

Principles and categories of tied legal work

for

Queensland Government Agencies

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Crown Law's Clients

The Crown Solicitor may act for:

- the State of Queensland;
- Ministers of the State;
- departments of the Queensland Government;
- a body established by or under an Act of the Queensland Parliament (eg; a corporation, board, commission, office, authority or committee) which represents the State;
- a person suing on behalf of the State or being sued on behalf of the State;
- an officer or a person employed by the State or by a government instrumentality, where the person is indemnified by the State under current Cabinet guideline or any statutory immunity.

The Crown Solicitor may also act for a corporation, entity or person where the State has a sufficient interest in the subject matter, or there is a sufficient connection with the State to warrant representation. For example, the Crown Solicitor may act for a Government Owned Corporation under the *Government Owned Corporations Act 1993* or for a State owned company.

Tied Work

Cabinet has approved that the set of principles set out below be used in defining the categories of legal work that should be tied to Crown Law.

Principles

The public interest principles which serve as the basis for determining the categories of tied work are:

- A. The recognition of the proper role of the Attorney-General as first law officer and as chief legal adviser to Cabinet and the Executive Government.
- B. Ensuring that in respect of certain types of legal work, either a consistent or a 'whole-of-Government' approach is taken in the public interest.
- C. The protection of the public revenue, given the magnitude of the financial implications that may flow from the manner in which the legal work is undertaken on behalf of the Crown.
- D. The political or policy sensitivity of the legal issues involved.
- E. The potential effect on intergovernmental activities or relations i.e. State/Commonwealth, State/State or State/foreign government.
- F. Where a legal issue has implications for government beyond the agency directly involved, the need to ensure a whole-of-Government approach is adopted.
- G. The need to avoid actual and potential conflicts of interest.

Agencies must adhere to the tied work categories described in this document.

Assistance

Where there is any doubt as to whether a matter needs to be referred to the Crown Solicitor, an agency must not engage another legal service provider (barrister or solicitor) without first consulting the Crown Solicitor.

Application of Tied Work Regime

The tied work regime applies to Queensland Government agencies. The expression 'agency' in this context covers a department or any organisation or business unit within a department and any government instrumentality that represents the Crown.

It is the responsibility of the chief executive of an agency to ensure that the agency directs all tied work to Crown Law and not to other external legal service providers (barristers or solicitors), unless that agency has been specifically exempted by Cabinet from the particular category of the tied work regime.

The tied work regime does not apply to:

- a statutory body that does not represent the Crown;
- a Government Owned Corporation under the *Government Owned Corporations Act 1993*;
- legal advice or representation provided by an appropriately qualified legal officer within an agency in respect of categories 5, 9 and 10;
- legal advice and representation provided by an external legal service provider to Queensland Treasury in respect of category 8;
- legal advice and representation provided by an external legal service provider to any Hospital and Health Service, or their successors, in respect of category 13.

At the request of an agency, the Crown Solicitor may agree that a particular tied work matter may be referred to a legal service provider other than Crown Law.

Categories of Tied Work

1. Matters arising from the special position at law of the Attorney-General

This category includes legal advice and representation on issues relating to:

- (a) the institution by the Attorney-General of proceedings to enforce and protect public rights;
- (b) advice in relation to the granting of pardons or remissions of penalty under the *Constitution of Queensland 2001* and the *Justices Act 1886*;
- (c) charities and charitable and public trusts;
- (d) the granting of the Attorney-General's approval to enable a private citizen to:
 - i. enforce a charitable or public trust; or
 - ii. enforce or protect a public right;
- (e) the role of the Attorney-General in appearing before and assisting the courts, in matters where there is no one to put the opposing legal argument and the public interest requires that all relevant legal argument be brought to the attention of the Court.

Applicable principle: A.

1A. Matters pertaining to the administration of justice which are not handled by the Director of Public Prosecutions

In essence, this category deals with the provision by the Crown Solicitor of advice and representation in relation to the institution and conduct of contempt of court proceedings.

