

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Program 1.1

Question No. 119

Senator Boyce asked the following question at the hearing on 18 October 2011:

Does the department receive copies of all legal advice sought by all government departments and ministerial offices from outside law firms? If not, why not?

There are examples where the government has received outside legal advice that an intended policy is likely to be unlawful and yet the government has ignored the advice and continued to pursue that policy. When this happens and the department is aware that the government is likely to be breaking the law if it continues to implement that policy – what action must you take? For example do you write a submission to cabinet raising concerns about the proposed actions of the government?

Where are the checks and balances in this scenario and what are the protections for taxpayers who could be left with massive legal costs because the government has still gone ahead and implemented policy that it had been advised was unlawful?

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

The Attorney-General's Department does not receive copies of all legal advice sought by all government departments and ministerial offices from outside law firms.

The Office of Legal Services Coordination (OLSC) in the Attorney-General's Department administers the *Legal Services Directions 2005* (the *Directions*). The *Directions* provide the framework for the Commonwealth's handling of claims and litigation and apply to 'Commonwealth legal work'. The *Directions* are a set of binding rules, issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*.

Paragraph 2 of the *Directions* requires that certain legal work, including constitutional, Cabinet, national security, public international law and most drafting work undertaken for an FMA Agency is tied to government providers of legal services within the Attorney-General's Department, the Australian Government Solicitor and the Department of Foreign Affairs and Trade. Tied work referred to as "Cabinet work" includes legal advice that is to be considered by Cabinet or relied on in preparing a Cabinet submission; or legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament.

Paragraph 3 of the *Directions* requires FMA agencies to report to OLSC on significant issues that arise in the provision of legal services, in particular in their handling of claims and involvement in dispute management, including litigation.

Paragraph 11 of the *Directions* places obligations on FMA and CAC Act agency heads to ensure each agency adopts appropriate management strategies and practices so as to achieve compliance with the *Directions* in the handling of claims and litigation, and in obtaining advice. Those obligations include the obligation to report to OLSC, and to make public, the agency's annual legal services expenditure. OLSC is preparing the Commonwealth Annual Legal Services Expenditure Report for 2010-11.