

Policy Directive



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Significant Legal Matters and Management of Legal Services

Document Number PD2017_003

Publication date 02-Feb-2017

Functional Sub group Corporate Administration - Purchasing

Summary This Policy Document will ensure that NSW Health entities notify the General Counsel of the NSW Ministry of Health of Significant Legal matters and adhere to relevant NSW Health and NSW Government policies when involved in legal matters and proceedings. Adherence is necessary to ensure that the State and its agencies are appropriately and effectively represented and Government advised of matters involving substantial costs or statewide precedents.

Replaces Doc. No. Significant Legal Matters and Management of Legal Services [PD2014_011]

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Applies to Local Health Districts, Board Governed Statutory Health Corporations, Chief Executive Governed Statutory Health Corporations, Specialty Network Governed Statutory Health Corporations, Affiliated Health Organisations, Public Health System Support Division, NSW Ambulance Service, Ministry of Health, Public Health Units, Public Hospitals, NSW Health Pathology, Cancer Institute (NSW)

Audience Administration, Directors of Workforce Development, Human Resources

Distributed to Public Health System, NSW Ambulance Service, Ministry of Health

Review date 02-Feb-2022

Policy Manual Not applicable

File No. 14/1921

Status Active

Director-General

This Policy Directive may be varied, withdrawn or replaced at any time. Compliance with this directive is **mandatory** for NSW Health and is a condition of subsidy for public health organisations.

SIGNIFICANT LEGAL MATTERS AND MANAGEMENT OF LEGAL SERVICES

PURPOSE

The purpose of this Policy Directive is to ensure that NSW Health entities notify the General Counsel of the NSW Ministry of Health of Significant Legal matters and adhere to relevant NSW Health and NSW Government policies when involved in legal matters and proceedings. Adherence is necessary to ensure that the State and its agencies are appropriately and effectively represented and Government advised of matters involving substantial costs or statewide precedents.

MANDATORY REQUIREMENTS

1. NSW Health entities must notify the Ministry of Health's General Counsel when Significant Legal Matters arise in accordance with this and NSW Government policies. Where a Health Entity becomes aware of a Significant Legal Matter the Health entity should not pre-empt government decisions or commit funds for private legal costs prior to notifying General Counsel. What action is to be taken will be examined upon notification and determined on a case by case basis.

Matters notified to, and covered by, the Treasury Managed Fund (TMF) which fall into the category of Significant Legal Matters do not require separate notification to the Ministry.

2. NSW Health entities have access to three panels of legal service providers, being; TMF Medical Liability Panel, the NSW Government Legal Services Panel and the TMF Liabilities Panel. The panels have been established following competitive tender processes and provide benefits to NSW Health entities using the panel firms. In each case competitive rates have been negotiated as part of the tender process. The requirements of use and engagement of panel firms vary according to the panel and matter type.
 - a. TMF Medical Liability Panel: The panel is primarily used for clinical negligence covered by TMF and Coronial matters. The panel is also available for non-TMF and general medico legal matters.
 - b. NSW Government Legal Services Panel: The panel is to be used by all NSW Health entities requiring external legal services provider to provide legal services for all major areas of law not covered by TMF, such as commercial, employment, litigation, property and major transactions. Use of the panel for all non TMF matters is mandatory, unless approved by General Counsel.
 - c. TMF Liabilities Panels: The panels were established in 2013 to undertake work covered by TMF Statement of Cover, and are required to be used for these matters unless there is approval by TMF for an alternative provider.

The Procedures document attached should be consulted for more detailed information on the panels, the types of matters covered by the panels and the requirements regarding the engagement process.

3. The following NSW Government policies relating to management of legal proceedings and related matters must be complied with by NSW Health entities when involved in legal matters and proceedings. These are:
 - a. The Model Litigant Policy
 - b. Litigation between Government authorities – Premiers Memorandum 97-26
 - c. Briefing Senior Counsel - Premiers Memorandum 09-17
 - d. Equitable briefing policy
 - e. Provision of ex gratia legal assistance - Premiers Memorandum 99-11
 - f. NSW Government Core Legal Work Guidelines - Premier’s Memorandum 16-04.

Details of the policies can be found in the Procedures document attached and the Department of Justice website.

4. All Government agencies are required to report on legal expenditure to the Attorney General. Reporting is by financial year and NSW Health Entities are required to provide information to the NSW Ministry of Health, who will collate information reported by NSW Health entities and provide the report to the Department of Justice on a consolidated NSW Health cluster basis. All NSW Health entities and Ministry Divisions are required to comply with timeframes set by the NSW Ministry of Health to enable compilation of the NSW Health cluster report.

IMPLEMENTATION

NSW Health entities will be responsible for ensuring compliance with the policy. Under the arrangements NSW Health entities will be responsible for paying Panel Firms’ fees (except for TMF matters) and that charging by panel firms is in accordance with their approved rates under the panel arrangements.

REVISION HISTORY

| Version | Approved by | Amendment notes |
|-----------------------------|--|---|
| February 2017 PD2017_003 | Deputy Secretary, Governance, Workforce and Corporate | Updates information and processes regarding engagement of Legal Firms on Legal Services Panels |
| April 2014 PD2014_011 | Deputy Director General, Governance, Workforce and Corporate | Consolidates PD2009_019 and PD2006_009, updates the contents in relation to what is considered significant legal matters and inserts requirements for annual reporting. |

ATTACHMENTS

1. Significant Legal Matters and Management of Legal Services: Procedures

Significant Legal Matters and Management of Legal Services



Issue date: February-2017

PD2017_003

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1 BACKGROUND

1.1 About this document

This document sets out procedures and obligations relating to:

- Notification of legal matters of significance to NSW Health or the Government generally
- Use of Health and Government legal services panels
- Whole of government policies relevant to legal services and legal proceedings (including the Model Litigant Policy)
- Requirements for annual reporting of legal expenditure.

