

Minute T93/926

Subject: **GUIDANCE TO STAFF ON OBTAINING  
LEGAL SERVICES**

Sub Program Managers

cc Deputy Secretaries  
Assistant Secretary CST  
Executive Officer IASC

This minute is to provide instructions to all staff in relation to arrangements for obtaining legal advice and other legal services.

The arrangements reflect recommendations in the report of the Review of Legal Services for the Department of Transport and Communications by Professor Dennis Pearce, Richard Moss and Di Mildern. A copy of the executive summary and recommendations accompany this minute. The recommendations aim to strengthen legal resources available to Departmental Managers and address the appropriate roles of the Legal & General Branch and the Attorney-General's Department (including the outposted General Counsel). The review team recommended a number of changes to existing arrangements for obtaining legal services, including:

- that all legal services be provided centrally, and that sub programs discontinue the practice of using members of their own staff as legal advisers;

- that all sub programs be required to use Legal & General Branch as the gateway in obtaining legal services from the Attorney-General's Department, except where specific agreement is reached (between L&G and the sub program) for direct access on particular matters;

- that the Executive and Legal & General Branch be able to refer issues directly to the General Counsel. (Other issues may be referred to the General Counsel through Legal & General Branch where appropriate)

- the review also recommended that Ministers be able to refer matters directly to the General Counsel. Where Ministers themselves seek

formal legal advice, it should ordinarily be sought through the Attorney-General. The General Counsel can facilitate the provision of such advice and will be available to advise on day-to-day issues in conjunction with officers of the Department;

that sub programs consult with Legal & General with a view to greater involvement of legal advisers early in policy and operational processes.

The arrangements to be followed are set out in more detail in the attached instructions and guide for obtaining legal services. They deal with the question of who should be approached for legal advice in a particular case and set out guidance on when to seek legal advice and how to go about it.

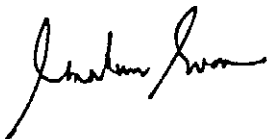
Sub program managers should ensure that all staff are familiar with the attached instructions and guide.

The reports by Professor Pearce indicated a need for greater attention to the effective involvement of legal advisers in the policy and operational processes. While practices have varied between sub programs, it is important that staff in all sub programs examine their approach to obtaining legal advice in the light of these arrangements.

The training sessions on legal awareness have included general guidance on the practicalities of obtaining legal advice. The second round of program specific workshops will provide a further opportunity to discuss these matters.

You will be aware that Alexandra Wedutenko has now been appointed as our General Counsel for a twelve-month period. Alexandra will also perform the function of Attorney-General's Department National Client Service Manager for this Department. Telephone and fax numbers for Alexandra and her support staff will be circulated as soon as possible.

CMD is implementing the other review recommendations.



GRAHAM EVANS

25 AUG 1993

DEPARTMENT OF TRANSPORT AND COMMUNICATIONS  
INSTRUCTIONS ON ARRANGEMENTS FOR PROVISION OF LEGAL SERVICES

1. Sub-programs should not use their own staff as legal advisers but should obtain legal services from Legal & General Branch (L&G) and, as appropriate, from officers of the Attorney-General's Department (A-G's).
2. Except in defined circumstances, L&G is to be the gateway to A-G's for the provision of legal services.
  - Except as set out in 3. and 4. below, requests for legal services should be referred to L&G in the first instance.
  - Should sub program staff see it as desirable that the General Counsel or other A-G's officers be involved, that should be specified.
  - L&G should also suggest the involvement of A-G's officers where that is appropriate; for example because of sensitivity of the subject matter or specialist expertise required.
3. Sub-programs may negotiate arrangements with L&G to work directly with A-G's for a defined purpose and time period where that would facilitate efficient access to legal services.

Relevant factors would include:

- whether specialised skills or expertise are involved that are not available in L&G
- whether the level of resources required exceeds that available within L&G in the necessary time frame
- whether there have been established arrangements for direct contact with A-G's that have worked efficiently.

In each case the terms of the agreement should be set out in writing, such as an exchange of minutes.

4. Issues requiring legal advice or other input may be referred directly to the General Counsel by:

- . the Executive
- . L&G, in accordance with working arrangements established with the General Counsel.

In any issue referred to the General Counsel, the General Counsel may involve other A-G's officers and L&G officers as considered appropriate.

Sub-program staff may specify that L&G involve the General Counsel in responding to a particular request for legal advice referred to L&G.

5. Where formal legal advice is sought by Ministers themselves, this should ordinarily be sought through the Attorney-General, but the General Counsel will facilitate this process whenever possible. The General Counsel will be available to advise on day-to-day issues in conjunction with Departmental officers.

- . Sub-program staff may approach the General Counsel directly to arrange participation by the General Counsel at meetings with Ministers in which legal issues will need to be discussed.

