

# RULE OF LAW INSTITUTE OF AUSTRALIA

## The Model Litigant Rules: Key Facts and Issues

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**Note:** *This document is updated regularly with new developments regarding the Commonwealth model litigant obligations and the*

*Legal Service Directions, see:*

**[www.ruleoflaw.org.au/priorities/mlrs/](http://www.ruleoflaw.org.au/priorities/mlrs/)**

*for the latest version.*

# What are Model Litigant Obligations?

In civil litigation the Commonwealth has a duty to act as a Model Litigant.

The development of this obligation in conducting litigation can be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 where Griffith CJ explained it as '[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects'.<sup>1</sup> In that case the Court criticised that '[t]he Crown should not take technical points'.<sup>2</sup> In *SCI Operations v The Commonwealth*<sup>3</sup> which concerned the failure of a government agency to refund money within a reasonable time, Beaumont, Einfeld and Sackville JJ stated that 'the position of the Crown itself, especially given its default... should also be taken into account. Otherwise the Crown would be taking, or be seen to be taking, advantage of its own default, whereas it is well established that the Crown must act, and be seen to act, as a model litigant'.<sup>4</sup>

More recently, in *Morley & Ors v Australian Securities and Investments Commission*<sup>5</sup> the NSW Court of Appeal stated that the principle is 'not limited to the criminal law'<sup>6</sup> and extends to civil practice and procedure.<sup>7</sup> It was critical of ASIC's approach to litigation stating that 'the government agency has no legitimate private interest of the kind which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime'.<sup>8</sup> The Court also stated,

'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings... No other person could have brought these proceedings. In partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can'.<sup>9</sup>

## *Legal Services Directions 2005* under the *Judiciary Act 1903 (Cth)*

In 1999 the *Judiciary Act 1903 (Cth)* was amended to enable the Legal Services Directions to be promulgated. Daryl Williams SC, the Attorney-General, said in the second reading speech to the Bill that the Directions 'will provide a framework for the conduct of the Commonwealth's legal affairs, but leave prime responsibility for the effective and efficient use of the legal services with agencies'.<sup>10</sup> The amendments also established the Office of Legal Services Coordination 'to assist [the Attorney-General] in discharging [his] First Law Officer role'.<sup>11</sup>

### *Legal Services Directions 2005 (Cth)*

Under section 55ZF of the *Judiciary Act 1903 (Cth)*, the Attorney-General issued the *Legal Services Directions 2005* outlining the Commonwealth's duty in litigation. The Directions provide that as a model litigant, the Commonwealth and its agencies must act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency. (See Appendix B on pages 8-9.)

The "Model Litigant Rules", as they are known, oblige the Commonwealth to act as a model litigant. This 'may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations'.<sup>12</sup>

The Directions also deal with a range of other matters such as engagement of barristers and the use of in-house lawyers for court litigation.

### Enforcement of the Obligations

The Office of Legal Services Coordination (OLSC), within the Attorney-General's Department, assists 'the Attorney-General in relation to his responsibilities for legal services to the Commonwealth'<sup>13</sup> by providing guidance notes and educational functions.<sup>14</sup>

<sup>1</sup> *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

<sup>2</sup> *Ibid.*

<sup>3</sup> (1996) 139 ALR 595.

<sup>4</sup> *Ibid.*, 164.

<sup>5</sup> [2010] NSWCA 331.

<sup>6</sup> *Ibid.*, 710.

<sup>7</sup> *Ibid.*, 708.

<sup>8</sup> *Ibid.*, 716.

<sup>9</sup> *Ibid.*, 728.

<sup>10</sup> Attorney-General Mr Williams *Second Reading Speech*, House of Representatives Hansard, 3<sup>rd</sup> December 1998, 1275.

<sup>11</sup> *Ibid.*

<sup>12</sup> Model Litigant Rules Note Number 2. See also the Joint Committee Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

<sup>13</sup> Explanatory Memorandum, *Judiciary Amendment Bill 1998 (Cth)*, 8.