This document also provides some guidance on practices that may be adopted by NSW Health agencies to support more efficient and cost effective management of legal matters and proceedings.

1.2 Key definitions

“**Counsel**” means a person admitted as a legal practitioner in NSW (or equivalent) who holds a current practising certificate to practise as a barrister in NSW.

“**Health Secretary**” means the Secretary of the NSW Ministry of Health.

“**Legal Branch**” means the NSW Ministry of Health’s Legal Branch.

“**Legal proceedings**” means proceedings commenced before any court, tribunal, commission or other arbitral, adjudicative or quasi-judicial body.

“**NSW Health agency**” means the NSW Ministry of Health, a local health district or statutory health corporation as defined in the *Health Services Act 1997*, and an administrative unit of the Health Administration Corporation (including NSW Ambulance Service, HealthShare NSW, Health Pathology and Health Infrastructure) and any other entity under the direction or control of the Minister for Health or Secretary NSW Health.

“**Panel Firm**” means a legal service provider on the NSW Government Legal Services panel, the TMF Medical Liability Panel, or a panel firm on the other TMF Liability Panels.

“**Significant Legal Matters**” means legal matters or proceedings which:

- i) Raise issues which are fundamental to the responsibilities of the Minister, Health Secretary or NSW Ministry of Health, Health Administration Corporation, or any officer thereof
- ii) Involve significant medico-legal, ethical, policy, industrial, work health and safety or other operational issues. Examples include legal matters with the potential to establish a precedent for the health system, commencement of legal proceedings where there is a refusal of treatment
- iii) matters relating to allegations of historical sexual abuse

- iv) Coronial proceedings
- v) Concern legal proceedings to which a NSW Health agency or its officers are a party to, which raise a significant question of interpretation of NSW Health policy or legislation administered by the Minister for Health
- vi) Concern legal proceedings involving more than one NSW Health agency, multiple NSW Government agencies, or proceedings involving a Minister of the Crown (including the Attorney-General in his or role of Protector of Charities)
- vii) Raise issues concerning intergovernmental relations, arrangements or agreements
- viii) Otherwise concern legal engagement involving the expenditure or reasonably anticipated expenditure on legal costs and disbursements in excess of \$150,000
- ix) Core Legal Matters that require referral to the Crown Solicitor's Office in accordance with Premier's Memorandum 2016-04¹. See section 7 for further guidance
- x) Proceedings where a claim has been made for compensation over and above the relevant award or statutory entitlements and those proceedings may have system wide implications (See *Non-Standard Remuneration or Conditions of Employment* PD2014_006).

2 SIGNIFICANT LEGAL MATTERS

2.1 Notification

Significant Legal Matters are generally legal proceedings involving NSW Health agencies as parties, or other legal matters arising in the course of conducting the agency's affairs, that may have implications for the broader health administration, or otherwise be relevant to the functions of the Minister for Health, NSW Ministry of Health or Health Administration Corporation. Significant Legal Matters also include Core Legal Work and are therefore required to be referred to the Crown Solicitor in accordance with Premier's Memorandum 2016-04.

Significant Legal Matters are to be notified to the NSW Ministry of Health via the General Counsel as soon as practicable after the NSW Health entity becomes aware of the matter.

In urgent cases the initial notification should be by telephone. In all other cases the initial notification is to be in writing and contain a summary of the relevant facts.

Upon notification, the circumstances of the matter will be considered by Legal Branch. Legal Branch will assess whether:

- The NSW Ministry of Health will take over management of the matter

¹ <http://arp.nsw.gov.au/m2016-04-nsw-government-core-legal-work-guidelines>

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- To provide legal assistance in the form of either direct legal advice or representation through Legal Branch
- To retain the Crown Solicitor's Office or other external legal service providers, or
- Contribute to part or all of the costs of private legal advice or representation.

In limited circumstances when the NSW Ministry of Health's Legal Branch takes over the management of Significant Legal Matters, it may also assume responsibility for legal costs.

The NSW Ministry of Health is also advised of some Significant Legal Matters through other processes. There is no requirement to notify Legal Branch separately to these processes. These processes are:

- Treasury Managed Fund matters are initially notified to the TMF Health Liability Claims Manager who will then inform the General Counsel where the matter is or could be significant. In addition to the criteria set out in the definition of Significant Legal Matters in section 1.2 above, Significant Legal Matters for the purposes of TMF Claims also include clinical negligence matters that:
 - i) Have a reserve of \$2.5 M or greater and / or
 - ii) Relate to any appeal on a substantive issue and / or
 - iii) Are listed for hearing within the next month and are unlikely to settle or resolve.

Matters relevant to legal management of these matters are addressed in Part 3.

- Coronial matters must also be notified to the NSW Ministry of Health. Specific notification requirements exist for Coronial matters to assist determining whether a civil claim is likely to arise from the death and whether legal representation is required. (see Part 4).
- Prosecutions under health legislation are approved under the NSW Health Prosecution Guidelines (summarised at Part 6).

Affiliated Health Organisations are requested to notify the General Counsel of Significant Legal Matters, excluding matters where anticipated expenditure alone is the reason the matter is being considered a Significant Legal Matter. While Affiliated Health Organisations conduct their own legal matters, notification is to ensure that the General Counsel is aware of matters that may have implications for the broader health administration, or otherwise be relevant to the functions of the Minister for Health or the NSW Ministry of Health.