6. Written arrangements are to be prepared between the General Counsel and L&G to ensure a co-ordinated and co-operative approach to the provision of legal services in the Department.

The arrangements will cover

- . the sharing of information
- . balancing workload between the units, having regard to relative priorities, areas of expertise and available resources
- . mutual assistance, making effective use of L&G's familiarity with many departmental programs, the range of expertise available through A-G's and the professional independence, judgement and experience of the General Counsel.

7. Departmental officers should consult L&G to involve legal services early in policy or operational issues which will require legal input.

it is envisaged that L&G will normally be involved in the early stages of policy/operational issues, approaching the General Counsel as necessary.
8. Departmental officers should exercise careful judgment to ensure that they seek legal assistance in all appropriate cases. Specific examples of circumstances in which legal services are to be sought are set out in Part 1 of the guide attached to these instructions.
9. Sub-program officers and legal advisers should examine the implications of each issue carefully to ensure that the full range of legal aspects are explored (eg commercial, constitutional, trade practices, litigation). Further specialist advice should be obtained through A-G's as appropriate.
10. A summary of the issues in which A-G's should be involved (usually through L&G) is set out in attached guide. The summary lists a number of issues on which A-G's must be involved. Further, it identifies other circumstances where, as a matter of judgement, A-G's should normally be involved. Both sub-program staff and L&G staff should exercise careful judgment to ensure that the General Counsel and other A-G's officers are involved in appropriate cases and are fully briefed on the Department's objectives and requirements.
11. The attachment also sets out guidance about how officers should go about obtaining legal advice in order to ensure that the legal expertise available is used effectively. Officers should, as far as practicable, follow those guidelines in their dealings with legal advisers.
12. Departmental officers can consult the A-G's National Client Service Manager, the General Counsel and any other outposted A-G's officers, or L&G for information on the range of expertise available within A-G's and appropriate contacts.

## ATTACHMENT

### GUIDE FOR OBTAINING LEGAL ADVICE

#### 1. When to get legal advice

- In preparing advice to ministers, government organisations or members of the public which involves real questions of interpretation of legislation or other legal issues.
- In developing policy options where constitutional issues, interpretation of international agreements, legislative interpretation or other legal issues might arise.
- In reaching any administrative decision which involves unusual or controversial aspects, or where the amount at stake suggests a prospect of legal challenge.
- In preparing statements of reasons under section 13 of the ADJR Act (or where any other issue arises under that Act).
- In development and processing of legislative proposals, including at Parliamentary debate where questions of interpretation arise and in developing responses to Parliamentary committees on legal policy issues.
- In development of legislation and statutory instruments
  - in preparing drafting instructions to reflect policy objectives and strategies, settling drafts and preparing explanatory material for legislation and legislative instruments.
  - in drafting other formal instruments under statute.
- In considering enforcement action (whether prosecution or regulatory) in other than purely routine cases.
- In any steps involved in defending litigation against the Commonwealth or Commonwealth officers (whether actual or contemplated).
- In responding to applications for merits review of a decision - internal review or review by the AAT.
- In preparing replies to the Ombudsman where an interpretation of portfolio legislation or other legal issues are involved.
- In dealing with correspondence which argues a legal position and where the resolution of that issue affects the response.

In all stages of major acquisitions (including but not limited to IT) and other substantial commercial tasks.

In drafting of any changes or additional clauses for standard form contracts.

In resolving any dispute over contractual terms.

In dealing with any claim against the Commonwealth for payment of monies or other concession where that is not routinely payable under an established scheme.

In responding to compulsory court processes (including subpoenas).

In responding to requests for access to sensitive information.

In considering the use of personal or other sensitive information for a purpose other than that for which it was obtained.

In establishing, or taking on participation as shareholder or officer (director, trustee, council member, etc) in a company or other external organisation.

**2. Issues on which the Attorney-General's Department must be involved (through L&G unless otherwise agreed)**

Constitutional issues.

Litigation against the Commonwealth or commonwealth officers (whether actual or contemplated).

Drafting or clearance of government contracts or legal agreements.

Drafting of new or amending Acts (Office of Parliamentary Counsel) and statutory rules (Office of Legislative Drafting).

Resolution of disputes between Commonwealth agencies or of legal issues affecting several agencies.

National security matters.

Government-to-government agreement work, whether within Australia or internationally.

**3. Other issues where A-G's involvement is likely to be appropriate (through L&G unless otherwise agreed)**

Where the issue calls for expertise on specialist areas covered in A-G's eg. international law, company law, copyright, major commercial issues.

Where there are major implications attaching to legal advice, such as:

- precedent value;
- political risk; or
- high risk of litigation.

Where the advice will be used to promote a particular legal interpretation externally.

**4. What staff should do in obtaining legal advice**

Think the issue through as far as you can yourself before seeking advice.