<sup>14</sup> Joint Committee on Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

The OLSC also investigates alleged breaches of the Directions.<sup>15</sup> Breaches are brought to the attention of the Office by way of self-reporting by government agencies, judicial comments, media reports or complaints made directly to the OLSC.<sup>16</sup> (Complaints alleging a breach of the Directions may be made to the OLSC at [olsc@ag.gov.au](mailto:olsc@ag.gov.au).)

The Attorney-General is given power by clause 14 of the Directions to impose sanctions for non-compliance with them. Clause 14.2 further provides that:

‘When entering into a contract for legal services, agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case’.

The Directions need to be read together with the Compliance Framework document issued by the OSLC. This document emphasises educational rather than a sanction-based approach to non-compliance.

However, according to the OLSC website they are ‘currently reviewing the compliance and enforcement strategy’<sup>17</sup> and there is no information currently available on the sanctions imposed by the Attorney-General.

The issue of non-compliance with the Directions cannot be raised in proceedings, except by, or on behalf of, the Commonwealth.<sup>18</sup> This places a heavy onus on the Attorney General’s Department to investigate and enforce compliance.

## Reporting by the Attorney General’s Department

The Attorney-General’s Department Annual Reports publish statistical data on breaches of the Directions.<sup>19</sup> From 2003 to 2009, the Annual Reports provided information on the number of breaches investigated per year, as shown in Table 1 below. However, the 2009-2010 Annual Report did not disclose data or make any statement about compliance with the Legal Services Directions.

The table below sets out the data recorded in the Attorney-General’s Department Annual Reports and the OLSC’s website for the respective years.

The graphic on the following page outlines the investigation and enforcement process as it currently stands and the graphs set out the reported breaches and investigations of the OLSC.

| Year  | Established Breaches | Examined and Not Found to Involve Breach | Still Under Investigation | Carried Forward | Total |
|-------|----------------------|--|---------------------------|-----------------|-------|
| 03/04 | 8                    | 3  | 5                         | -               | 16    |
| 04/05 | 21                   | 10                                       | 10                        | 5               | 41    |
| 05/06 | 6                    | 22                                       | 11                        | 10              | 39    |
| 06/07 | 14                   | 22                                       | 15                        | 11              | 51    |
| 07/08 | 9                    | 15                                       | 40                        | 15              | 64    |
| 08/09 | 35                   | 19                                       | 16                        | 40              | 70    |
| 09/10 | 24                   | 30                                       | 6                         | 16              | 60    |
| 10/11 | 17                   | 8  | 16                        | 6               | 41    |
| 11/12 | 42                   | 18                                       | 50                        | 16              | 110   |

<sup>15</sup> Office of legal Services Coordination, Guidance Note No 3, Office of Legal Services Coordination Website <[http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_LegalServicesDirections2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_LegalServicesDirections2005)> accessed on 11 August 2011 .

<sup>16</sup> Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 17.