Applicable principle: A.

2. Matters involving judicial officers

Proceedings involving judicial officers would normally involve a challenge to the decision of a judicial officer. If a judicial officer is joined as a party, the Crown Solicitor acts on the judicial officer's behalf.

Applicable principle: A.

3. Matters involving indemnities for public officers

Under section 26C of the *Public Service Act 2008*, section 10.5 of the *Police Service Administration Act 1990* and various guidelines approved by Cabinet, the State indemnifies Ministers, judicial officers and other public officers and employees against civil liability incurred and legal costs of civil and other proceedings arising out of the performance of their public functions and duties.

Where legal advice is required in relation to the operation and application of those provisions or the various guidelines, it should be provided by the Crown Solicitor to ensure a consistent whole-of-Government approach.

Applicable principle: B.

4. Matters involving public inquiries

This includes representing the State, Ministers and other State interests before Commissions of Inquiry and other public inquiries (excluding coronial inquiries) and, if requested to do so by the particular Commission, providing staff to assist the Commission.

Applicable principles: A, C.

5. Legal advice on matters pertaining to the role and powers of the Governor, Parliament or Cabinet

The Attorney-General as first law officer, through the Solicitor-General (on the instructions of the Crown Solicitor) or the Crown Solicitor, is the appropriate legal adviser to provide definitive advice in relation to these matters.

This category relates to requests from government agencies, not requests from Parliamentary Committees, the Speaker, and the Clerk of the Parliament or the Governor.

Applicable principle: A.

6. Legal advice underpinning a Cabinet decision

The Attorney-General is the legal adviser to Cabinet.

If a proposed Cabinet submission is predicated on legal advice or the submission will require the substance of the legal advice or the advice itself to be set out in the submission, the agency preparing the submission must ensure that Crown Law has been adequately consulted in order to ensure the Attorney-General is aware of, and able to provide legal analysis of, the issue to Cabinet.

This category focuses on the need for consultation to occur with Crown Law and does not mean that Crown Law must actually provide the advice. However, by consulting with Crown Law, agencies will ensure the proposal is considered from a whole-of-Government perspective and any government specific or constitutional issues that may not be immediately apparent are identified and considered.

This category of tied work only applies where the legal advice underpins, and is critical to, the proposal being considered by Cabinet. It is not intended to apply to cases where legal advice was obtained at some stage during the development of the proposal if the advice does not underpin or is not critical to the proposal.

Applicable principle: A.

7. Advice and representation in respect of constitutional law issues

This category includes legal advice and representation on issues relating either to the State Constitution or the Commonwealth Constitution.

Applicable principle: A.

8. Agreements that are to be approved by Cabinet or which involve unique or major considerations and which are of special policy or operational significance for a department or agency of the State

The provision of legal advice on an agreement that is of such importance that it is to be approved by Cabinet should be undertaken by officers within the portfolio responsibility of the Attorney-General, given the Attorney-General's role as legal adviser to the Executive Government and to Cabinet.

If legal advice is obtained on an agreement that is of such importance that it is to be considered by Cabinet, the agency preparing the submission must ensure that Crown Law has been adequately consulted in order to ensure the Attorney-General is able to provide legal analysis of the advice and agreement to Cabinet.

Similarly, an agreement which involves unique or major considerations or which has a special policy or operational significance should also be advised upon by officers within the portfolio responsibility of the Attorney-General. In this way, the Attorney can properly exercise their role as first law officer in advising both the Executive Government and Cabinet on matters of legal significance to the State.

This category focuses on the need for consultation to occur with Crown Law and does not mean that Crown Law must have actually provided the advice and drafted the agreement. However, by consulting with Crown Law, agencies will ensure the proposal is considered from a whole-of-Government perspective and any government specific or constitutional issues that may not be immediately apparent are identified and considered.