2.2 Initial Management of Significant Legal Matters

NSW Health agencies should not act in a way that pre-empts Government decisions in respect of the appropriate conduct of Significant Legal Matters or commit funds to private legal costs where legal costs would otherwise be met as part of the "core legal work" of Government.

2.3 Internal reporting systems

NSW Health agencies are to ensure internal reporting systems are in place so that legal matters originating in hospitals and other health services are promptly notified in accordance with this Policy Directive.

3 TREASURY MANAGED FUND MATTERS

The Treasury Managed Fund (TMF) is the NSW Government's self-insurance scheme. TMF provides indemnity for liability claims against NSW Health agencies under the Statement of Cover.

The majority of claims made against Health agencies through TMF involve alleged clinical negligence, and these will generally be managed by legal providers from the Medical Liability Panel or TMF Workers Compensation Panel. Other types of claims will be allocated to legal providers on a case by case basis, in consultation with TMF and the health agency (see Part 5 below).

TMF cover can be extended to an employee of NSW Health where TMF is satisfied that the employee acted reasonably in the circumstances and within the scope of his or her employment. TMF also provides cover for voluntary workers for death or bodily injury sustained whilst the voluntary worker is actively engaged in voluntary work with NSW Health.

A copy of the Statement of Cover can be found [here](#).

Where TMF accepts a claim, legal costs will also be met by the Fund. The Fund may also cover legal costs in some coronial matters, but only where it is determined that the coronial is likely to give rise to a legal claim (see Part 4 below).

4 CORONIAL MATTERS

Coronial matters should be notified to the General Counsel using the Checklist attached as Annexure 1. The Checklist also enables identification of matters likely to give rise to a claim on TMF.

Matters identified as having potential to raise a claim will be reviewed by General Counsel. Where a case is assessed as likely to lead to a civil claim, the checklist will be forwarded to SiCorp with a request for TMF cover for the legal costs.

Where a Coronial matter is assessed as *unlikely* to lead to a civil claim, legal costs will be met by the Health agency. Where a NSW Health agency spends over \$100,000 on costs for Coronial matters in any single financial year, an application can be made to the NSW Ministry of Health's Chief Financial Officer for reimbursement of the excess amount.

Briefs, including the Coronial Checklist, should be sent via e-mail to: significantlegalmatters@doh.health.nsw.gov.au.

5 ENGAGING PROVIDERS ON GOVERNMENT LEGAL SERVICES PANELS

5.1 Overview

There are three main Legal Services Panels available to NSW Health agencies:

- TMF Medical Liability Panel: Mandatory for clinical negligence claims covered by TMF Statement of Cover (unless an alternative provider is approved by TMF and MoH) and Coronial matters.
- TMF Liability Panels: The Panels were established in 2013 to undertake work covered by TMF Statement of Cover, and are required to be used for these matters unless there is approval by TMF for an alternative provider.
- NSW Government Legal Services Panel: A mandatory and comprehensive legal services panel covering all major areas of law in which NSW Government agencies require legal services, such as commercial, employment, litigation, property and major transactions.

These panels have been established following competitive tender processes and provide a number of benefits for NSW Health agencies, including:

- Access to high quality, value for money legal services in a range of specialist areas
- Enabling Panel Firms to be engaged without further procurement process such as seeking quotations, and
- Access to service “add-ons” such as workshops and presentations on topical legal issues relevant to NSW Health staff.

Arrangements for accessing the panels, coverage of matters and payment of legal services providers varies between the panels and are described in further detail below.

For the NSW Government Legal Services Panel and coronial matters under the TMF Medical Liability Panel matters will generally be charged on a “do and charge” basis at the established panel rates. However, for work of a more routine nature consideration can be given to requesting a fixed quotation (under the NSW Government Legal Services Panel, fixed rate options are available in a number of Areas of Law such as property or conveyancing).

Information on the panel arrangements can be obtained from Legal Branch. NSW Health agencies should note that information on rates and disbursements under the panel arrangements is commercially confidential and should be available only to appropriate staff and not be released outside the agency.

5.2 TMF Medical Liability Panel

The TMF Medical Liability Panel provides services in litigated and unlitigated civil liability matters on behalf of NSW Health agencies. The Panel also provides services for health

care claims against VMOs and Staff Specialists who have signed individual Contracts of Cover with a NSW Health agency.

The majority of the matters covered by this panel are clinical negligence matters, although public liability, privacy and other types of claims may also be included.

The NSW Ministry of Health is informed of claims by the TMF, or in some cases, by the Health agency involved. Upon notification the NSW Ministry of Health will determine its involvement in the matter and communicate this to both the TMF claims manager and the NSW Health agency. In most matters, the TMF claims manager will provide instructions to a Panel Firm with the NSW Health agency involved, and the NSW Ministry of Health will only provide instructions on certain issues, for example whether to plead contributory negligence. Where a matter is classified as a Significant Legal Matter, the NSW Ministry of Health will provide instructions (in addition to the TMF claims manager and the Health agency).

Legal representation for coronial matters will be provided from firms appointed to the TMF Medical Liability Panel.

5.3 TMF Liability Panels

TMF also operates a general panel for other TMF matters over five practice areas / sub-panels. These cover general claims, complex claims, workers compensation, employment and protective actions. Health agencies will not generally need to call on the general TMF Panel, other than the workers compensation sub-panel.

Where a claim is made to TMF, a TMF panel firm must be used, unless TMF provides approval of the use of an alternative firm.