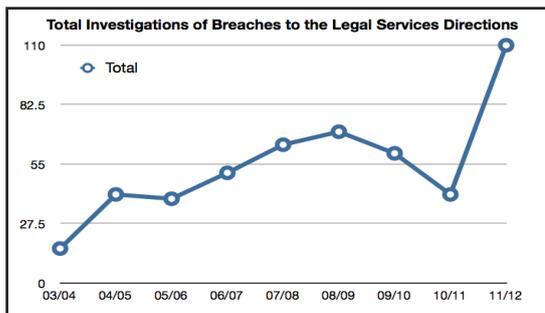
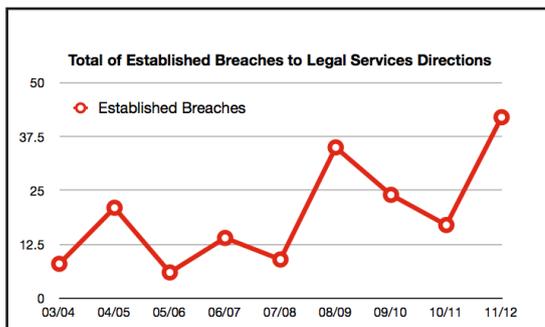
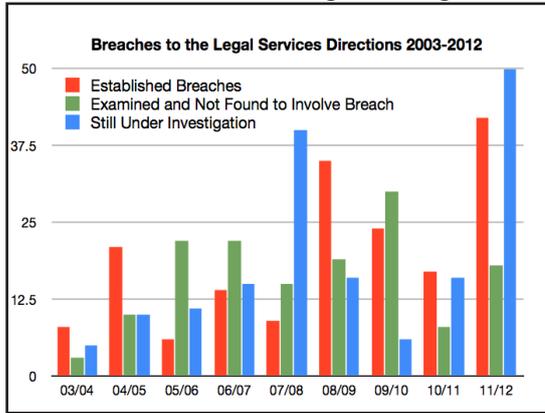
<sup>17</sup> See Attorney General’s Department website < [http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_Complianceandenforcementstrategy](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_Complianceandenforcementstrategy) > accessed 11 August 2011.

<sup>18</sup> s55ZG(3) *Judiciary Act 1903*.

<sup>19</sup> OLSC, Guidance Note No 3, see above n 14.

# Reporting Process for Breaches of the Legal Services Directions

The data in the charts below have been compiled from the AG's Department Annual Reports and the OLSC website. The data does not separately identify breaches of the model litigant obligations:



In the Rule of Law Institute of Australia's view this reporting is inadequate. As well as failing to identify the types of breaches of the Legal Services Directions, including whether or not they involved a failure to comply with the model litigant obligations, it also does not provide information about the investigations undertaken, the results of those investigations, or any proposals to deal with recidivist government agencies.

## Breach is Reported to OLSC

Complaints are received from parties to litigation, media reports or judicial comments

Government departments and agencies are required to self-report on breaches. They are required to issue a Certificate to the OLSC annually outlining any breaches they have not previously reported to the OLSC (s11(1) *Legal Services Directions 2005 (Cth)*).

The certificates are not publically available.

## OLSC Investigates the Breach

OLSC contacts the relevant agency seeking further information.

OLSC may contact the complainant for further information.

## If a Breach has occurred...

Agency will be contacted and OLSC will determine the circumstances of the breach and any steps taken to address the breach

OLSC monitors actions taken by the agency or legal services provider to prevent further breach and provides educational resources to prevent further breaches

## OLSC Notifies Attorney-General - Attorney-General can impose sanctions for non-compliance

s55ZG(2) *Judiciary Act 1903 (Cth)*

## Statistical Information is published

Published in the Attorney-General's Department Annual Report according to OLSC Guidance Note No 3

# Criticism of Enforcement and Compliance Framework

The NSW Court of Appeal in *Morely & Ors v Australian Securities and Investments Commission*<sup>20</sup> was critical of ASIC's litigation strategy.<sup>21</sup>

Following this case, the Attorney-General's Department was asked about its compliance with the model litigant obligations by the Parliamentary Joint Committee on Corporations and Financial Services hearing on 11 March 2011.<sup>22</sup> In particular, the Committee asked the OLSC representative whether the 'office ... conduct[s] its own review of ASIC in terms of all its litigation...[or an] annual review'.<sup>24</sup> In response, the representative from the OLSC stated:

'No...we are a smaller regulator... The general kind of staffing profile in the office would be about 14 people...In terms of the way we approach compliance with the directions, we have to very much be selective in our approach' (Italics added).<sup>25</sup>

The representative added 'it is not really that productive for us to scan newspapers and then ring agencies. I think they are a good reporter...We kind of put our efforts into the front end of trying to help people understand how to comply'.<sup>26</sup>

The Department representative also stated:

'[the] primary role of the OLSC is to facilitate compliance with the directions predominantly through education and outreach. OLSC officers visit agencies and conduct training on the directions. We maintain a website that sets out information, including guidance notes and other

information to assist agencies and members of the public who may have concerns about an agency's conduct'.<sup>27</sup>

In *Morely v ASIC*,<sup>28</sup> Spigelman CJ, Beazley and Giles JJA agreed that the range of powers and functions of ASIC mean that 'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings...No other person could have brought these proceedings'.<sup>29</sup> However, in ASIC's 2011 submissions to the High Court in *ASIC v Shafron*,<sup>30</sup> ASIC submitted that '[w]hilst the role of the Commonwealth as a model litigant influences the way in which it conducts litigation, it does not impinge on the Commonwealth's ability to enforce its substantive rights. The Commonwealth has the same rights as any other litigant...Further, the model litigant standard is unrelated to any question of the statutory powers an agency may possess to bring proceedings'.<sup>31</sup>

However, when the Committee questioned the Attorney-General's Department representative in 2009 about ASIC's capability to comply with the model litigant rules the reply was:

'ASIC is very aware of what its obligations are under the Directions'.<sup>32</sup>

'ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligation requires'.<sup>33</sup>

During debate in 1999 under-resourcing of the OLSC appears to be a key problem. On amendments to the *Judiciary Act 1903 (Cth)* in 1999, Opposition spokesman Senator Nick Bolkus stated that the OSLC had:

[A] wide ranging task. It is a task which covers the breadth of government. The

<sup>20</sup> [2010] NSWCA 331.

<sup>21</sup> Ibid, 728.

<sup>22</sup> Joint Committee Corporations and Financial Services, 11 March 2011, above n17, CFS 11.

<sup>23</sup> 'Oversight of the Australian Securities and Investments Commission' <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=11%20march%202011%20dines;rec=4;resCount=Default>> accessed on 11 August 2011.

<sup>24</sup> Ibid CFS 14.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid, CFS15.

<sup>27</sup> Ibid, CFS 12.

<sup>28</sup> [2010] NSWCA 331.

<sup>29</sup> Ibid, 728.

<sup>30</sup> Case Number S173/2011

<sup>31</sup> High Court of Australia, *ASIC v Shafron* Case Number S173/2011 Applicants Written Submission 17<sup>th</sup> June 2011, para 54< [http://www.hcourt.gov.au/assets/cases/s174-2011/ASIC\\_App.pdf](http://www.hcourt.gov.au/assets/cases/s174-2011/ASIC_App.pdf)> accessed on 9<sup>th</sup> August 2011.

<sup>32</sup> Joint Committee on Corporations and Financial Services, 11 March 2009, above n 17, CFS 12.

<sup>33</sup> Ibid, CFS 14.

office established to perform such a task was originally staffed by only three people. Given that the Commonwealth manages some 15,000 pieces of litigation per year, it was and continues to be our concern that this function could not be adequately performed with the resources allocated. Now the Government has said that it will apply six staff to this function. However, it is fair to say that our concerns...still remain in respect of the administration of the directions under this part of the government's proposal'.

'In essence, model litigant rules will become meaningless if there is inadequate means to enforce them...the Government should agree to increase the resources of the Office of Legal Services Coordination to ensure it can meet the full range of functions intended for it'.<sup>34</sup>

A 2005 Australian National Audit Office (ANAO) Report stated that the OLSC relies heavily on reporting either by agencies or on complaints from other sources.<sup>35</sup> There is also no formalised complaints system. ANAO further reported that the OLSC does not commonly discover breaches,<sup>36</sup> and 'does not proactively monitor agency's compliance with the Directions'.<sup>37</sup>

The 2009 Blunn Krieger 'Review of Commonwealth Legal Services Procurement'<sup>38</sup> noted '[w]hile the [Legal Services Directions]... detail requirements and impose a number of restrictions on agencies, they provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services'.<sup>39</sup>

34 Senator Balkus Second Reading Speech, 8<sup>th</sup> March 1999, Senate Hansard, 2402-3.

35 ANAO *Legal Services Arrangements in the Australian Public Service* Audit Report No 52 (2005), 5.12.

36 Ibid.

37 Ibid.

38 Anthony Blunn and Sibylle Krieger, Review of Commonwealth Legal Services Procurement, 2009 <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF/\\$file/REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF/$file/REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF)> accessed on 11<sup>th</sup> August 2011.