Applicable principles: A, B, D.

9. Matters of special significance, sensitivity or which have Government-wide implications

Matters covered by this category include:

- (a) claims of public interest immunity;
- (b) judicial review matters whether arising under the *Judicial Review Act 1991* or under the general law including:
 - advice to Ministers and other decision-makers on the proper exercise of statutory discretions;

- advice on judicial review matters;
 - representation of Ministers and decision-makers in judicial review proceedings before the courts;
- (c) matters arising under the Right to Information Act 2009 and chapter 3 of the Information Privacy Act 2009;
- (d) Crown copyright;
- (e) industrial relations and employment law in so far as these matters affect employees of an agency;
- (f) intergovernmental agreements or arrangements with another State or Territory or the Commonwealth or with a foreign Government;
- (g) representation by the State on behalf of another State Government or foreign Government; and
- (h) advice on the government wide legal issues arising from the application of the National Competition Policy and the *Competition and Consumer Act 2010* to the State which will affect all agencies.

Applicable principles: B, C, E.

10. Native title claims

The State is the statutorily prescribed first respondent to native title claims filed in the Federal Court of Australia. These claims concern the recognition and protection of native title. As the contravener for the purposes of the *Native Title Act 1993* (Cth), the State is the party that must, in a practical sense, be satisfied of the 'connection' of people to country. In this way, the State has an institutional role in assessing the merits of native title claims.

This category includes all aspects of the legal representation of the State as first respondent to native title claims, including the drafting or negotiation of indigenous land use agreements linked to the resolution of these claims.

This category also includes legal representation or advice in respect of native title matters unrelated to native title claims and legal representation or advice in respect of compliance with the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

Applicable principle: B.

11. Legal advice and representation in relation to child welfare and protection

Agencies responsible for child welfare and child protection must act and be seen to act with absolute propriety.

It is in the public interest that the legal advisers who represent agencies in this

area are within the portfolio responsibility of the Attorney-General both for the purposes of consistency and in view of the sensitive issues that can arise from Executive Government action in relation to these matters.

Applicable principles: A, B, C.

12. Legal advice or representation between or on behalf of two or more government agencies

This category includes:

- settling questions of statutory interpretation involving more than one agency;
- advising on or preparing agreements between or for the use of two or more agencies of the State for the provision of services between agencies;
- determining legal conflicts between agencies.
- Applicable principles: B, F, G.

13. Litigation

This category relates to litigation in the courts by or against the State, Ministers of the Crown, other State officers or employees and on behalf of agencies which represent the Crown including:

- appeals;
- matters in which the State may be liable for its employees' actions;
- matters which if not settled could result in damages claims against the Crown;
- damages claims that may be settled by alternative dispute resolution techniques;
- claims for the non-production of evidence or material to a court; and
- Queensland Government Insurance Fund (QGIF) managed claims.

Litigation is tied to Crown Law because:

- the Crown must act as the model litigant;
- there is a need to minimise actual or potential conflicts of interest;
- litigation by or against the State must be handled in a consistent manner to reduce the financial impact on the Consolidated Fund.

However, this category of tied litigation does not include:

- litigation conducted by WorkCover Queensland relating to claims made against private sector employers;
- personal injury litigation arising from a motor vehicle accident;
- personal injury litigation (except for QGIF managed claims);
- commercial litigation (except for QGIF managed claims) such as:
 - insolvency litigation
 - revenue appeals
 - contractual disputes
 - land title/real property claims
 - debt recovery
 - construction litigation.
- Planning and Environment Court litigation
- Land Court Appeals under the *Valuation of Land Act 1944*
- Compensation claims to the Land Court for the compulsory acquisition of land.

Note: Litigation excluded from Category 13 will still be tied if it falls within another category of tied work.

Applicable principles: A, B, C, D, G.

- 14. Any other specific matter which the Attorney-General directs is a matter that is to be carried out under the supervision of the Crown Solicitor.**