Clearly set out the objectives, your understanding of the policy/operational issues and all relevant background information.

Try to identify areas of concern and the nature of any legal issues you are concerned might arise.

If you are aware of previous legal advice on relevant issues, identify that advice and provide a copy if practicable.

Set out any time requirements clearly and be in a position to discuss them.

- Allow a reasonable time in the context of the complexity of the issues and the sort of advice requested.

Clear the proposed request for advice at an appropriate level

- Make sure your understanding reflects that of others in your area.
- Articulating the background and issues and exposing your account to others can help clarify the thinking or identify further issues.

Seek advice early in the process and be prepared to obtain further advice progressively as proposals firm or other issues emerge.

Do not expect once-and-for-all answers on complex issues.



- Think about taking it in stages.
- Advice on complex issues requires a co-operative approach to bridging the gap between policy or operational and legal perspectives.
- Consider carefully the advice you receive and its implications at each stage.

Feel free to ask follow up questions or to query the advice, or to discuss your understanding of it with the adviser.

If you intend to rely on oral advice, record that advice carefully and clear the record with the adviser.

## 5. What not to do in seeking legal advice

Don't put the same question to several legal advisers in order to choose the advice you prefer.

- If the advices are different, there is clearly a level of uncertainty to be resolved.

Don't provide unbalanced or incomplete supporting information in the hope of a particular outcome.

Don't seek to obtain advice by asking for clearance of draft documents without explaining their intended effects, your policy objective and any relevant background information or identifying issues to be addressed.

Don't present complex policy/operational problems as if they might be resolved by legal advice alone. Describe the objectives that are sought to be achieved.

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## EXECUTIVE SUMMARY AND RECOMMENDATIONS

Assessing the demand for legal services has been a major task for the review. The primary focus has been on identifying current and future demand.

Over the last twelve months, the development of legislation has been a principal area of concern in Sub-programs, consistent with the major reforms in many of the areas.

Sub-program officers identified a significant demand for legal advisings - particularly, but not exclusively, in relation to the application and implementation of new legislation.

There has also been a significant demand for assistance with litigation, including several major administrative law cases which may affect Sub-program operations.

Interviews with Sub-program officers suggested too that there was a growing realisation of the value of using legal services in their work. There is an increasing tendency to try to involve legal advisers in early stages of policy development to ensure they have a greater appreciation of the background to particular issues and to help identify potential problems.

A number of areas suggested that their real needs exceeded their expressed demand, particularly with regard to involving legal advisers in strategic approaches to policy formulation. They did not involve Legal & General (L&G) Branch because they were aware that L&G's workload was too great to enable it to provide the desired service.

The Department's demand for legal services has historically been met from a number of sources. Some areas use L&G, some rely on Attorney-General's (A-G's), and others use a mixture of approaches depending on particular requirements. Use is also made in a few areas of legally qualified Sub-program staff.

The Department has not articulated the relationship between Sub-programs, the in-house legal unit and A-G's. In its day-to-day operations L&G Branch has been guided by the principle that it exists to assist Sub-program managers achieve their targets by which ever approach they might choose.

For specific projects, the Department has made a practice of arranging for the attachment to the team of specialist legal advisers from A-G's.

The Review Group is satisfied that the demand for legal services by the Department is unlikely to diminish over the next few years although it expects some changes in the balance of activities.

The Group agrees with those senior managers who stressed the importance of early participation by legal advisers in the policy development process and in the development of regulatory mechanisms or administrative schemes. It also recognises that there are difficult judgments to be made about the best use of resources.

#### RECOMMENDATION 1

**That the Department actively promote the greater involvement of legal advisers early in the policy development process, with the proviso that involvement should be subject to consultation between the relevant Sub-program manager and the head of L&G as to the feasibility of making an officer available.**

Against the background of the nature of the demand and availability of A-G's services the Review Group considered whether the Department should continue to maintain an in-house legal unit and the form it should take.

#### RECOMMENDATION 2

**The Department continue, for the immediate future, to use a combination of A-G's (central and outposted) and in-house legal resources for those legal functions for which use of A-G's is not obligatory.**

#### RECOMMENDATION 3

**That legal services be provided centrally and the practice of allowing Sub-programs to use members of their own staff as legal advisers be discontinued.**

Although the primary focus of the review has been on the legal services provided by L&G Branch, the Group also addressed the Branch's broader corporate functions, including contracts, assets and supply functions and functions of a quasi-legal nature such as FOI, privacy, co-ordination of portfolio legislation and other matters with a broad legal content.

#### RECOMMENDATION 4

**That L&G Branch be retained within CMD and that the Branch continue to embrace broader functions such as FOI and Privacy. Further, CASS should remain within the Branch at this stage.**

The Review Group's assessment is that the L&G Branch is currently under-resourced. Not only is the Branch Head being over-used as an adviser, but other senior staff are

working excessive hours for sustained periods and most of the legal staff are carrying more complex case loads than is normal for officers at their classification level.