For more information regarding utilising the TMF Liability Panel for worker's compensation matters contact the NSW Ministry of Health's Manager of Risk and Insurance. For information regarding all other sub-panels contact Legal Branch.

5.4 NSW Government Legal Services Panel

For matters not covered by the Medical Liability Panel or the TMF Liability Panel, NSW Health agencies are required to use the NSW Government Legal Services Panel.

The Panel is a whole of government legal services panel that commenced on 1 July 2016. The Panel is managed by Transport for NSW on behalf of the NSW Government.

The Panel comprises six sub-panels covering 35 areas of law.

1. Major transactions
2. Commercial
3. Planning, property and environment
4. Employment, work health and safety
5. Government, regulatory and administrative
6. Litigation and inquiries

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The NSW Procurement website (at <https://www.procurepoint.nsw.gov.au/2015068>) includes detailed information about the Panel, including:

- How to access services from the Panel
- Details of which firms are appointed to the Areas of Law covered by the Panel
- Panel firm contact details
- Panel Rules, including the off-panel engagements guideline (see below) and the Conflict Management Guideline

The NSW Procurement website does not include details of firm rates (including fixed rates); however this information can be obtained from the Legal Branch.

Where a matter is a Significant Legal Matter the NSW Health agency must notify General Counsel in accordance with Part 2 prior to any decision to engage external legal services providers.

For non-Significant Legal Matters, NSW Health agencies may approach any firm appointed to the relevant area of law directly to obtain legal services. There is no longer a requirement to notify or seek approval from the NSW Ministry of Health's Legal Branch. All firms appointed to a particular area of law will have the requisite skills and expertise to provide legal services in that area, although NSW Health agencies are welcome to consult Legal Branch to assist in identifying an appropriate firm or for any other questions about use of the panel.

When engaging a firm under the Panel, Health Agencies will be required to provide a Legal Services Order Number. This number is a relevant internal number of the Agency, such as a file number or TRIM number.

Services provided under the NSW Government Legal Services Panel are not covered by TMF, and all costs will need to be met from the engaging agency's budget, except as in the circumstances set out in Part 2.

If in the course of an engagement the NSW Health agency identifies that the matter should be covered by the NSW TMF, Legal Branch can assist the Health agency to seek approval from TMF for the appointed legal firm to continue to act.

Specific categories of work are excluded from the legal services provided by the NSW Government Legal Services Panel, including:

- Work undertaken by existing panels, (such as the Medical Liability Panel and TMF Liability Panels)
- Core Legal Work, undertaken by Crown solicitor (see section 7.1 below)
- Direct briefs to Counsel,
- The provision of ex gratia legal assistance in accordance with Premier's Memorandum 99-11.

Off Panel Engagements

The NSW Government Legal Services Panel is mandatory, but does allow for “Off-Panel” engagement in limited circumstances. Any off-panel engagement must be approved by the General Counsel, and be in accordance with the whole of Government Off-Panel Guidelines.

Each Panel Firm is appointed to provide services in specific areas of law in specific sub-panels. “Off-Panel” engagement therefore includes not only engaging a firm not on the Panel, but also engaging a Panel Firm in an area of law outside those to which they have been appointed.

A written request for General Counsel approval to engage Off Panel must include:

- The reason why external advice or assistance is sought
- A brief description of the main issues arising, the nature of the legal services likely to be required, and the anticipated complexity of work involved
- The timeframe within which services are required and why
- The reason why an off panel firm is proposed (see below) and
- Relevant contact at the NSW Health entity.

Briefs should be forwarded directly to the NSW Ministry of Health’s Legal Branch via e-mail to: NSWLegalPanel@moh.health.nsw.gov.au.

Valid reasons for an application to make an off-panel engagement are set out in detail in the off-panel engagements guideline. However, key reasons for NSW Health agencies are likely to be:

- The area of law is not covered by the Panel (this is expected to be rare given the breadth of services covered by the Panel)
- Work commenced under one area of law transitions into work covered under another area and retaining the same Panel Firm represents good value for money but the firm engaged is not on the sub-panel for the subsequent area
- For major projects or commercial transactions, associated work spanning a number of areas of law may be undertaken by the Panel Firm engaged for the major transaction e.g. PPP projects involving tax issues; divestment transactions involving property or employment issues
- To provide opportunities for regional / rural law firms, if a matter is estimated to cost no more than \$30,000 (incl GST) and it arises in a regional or rural area, NSW Health agencies may seek approval to engage a local ‘off panel’ regional or rural firm.

Briefing Counsel

The NSW Government Legal Services Panel does not cover the direct engagement of Counsel by Government agencies.

NSW Health agencies may continue to directly engage Counsel in appropriate matters (subject to the requirements regarding notification to the NSW Ministry of Health’s Legal Branch of Significant Legal Matters prior to engaging any legal service provider).

In considering which Counsel to brief, NSW Health agencies must comply with the whole of government Equitable Briefing policy and Briefing Senior Counsel policies (see sections 7.4 and 7.5 below).

6 PROSECUTIONS

NSW Health, through the NSW Ministry of Health and Public Health Officers, has regulatory functions under a number of Health portfolio statutes. Prosecutions must be approved by the NSW Ministry of Health's General Counsel. Prosecutions must be conducted in line with the NSW Government's Model Litigant policy and NSW Health's Prosecution Guidelines.

For further information see PD2014_021 *Prosecution Policy and Guidelines*.

7 WHOLE OF GOVERNMENT POLICIES

A range of whole of NSW Government policies relating to management of legal proceedings and related matters must be complied with by NSW Health agencies.