39 Ibid, 27 [para 47].

# Appendix B of the Legal Services Directions 2005 (Cth)\*

\*accessed 12/09/2013 on Comlaw, see  
<http://www.comlaw.gov.au/Details/F2012C00691>  
for the authoritative version

## **Appendix B            The Commonwealth's obligation to act                                  as a model litigant**

### **The obligation**

- 1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

### **Nature of the obligation**

- 2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

- (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
- (aa) making an early assessment of:
  - (i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and
  - (ii) the Commonwealth's potential liability in claims against the Commonwealth
- (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
- (c) acting consistently in the handling of claims and litigation
- (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
- (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
  - (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true
  - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
  - (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement

- offers, payments into court or alternative dispute resolution, and
- (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
  - (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
  - (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
  - (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
  - (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1 The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2 In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

Note 3 The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

Note 4 The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5 The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

# Judiciary Act 1903 (Cth) - AG's Legal Services Directions

## Part VIIIIC - Attorney- General's Legal Services Directions

**Section 55ZF:** Attorney General may issue directions

(1) The Attorney General may issue directions (Legal Services Directions):

- (a) that are to apply generally to Commonwealth legal work; or
- (b) that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.

(2) The Attorney General may publish or give notice of Legal Services Directions in any manner the Attorney General considers appropriate.

(3) In this section: Commonwealth legal work means:

- (a) any work performed by or on behalf of the AGS in the performance of its functions; or
  - (a) any legal work performed by a person for any of the following:
    - (i) the Commonwealth;
    - (ii) a body established by an Act or regulations or by a law of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island);
    - (iii) a company in which the Commonwealth has a controlling interest (including a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies);
    - (iv) other persons or bodies referred to in subsection 55N(1), to the extent that the work relates to the person's or body's performance of a Commonwealth or Territory function.

**Section 55ZG:** Compliance with Legal Services Directions

(1) The following persons or bodies must comply with Legal Services Directions that have been published and with Legal Services Directions of which the person or body has been notified:

- (a) a person or body referred to in subsection 55N(1);
- (b) a person or body referred to in subsection 55N(2), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (c) a person or body in respect of whom the Attorney General has made a request under subsection 55N(3), in relation to a matter, if the AGS is acting for the person or the body in that matter;
- (d) a person or body in respect of whom the CEO has made a determination under subsection 55N(4), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (e) the AGS;
- (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection 55N(1) in that matter.

(2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney General.

(3) The issue of noncompliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

#### Section 55ZH: Legal Services Directions and legal professional privilege

(1) If a Legal Services Direction requires a person to provide any information, or produce a document or record, to another person, the person must not refuse to comply with the Direction on the ground of legal professional privilege or of any other duty of confidence.

(2) A person performing Commonwealth legal work (within the meaning of subsection 55ZF(3)) may provide information or produce a document or record relating to that work to the AttorneyGeneral or to a person authorised by the AttorneyGeneral for that purpose.

(3) If:

(a) a person provides information or produces a document or record under subsection (2); and

(b) the person would, apart from this subsection, be breaching legal professional privilege or any other duty of confidence in so doing;

the person is taken, for all purposes, not to have breached legal professional privilege or the duty of confidence in so providing the information or producing the document or record.

(4) If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

#### 55ZI Anything done under Legal Services Directions not actionable

(1) The AttorneyGeneral is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done in compliance, or purported compliance, with a Legal Services Direction.

(2) A person (other than the AttorneyGeneral) is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done by the person in compliance, or in good faith in purported compliance, with a Legal Services Directions.