.7. Any term of settlement imposing a confidentiality obligation must incorporate an exception to enable voluntary disclosure of the settlement (in whole or in part) as required or authorised by law, or to the Auditor-General, the Legislative Assembly, the Integrity Commissioner, or an Assembly Committee.

- 10.8. An 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.

11. Legal Professional Privilege

- 11.1. 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.

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

- 12.1. 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.

Note: The **Guidelines for the provision of assistance to Ministers and Members in relation to legal proceedings** were tabled in the Legislative Assembly in **June 1997** following a report the Standing Committee on Legal Affairs (**Report No.3 of March 1997**)

13. Provision of assistance to public employees in relation to legal proceedings

- 13.1. This direction concerns requests for assistance from the Territory by individual public employees in relation to legal, investigation 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.
- 13.2. This direction also applies to a person that has been employed by the Territory, whether before or after the proceedings commenced.
- 13.3. 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).
- 13.4. 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, other than where it is not appropriate for the employing agency to be engaged in this decision-making process. In this instance the Chief Solicitor will decide whether assistance is provided and on what terms.

- 13.5. Where the Territory provides assistance and indemnification to an employee, the Territory (represented by the Government Solicitor or otherwise) will conduct the proceeding on behalf of the employee and will meet all relevant costs including any award of damages.
- 13.6. 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 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.
- 13.7. 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
- 13.8. Assistance and indemnification of the employee may be declined or withdrawn if:
- (3) 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;
 - (4) the employee does not provide the assistance required by the Territory in the conduct of the defence; or
 - (5) the employee has not acted in good faith or failed to disclose material information.
- 13.9. The Territory will not indemnify a public employee in circumstances where, because of the criminal, malicious, 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.
- 13.10. 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.
- 13.11. 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.

14. Agency responsibility

- 14.1. 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.
- 14.2. This includes ensuring that:
 - (1) lawyers (conducting Territory legal work approved under paragraph 2) providing legal services to the agency are aware of, and are required to, assist in ensuring that the agency complies with these Directions;
 - (2) any matters required to be approved by the Attorney-General are raised promptly, and
 - (3) legal services activity is monitored and that, each year an agency responds to requests by the Chief Solicitor regarding its legal services activity and expenditure for the previous

financial year, including any possible or apparent breaches of the Directions by the agency, or allegations of breaches by the agency of which the agency is aware, and the corrective steps taken or proposed to be taken, by the agency to achieve compliance.

- 14.3. The Chief Solicitor will report any breaches of Directions identified in a financial year to facilitate reporting under section 15 of the *Law Officers Act 2011*.

Part 2

Legal Services (Model Litigant Guidelines) Directions

15. The Obligation

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

16. Application of the obligation

- 16.1. These Guidelines apply to civil claims and litigation including proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes involving the Territory and its agencies.
- 16.2. The agency involved in the litigation has the primary responsibility for compliance with the obligation. In addition, lawyers performing Territory legal work, must act in accordance with the obligation and assist their client to do so.

Note 1 For obligations of the Legal Aid Commission, see the *Legal Aid Act 1977*.

Note 2 *Guidelines* for prosecutions applying to the Director of Public Prosecutions are made under the *Director of Public Prosecutions Act 1990*, section 12.

17. Nature of the obligation

- 17.1. The obligation requires that the Territory and its agencies act honestly and fairly in handling claims and litigation brought by or against the Territory or an agency by:
- (1) dealing with claims promptly and not causing unnecessary delays in the handling of claims and litigation;
 - (2) paying legitimate claims without litigation, including making partial settlements of claims or interim payments in appropriate circumstances, where it is clear that liability is at least as much as the amount to be paid;

- (3) acting consistently in the handling of claims and litigation;
- (4) where it is not possible to avoid the commencement of legal proceedings, keeping the costs of litigation to a minimum, including by:
 - (a) not requiring the other party to prove a matter if the Territory or its agency knows it to be true;
 - (b) not contesting liability if there is no doubt concerning liability;
 - (c) using methods that it considers appropriate to resolve the litigation including alternative dispute resolution;
 - (d) ensuring that persons participating in settlement negotiations on behalf of the Territory or an agency have authority to settle a claim or legal proceedings in the course of the negotiations.
- (5) not taking unfair advantage of a claimant who lacks the resources to litigate a legitimate claim;
- (6) not relying on a technical defence which will delay or circumvent the resolution of the issues involved in litigation, unless the Territory's or the agency's interests would be prejudiced by the failure to rely on that defence;
- (7) not undertaking and pursuing appeals unless the Territory or the agency believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest; and
- (8) apologising where the Territory or the agency is aware that it or its lawyers have acted wrongfully or improperly.

18. What the obligation does not prevent

- 18.1. The obligation does not prevent the Territory and its agencies from acting firmly and properly to protect their interests. It does not prevent the Territory and its agencies from taking all legitimate steps in pursuing litigation, or from testing or defending claims made against them, including to test a significant point of law.
- 18.2. In particular, the obligation does not prevent a Territory and its agencies:
 - (1) enforcing costs orders or seeking to recover costs;
 - (2) relying on claims of legal professional privilege or other forms of privilege;
 - (3) pleading limitation periods;

- (4) seeking security for costs;
 - (5) opposing unreasonable or oppressive claims or processes; or
 - (6) requiring opposing litigants to comply with procedural obligations.
- 18.3. The obligation does not prevent the commencement of an appeal (pending the receipt or proper consideration of legal advice) that may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Territory or an agency, provided that a decision to continue or withdraw the appeal is made as soon as practicable.

Part 3

General Matters

19. Chief Solicitor Guidelines and Compliance

- 19.1. The Chief Solicitor may make Guidelines to further explain any matter in these directions.
- 19.2. Issues relating to compliance with these Directions, or Guidelines made thereunder, are matters for the Attorney-General and not for any court, tribunal or other body.
- 19.3. The Directions do not apply to:
 - (1) handling of criminal prosecutions and related proceedings unless expressly referred to; and
 - (2) do not override any legislative requirement or authority concerning an agency's functions (in particular, the role of the Director of Public Prosecutions).

20. Interpretation

- 20.1. 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*.

agency includes:

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

- (4) statutory office holder.

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

Claim is:

- (1) an assertion of a right or demand (however described) where a person is seeking compensation, damages (quantified or not) or relief, in any form, whether legally represented or not; and
- (2) includes receipt of notice of an intention of a person to make a claim, whether express or implied, and whether by formal notice complying with a law or otherwise (for example by letter, personal injury claim notification or court proceedings);

cost includes expenses.

damages include compensation.

director-general – see section 163, *Legislation Act 2001*.

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

in-house lawyer means a legal practitioner approved under paragraph 2.1 of these Directions but who is not an authorised person under section 29 of the *Law Officers Act 2011*.

legal proceedings include 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) and being Part 2 of these Directions.

public employee - see the Dictionary to the *Legislation Act 2001*, part 1.

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* (Cwlth).

Territory agency – 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.