7.1 Core Legal Work

Core legal work is required to be referred to the NSW Crown Solicitor's Office in accordance with Premier's Memorandum 2016-04 *NSW Government Core Legal Work Guidelines*.

A matter will constitute Core Legal Work where:

- The best interests of the Government as a whole require a single source of authoritative legal advice and central management or
- It relates to the statutory or common law functions of the Attorney General.

The Memorandum includes a list of matters likely to fall within the ambit of "core work", including questions of public interest immunity, the State's relationship with another government, prohibited employment matters and Crown copyright.

Matters that are Core Legal Work also fall within the definition of Significant Legal Matters and must be notified to the Legal Branch. Where a NSW Health agency considers a matter may be Core Legal Work advice should be sought from the Legal Branch.

Full text of the Memorandum can be found [here](#).

7.2 Model Litigant Policy

Premier's Memorandum M2016-03 *Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse* imposes obligations on all government agencies to act as a model litigant in the conduct of litigation. This requires more than merely acting honestly or in accordance with the law and court rules. It requires that

NSW Health agencies act with complete propriety, fairly and in accordance with the highest professional standards.

The obligation does not prevent NSW Health agencies from acting firmly and properly to protect the interests of the agency or the State. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

Full text of the Policy can be found [here](#).

7.3 Litigation between Government authorities

Premier's Memorandum 97-262 *Litigation Involving Government Authorities* sets out guidelines for litigation between Government authorities, and covers both civil actions and criminal prosecutions. The guidelines are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible.

Where litigation does occur, Government authorities are required to take steps to consult with the authority against which litigation has been commenced and attempt to reach agreement on as many factual and legal issues as possible, to ensure only matters which need to be resolved by the Court are left in issue. In civil proceedings, alternative dispute resolution procedures should be utilised before resorting to the Court system.

The guidelines set out the process to be followed, including:

- For prosecutions by one government authority of another
- For civil disputes between government authorities
- For claims of public interest immunity.

In any situation involving potential litigation between a NSW Health entity and another NSW Government authority, advice must be sought from Legal Branch as soon as possible.

Full text of the memorandum can be found [here](#).

7.4 Briefing Senior Counsel

Premier's Memorandum 2009-17 *Briefing Senior Counsel* requires Government agencies to obtain approval from the Attorney General prior to briefing Senior Counsel, including for representation in proceedings and in advice matters.

Requests to brief Senior Counsel should be submitted via NSW Health General Counsel. To assist with the process, NSW Health agencies should include with the request:

- Name of matter
- Jurisdiction (i.e. court)

² http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/1997/m1997-26

- Overview of facts
- Relevant legal arguments
- Reasons for briefing Senior Counsel, including the importance and any special sensitivities of the matter.

Requests need to include three nominated Senior Counsel, including one female Senior Counsel. If these requirements cannot be met an explanation is required to be included as part of the request for approval.

Full text of the memoranda can be found [here](#).

7.5 Equitable briefing policy

The NSW Government *Equitable Briefing Policy* requires Government Agencies to make all reasonable endeavours to genuinely consider female Counsel and Senior Counsel in the relevant practice area and regularly monitor and review the engagement of female Counsel.

Equitable briefing of Counsel by agencies is captured as part of the annual reporting on legal expenditure.

Full text of the Policy can be found [here](#).

7.6 Ex gratia legal assistance for NSW Health employees

Premier's Memorandum 99-11 *Guidelines for the Provision of ex Gratia Legal Assistance for Ministers, Public Officials and Crown Employees* sets out the process for obtaining ex gratia legal assistance for public officials, including NSW Health employees.

Ex gratia legal assistance is available for certain proceedings arising out of or related to the performance of the official's employment, such as:

- Where staff are called to appear before a Special Commission of Inquiry or the Independent Commission Against Corruption
- Apprehended Violence matters, or
- When legal proceedings have been commenced against a public officer or are known to be imminent.

Assistance is discretionary and requires approval through the Department of Justice.

Applications for ex gratia legal assistance for NSW Health employees should be made initially to the Chief Executive of the relevant NSW Health agency who should undertake a thorough investigation into the circumstances giving rise to the proceedings to determine whether it falls within the guidelines and whether an application for ex gratia assistance is supported.

If the application is supported the Chief Executive should submit a brief with supporting documentation to the Health Secretary via the General Counsel. Legal Branch will review and submit the application to the Department of Justice for approval.

Applications should be submitted promptly to enable sufficient time for local investigation and consideration by both the NSW Ministry of Health and Department of Justice.

The Department of Justice will also determine rates and the legal service provider to be engaged.

Once the application is approved by Department of Justice, the employee is entitled to be indemnified against legal costs and any verdict (in civil proceedings) awarded against the person (subject to any conditions that may be imposed by Department of Justice). The indemnity will not cover fines, penalties or criminal compensation, or punitive / exemplary damages where the officer has engaged in serious and wilful misconduct.

When ex gratia assistance is approved representation will usually be provided by the NSW Crown Solicitor's Office. The Health agency will be responsible for paying the legal costs.

Full text of the memoranda can be found [here](#).

8 ANNUAL REPORTING OF LEGAL EXPENDITURE

The NSW Department of Justice requires annual legal services expenditure reporting by NSW Government agencies to obtain information about legal services expenditure by government sector agencies in NSW. All NSW Government agencies are required to report annually on internal and external legal services expenditure. The reporting takes place for each financial year period.

For NSW Health entities this is co-ordinated by the NSW Ministry of Health's Legal Branch.

With the introduction of the NSW Government Legal Services Panel the reporting mechanisms are being strengthened.