#### RECOMMENDATION 5

That the Department make every effort to reallocate from within existing resources sufficient funds to permit the creation and filling of an additional SO B position within L&G to manage the significant quasi-legal functions for which the Branch is responsible.

Given the requirements of the work in L&G, the Review Group is of the view that the legal structure is more appropriate than is the clerical or administrative structure. Not only would it resolve anomalies within the classification structure, but it would also increase the status and authority of in-house advisers and assist the Department to attract and retain legal staff. The officers would have access to a legal career structure across the APS and there would be a real possibility of effective staff interchange with A-G's.

#### RECOMMENDATION 6

That the Department adopt the Legal classification structure for the legal unit within L&G Branch and that its implementation occur through a transition phase involving parallel clerical and legal positions.

The Department currently uses three principal sources of legal advice: L&G, A-G's proper and outposted A-G's officers and it will shortly have a General Counsel, also outposted from A-G's. This creates particular problems for both users and providers if the roles of, and interrelationships among, the sources are neither well defined nor well understood.

The Review Group identified three problem areas: the relationship between the General Counsel and the in-house legal advisers; between Sub-programs and each of the sources of legal services; and between resources located in the Department and those in A-G's proper.

In the Group's view, the General Counsel should focus on the advising and major litigation functions. His/her role should be defined as:

- the provider of consultant legal services to the Executive of the Department (and, on occasions to the portfolio Ministers) and to L&G Branch. The primary focus will be on the more critical or sensitive issues which confront the portfolio Ministers and the Department and especially on helping them assess the strategic significance of specific advisings or specific aspects of litigation.

- facilitator of access to specialist expertise within A-G's where this is necessary to satisfy the needs of the Executive and/or the in-house legal unit. Critical in this aspect will be the ability to integrate, in a way that is useful to senior managers, advice from a variety of specialist sources and to draw out its implications.

With this role clearly in mind, the Group sees access to the General Counsel as being necessarily limited. Without a restriction on access Counsel's ability to meet the demands placed on the position will be severely constrained.

The normal operating arrangements should be for Sub-programs seeking advisings from the General Counsel to go to L&G Branch.

Where the Executive goes to General Counsel for advice, Counsel will decide whether the matter can be best handled by a direct response, by reference to the appropriate specialist area of A-G's, or by L&G.

#### RECOMMENDATION 7

That the Secretary issue formal instructions defining the arrangements under which the services of the General Counsel are available to officers of the Department, key elements of the arrangements being:

- direct access rights limited to Ministers, the Executive and L&G Branch;
- a formal agreement between the General Counsel and L&G as to matters on which the latter may approach A-G's directly; and
- the accumulation within L&G of copies of all advisings, irrespective of their source.

The relationship which emerges between the head of the Branch and Counsel will be critical to the legal services function.

The Review Group also considered the role of the A-G's National Client Service Manager (NCSM), in light of the General Counsel arrangement.

#### RECOMMENDATION 8

That the Department ask the Australian Government Solicitor (AGS) to redefine the role and functions of the NCSM for the Department of Transport and Communications and examine whether these could and should be performed by the General Counsel and his/her support staff.

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In its examination of existing arrangements within the Department, the Group noted that there are major variations in practice when decisions are being made about where to seek legal services. It concluded that it is in the Department's interest to adopt a firm position of requiring all Sub-programs to use L&G as the gateway to other legal services.

Where L&G lacks either the specialised skills or sufficient capacity to meet the client Sub-program's needs within the required timeframe, it would enter into a formal agreement with the Sub-program manager that the latter would work directly with A-G's for a defined purpose and time period.

Because those Sub-programs which have long standing arrangements with A-G's do gain advantages from them, the Group believes that these arrangements should be brought within the framework of agreements negotiated with L&G, and the General Counsel advised of them.

#### **RECOMMENDATION 9**

That the Department require all Sub-programs to use L&G Branch as the gateway to other legal services and require Sub-program managers to enter into a formal agreement with L&G where, by mutual agreement, it is decided that direct access to A-G's on specified matters is the most desirable course of action.

The Review Group believes that it will be necessary to review the arrangements that it proposes for the provision of legal services after they have been in place for a reasonable period.

#### **RECOMMENDATION 10**

That the arrangements for the provision of legal services be reviewed within twelve months. In particular, the review should examine whether the recommended arrangements for managing the relationships among L&G, the General Counsel and A-G's have been effective; and assess progress with, and effectiveness of, the adoption of the Legal structure and the adequacy of co-ordination arrangements with A-G's. The review should also take up the question of whether it is then appropriate to move the contracts, assets and supply functions out of L&G Branch.