Off-panel expenditure will be monitored on a bi-annual basis by the Procurement Board. The NSW Ministry of Health's General Counsel is required to put in place processes to track off-panel legal expenditure and report this by 31 November and 31 May each financial year to the NSW Government Legal Services Panel Contract Manager for provision to the Procurement Board. This information will be used to review the performance of the Panel, including appropriateness of the exemption arrangements.

9 GOOD PRACTICE IN MANAGING LEGAL SERVICE PROVIDERS

There are a number of basic practices that can be adopted to support efficient and cost effective management of legal proceedings and service providers. These include:

-
- Developing procedures to manage service providers, such as:
 - Appointing a contact with appropriate delegations to provide instructions and approve costs
 - Putting in place reporting processes including regular reports by the external legal service provider.
 - Ensuring there are clear, agreed costs estimates, as well as regular updates on work in progress fees. Consideration should be given to requiring providers to notify when fees reach certain threshold levels to ensure cost issues are managed proactively.
 - Considering using internal legal Counsel to assist in managing the matter and / or relationships with external legal service providers.
 - Ensuring representatives of off panel legal firms are aware of all relevant NSW Health and NSW Government policies at the outset of proceedings.
 - Providing feedback on services received to the NSW Ministry of Health and / or the legal service provider to support oversight and quality of services.

10 LIST OF ATTACHMENTS

Coronial Checklist

Core Legal Work Guidelines

LEGALLY PRIVILEGED – THIS DOCUMENT DOES NOT FORM PART OF ANY PATIENT FILE OR RECORD

NAME OF DECEASED _____

Checklist for approval to obtain legal representation and to assist the NSW Treasury Managed Fund in determining whether indemnity for legal costs will be granted.

Attention: General Counsel, NSW Health, email significantmatters@doh.health.nsw.gov.au

Are the circumstances of the coronial investigation / inquest likely to give rise to a civil claim?

Liability

1. If an RCA was conducted, please attach a copy of the final report.
Additional Comments:
2. Does the PHO consider that there may have been negligence / a breach of duty of care toward the deceased that contributed to their death?
Additional Comments:
3. Have any of the health professionals involved been subject to complaints to their registration board / the HCCC in respect of their involvement in the deceased's treatment?
Additional Comments:

Family Intention

4. Has the family of the deceased indicated that they intend to seek compensation or legal advice?
Additional Comments:
5. Has the family instructed a lawyer?
Additional Comments:
6. Has the family been aggressive towards staff?
Additional Comments:
7. Has the family made any complaints in respect of the deceased's treatment (including to the PHO or to the HCCC?)
Additional Comments:
8. Has open disclosure taken place?
Additional Comments:
9. Has the family refused to participate in open disclosure?
Additional Comments:
10. Has the family made a request for patient records or patient information?
Additional Comments:
11. Has the family made any concerns about the deceased's death or treatment public?
Additional Comments:

Family / Potential Claimants

12. What was the age of the deceased?
Additional Comments:

13. Did the deceased have young children or other dependents?

Additional Comments:

14. Was the deceased:

- (a) A mental health patient
- (b) An obstetric patient

GENERAL COMMENTS/CONCERNS:

ATTACHMENTS:

(Please attach copies documents such as correspondence from the Coroner / Police requesting statements, the RCA report, any correspondence with the family, HCCC or any other relevant document

Approved by:

Designation: *(eg. LHD coronial contact officer as notified to Legal Branch)*

NOTES:

1. THIS CHECKLIST MUST BE SIGNED BY AN OFFICER WITH AN APPROPRIATE DELEGATION TO INCUR LEGAL COSTS (IN THE EVENT THAT LEGAL COSTS ARE INCURRED BEFORE TMF COVER IS APPROVED, OR TMF COVER IS DECLINED OR NOT SOUGHT.
2. THIS FORM CONSTITUTES A REQUEST FOR LEGAL REPRESENTATION, REGARDLESS OF WHETHER TMF COVER IS OBTAINED.
3. THIS FORM CAN BE UPDATED AND RE-SUBMITTED AT ANY TIME WHEN FURTHER INFORMATION ABOUT THE LIKELIHOOD OF A CIVIL CLAIM BECOMES AVAILABLE.

Reviewed: PLO

Approved: General Counsel

NSW Government Core Legal Work Guidelines

What is core legal work?

A matter will constitute core legal work where:

- (a) the best interests of the Government as a whole require a single source of authoritative legal advice and central management; or**
- (b) it relates to the statutory or common law functions of the Attorney General.**

Core legal work must be referred to the Crown Solicitor.

The Attorney General is the first law officer of the State. By virtue of that office, the Attorney has traditionally been regarded as the legal adviser to the Crown in right of New South Wales and the proper person to conduct or defend legal proceedings on behalf of the Crown, subject to any statute to the contrary. In the conduct of such matters, the Attorney General is advised by Crown Law Officers (including the Solicitor General, the Crown Advocate and the Crown Solicitor).

Notwithstanding the Attorney General's role as legal adviser to Government, Ministers remain entitled to their own advisers in the administration of their portfolio responsibilities. As a result, in practice, much of the legal work of Government is undertaken on instruction from Ministers and the agencies within their administration. Agencies have developed substantial in-house legal expertise. They may also engage private sector law firms, for example, in matters that do not involve core legal work.

Having a single legal adviser in respect of core matters, however, reduces the risk of different parts of Government seeking external legal advice from different sources that may be inconsistent, not take fully into account the interests of Government as a whole or address broader public interest issues, or duplicate previous advice given on the same or similar matter to other Government agencies.

At Annexure A of these guidelines is a list of the types of matters that are generally treated as core legal work in accordance with the criteria set out above.

Government agency legal services managers must continue to exercise their judgment to assess whether matters arising within their agencies may constitute core legal work. If an agency is uncertain as to whether a particular matter constitutes core legal work, the Crown Solicitor must be contacted for guidance on whether the matter should be referred in accordance with these guidelines.

From time to time, however, matters may arise that the Crown Solicitor determines are not covered by the list in Annexure A, but that otherwise satisfy the overarching criteria for core legal work and must therefore be referred to the Crown Solicitor. The Crown Solicitor may determine that a routine matter meets the criteria and should be treated as core legal work, even if it does not clearly fall within one of the examples listed in Annexure A. Where an agency disputes whether the matter is core legal work or there is otherwise uncertainty as to whether or not the matter is core legal work, the Crown Solicitor may refer the matter to the Secretary of the Department of Premier and Cabinet to determine, in consultation with the Secretary of the Department of Justice.

Who pays for core legal work?

Core legal work referred by General Government Sector agencies will generally be paid for from the Attorney General's Legal Fund (formerly the Core Legal Fund) unless a different source of funding is available, for example:

- work paid for by the Treasury Managed Fund; and
- work undertaken in respect of Australia's obligations under the Hague Convention and paid for by the Commonwealth Government.

The Attorney General's Legal Fund is administered by the Secretary of the Department of Justice.

Core legal work referred by non-General Government Sector agencies will not be paid for from the Attorney General's Legal Fund. Non-General Government Sector agencies are, however, required to refer core matters to the Crown Solicitor. The costs of such matters must be met by the relevant agency or someone else on the agency's behalf (for example, the Treasury Managed Fund).

Can core legal work be performed in-house?

Legal officers employed by agencies play an important role in identifying core legal matters and may provide preliminary or urgent advice in relation to those matters. As a general rule, however, matters falling within the list of examples at Annexure A should, particularly where they involve litigation or where legal advice is to be relied upon publicly, be referred to the Crown Solicitor unless other arrangements have been agreed with Crown Solicitor.

Where the Crown Solicitor has provided advice in relation to a core legal matter, public sector agencies are expected to defer to the opinion of the Crown Solicitor in the event of any difference of legal opinion with the agency's in-house legal officers. (By convention, the Crown Solicitor in turn defers to the legal opinions of the Solicitor General and, ultimately, the Attorney General.)

Can core legal work be performed by a private-sector provider?

There may be occasions where the Crown Solicitor is referred a core legal matter and determines, in consultation with the relevant instructing agency, to refer some or all of it to the private sector.

If the Crown Solicitor is unable to act due to a conflict of interest, the relevant agency may engage an alternative private sector adviser once the Crown Solicitor has confirmed that the conflict precludes her or his Office from accepting instructions. In this case only, all costs associated with core legal work that is performed by private sector legal practitioners will be paid for from the Attorney General's Legal Fund. The agency must promptly notify the Department of Justice of the matter if it is to be paid from the Attorney General's Legal Fund.

There may also be cases where an agency wishes to engage or continue to engage a private sector legal practitioner to perform core legal work. For example:

- major litigation or commercial transactions; or
- where it is not apparent that a matter will involve core legal work until after a private sector legal practitioner has been engaged to conduct the matter and the transfer of the matter would result in a substantial duplication of resources.

In these circumstances, whether or not core legal work may be performed by a private sector provider is a matter for the Crown Solicitor, and agencies must seek the approval of the Crown Solicitor before engaging, or continuing to engage, a private sector provider. All costs associated with core legal work that is performed by private sector legal practitioners in these circumstances will be borne by the relevant agency and not the Attorney General's Legal Fund, and the Crown Solicitor will advise the Attorney General's Legal Fund that the costs of such work will be met by the relevant agency.

Can agencies brief the Solicitor General?

From time to time the Solicitor General will advise or appear on behalf of the State, the Attorney General or an agency. Where the matter involves core legal work, all briefs to the Solicitor General are to be provided by the Crown Solicitor. For other matters, it will also generally be appropriate for agencies to instruct the Crown Solicitor to prepare the necessary brief to the Solicitor General.

If agencies wish to brief the Solicitor General directly on any matter that does not involve core legal work, they must first inform the Crown Solicitor in writing that they are doing so and ensure that a copy of any opinion or other advice provided by the Solicitor General is made available to the Crown Solicitor to ensure continued consistency of advice to Government (noting that the Crown Solicitor will, by convention, generally defer to the legal opinion of the Solicitor General).

NSW Core Legal Work Guidelines

Annexure A – Examples of Core Legal Work

A matter will constitute core legal work where:

- (a) the best interests of the Government as a whole require a single source of authoritative legal advice and central management; or**
- (b) it relates to the statutory or common law functions of the Attorney General.**

Core legal work must be referred to the Crown Solicitor.

The following types of matters will generally be regarded as satisfying the above criteria. The Crown Solicitor may determine that a routine matter meets the above criteria and should be treated as core legal work, even if it does not clearly fall within one of the examples listed below. Where an agency disputes whether the matter is core legal work or there is otherwise uncertainty as to whether or not the matter is core legal work, the Crown Solicitor may refer the matter to the Secretary of the Department of Premier and Cabinet to determine, in consultation with the Secretary of the Department of Justice.

1. Legal proceedings or legal advice concerning:

- the constitutional powers and privileges of the State and/or the Commonwealth;
- the powers and privileges of Parliament and its Committees, including advice on orders and requests for documents under Standing Orders 52 and 53;
- the Governor;
- the existence or scope of the Crown's executive powers;
- Commonwealth, State and local government elections, and other elections that the Electoral Commissioner is required to conduct by statute;

- the State's relationship with another government;
 - native title, Aboriginal land claims, and the identification of Crown land¹ prior to sale or disposition;
 - water prosecutions under the *Water Management Act 1912*;
 - public interest immunity, including advice on whether or not a claim should be made; or
 - Cabinet information and Executive Council information under the *Government Information (Public Access) Act 2009*; or
 - the interpretation of legislation that is allocated to the Premier, the Treasurer, or the Attorney General, where the interpretation will likely affect all or a class of Government agencies generally and does not merely involve the application of well-settled precedent.²
2. The provision of legal assistance to, and legal advice concerning, inquiries established under:
- the *Royal Commissions Act 1923*, the *Special Commissions of Inquiry Act 1983*, or other Commonwealth or State legislation; or
 - the prerogative of the Crown.
3. The following matters related to the Attorney's role as *parens patriae*:
- Prosecutions relating to children.
 - Contested adoption matters.
 - Matters involving the exercise of the Supreme Court's *parens patriae* jurisdiction.
 - Sensitive or complex matters relating to the care and protection of children that arise:
 - in, or on appeal from, the Children's Court or the NSW Civil and Administrative Tribunal; or
 - under the *Family Law Act 1975* (Cth).
 - Prohibited employment matters in the NSW Civil and Administrative Tribunal and on appeal.
 - Matters concerning the enforcement of charitable trusts and the exercise of the Attorney General's powers under the *Charitable Trusts Act 1993*.
 - Relator actions.³

¹ As defined in section 3 of the *Crown Lands Act 1989* (NSW).

² Excluding advice as to the nature and extent of any legislative power to make regulations and other subordinate legislative instruments, which is a matter for the Parliamentary Counsel.

4. The following matters related to the Attorney's role in the administration of justice:

- Prosecutions that involve the prerogatives of the Crown,⁴ for example:
 - prosecutions under the *Crimes Act 1900* (enforcement of criminal law); or
 - prosecutions relating to State revenue (protection of State revenue).
- State taxation appeals⁵ and appeals under the *Valuation of Land Act 1916*.
- Matters involving the granting of immunities from prosecution or the prerogative of mercy.
- Matters where there is no obvious contradictor.
- *Amicus curiae* appearances and submitting appearances.
- Proceedings for contempt of court.
- Applications under the *Vexatious Proceedings Act 2008*.
- Matters concerning the composition, jurisdiction and rules of tribunals and other quasi-judicial bodies.

5. Matters related to Crown copyright, including:

- the licensing or assignment of Crown copyright (but not where the matter is incidental to the procurement of other goods and services);
- disputes concerning Crown copyright; or
- legal advice on whether or not the State owns copyright in a work and/or the implications of such ownership.⁶

6. Cross-agency⁷ legal matters, including:

³ This refers to cases where the Attorney (on behalf of the Crown) grants his or her 'fiat' or authorisation to enable a private litigant who would not otherwise have standing to institute proceedings to enforce public rights.

⁴ Excludes regulatory prosecutions (e.g. work health and safety offences, transport-related offences, professional registration and licensing offences, etc) and prosecutions initiated by the Director of Public Prosecutions unless referred to the Attorney General under section 29 of the *Director of Public Prosecutions Act 1987* (NSW).

⁵ Includes advice concerning taxation assessments before an appeal has formally commenced and advice concerning grant schemes that involve a concession as to tax payable (e.g. the *NSW New Home Grant Scheme*).

⁶ To be read in conjunction with C2005-06 *Intellectual Property Management Framework for the NSW Public Sector*.

⁷ 'Agency' in this context refers only to agencies that are subject to the Premier's Memorandum under which these guidelines have been issued. It does not include, for example, State Owned Corporations or statutory bodies that are independent of Ministerial direction and control.

- disputes between, or joint requests for advice from, agencies as to the interpretation of legislation, or the application of the common law, that affects those or other agencies; or
- litigation or potential litigation that involves, or has direct implications for, multiple agencies.⁸

7. Matters for:

- the following 'central' agencies:⁹
 - the Department of Justice, but only where the matter relates to the statutory, common law or other portfolio responsibilities of the Attorney General;
 - the Department of Premier and Cabinet;
 - the Public Service Commission;
 - the Treasury.
- Ministerial Offices, but only where the matter concerns:
 - the employer functions of political office holders under the *Members of Parliament Staff Act 2013*; or
 - NSW Civil and Administrative Tribunal proceedings for review of decisions made by political office holder staff under the *Government Information (Public Access) Act 2009* or the *Privacy and Personal Information Protection Act 1998*.

⁸ To be read in conjunction with PM1997-26 *Litigation Involving Government Authorities*, which provides that, if civil disputes between Government agencies cannot be resolved, they are to be referred to the Premier who may seek the Attorney's advice, and also provides that no such proceedings may be commenced without the Premier's approval.

⁹ Except as otherwise agreed between the head of the agency and the Crown Solicitor in respect of particular matters or parts of matters, or categories of matters. For example, it has been agreed that the provision of legal assistance to coronial proceedings for the Department of Justice will not be core legal work unless at least one of the following criteria apply:

- (a) the proceedings raise complex issues (including significant legal, procedural, technical or evidentiary issues); or
- (b) multiple agencies are involved; or
- (c) there is likely to be a significant public interest in the proceedings; or
- (d) it would be inappropriate for the Police Coronial Advocate to act because of an actual or perceived conflict of interest.