

# Significant Litigation Directions

(Issued 16 April 2012)

## SIGNIFICANT LITIGATION DIRECTIONS

These Directions have been issued at the direction of Cabinet. They state the principles and practices for managing significant litigation matters, and specify notification and reporting requirements that all agencies are required to comply with.

The Directions will be kept under review and amended from time to time with the approval of the Premier and the Attorney-General, or, if significant amendments to the Directions are proposed, with the approval of Cabinet.

It should also be noted that the Directions are not intended to override any legislative requirement or authority concerning an agency's functions.



## 1. Purpose of the Directions

- 1.1 The purpose of these Directions is to help to ensure that significant litigation (including prospective significant litigation) is managed in a way that has proper regard to the public interest and whole-of-Government considerations.
- 1.2 It is particularly important that agencies are aware of the need to comply with the Directions and that the management of significant litigation is undertaken with due regard for the role of:
  - Cabinet as the pre-eminent decision-making body of Government;
  - the Premier as the Leader of the Government and the Chairperson of Cabinet; and
  - the Attorney-General as the Queensland Government's first law officer and legal adviser to Cabinet.

For this reason, the Directions articulate the roles and responsibilities of those who are likely to be involved in the conduct of significant litigation.

- 1.3 To ensure that Cabinet, the Premier and the Attorney-General are appropriately supported in their roles, the Directions also provide for notification and reporting requirements for significant litigation matters that will apply to all agencies.
- 1.4 While all State litigation should be conducted on the basis of a whole-of-Government approach and adherence to model litigant principles, these issues become even more important in the context of significant litigation matters as they are likely to be high profile matters, or set a precedent for the conduct of future litigation by the State. For this reason, the Directions provide a statement of factors to be considered in proposing a litigation management framework to Cabinet.

## 2. Definitions

### 2.1 In these Directions

**“agency”** means a department or part of a department;

**“department”** has the same meaning as in the *Public Service Act 2008*;

**“litigation”** means any proceeding before a court, tribunal, coronial inquiry or other inquiry (other than criminal prosecutions, or appeals relating to criminal matters) and includes any arbitration or alternative dispute resolution process in connection with any such proceeding; and

**“relevant Minister”** means the Minister who has portfolio responsibility for an agency concerned with a particular significant litigation matter.

2.2 An authority, corporation, instrumentality or office is part of a department if:

- (a) it represents the State, is established under an Act or is established for a purpose connected with the government of the State; and
- (b) its expenditure is payable, in whole or part, out of –
  - (i) amounts paid to the department from the consolidated fund; or
  - (ii) controlled receipts of the department

For the purpose of these Directions, Hospital and Health Services established under the *Hospital and Health Boards Act 2002* are part of the Department of Health.

### **3. Application of the Directions**

3.1 These Directions apply to all agencies.

3.2 The Chief Executive of an agency must ensure that the agency has processes in place to meet the requirements of the Directions.

3.3 These Directions apply to litigation involving agencies whether as a party or otherwise, and litigation involving a person whom the State has agreed to indemnify for costs or liability in respect of the litigation.

3.4 These Directions do not apply to the handling of criminal prosecutions or appeals in respect of those prosecutions. They are not intended to affect in any way the role of the Office of the Director of Public Prosecutions. Nor are the Directions intended to affect the summary prosecution of criminal matters by the Queensland Police Service or the prosecution by an agency for simple statutory offences.

### **4. What is significant litigation?**

4.1 An assessment of whether or not a matter is or could become significant litigation is to be made on a case by case basis.

4.2 Advice should be sought from the Department of Justice and Attorney-General if there is any doubt about whether or not a matter is a significant litigation matter.

4.3 The following considerations may be used to give guidance to determine whether litigation is significant litigation:

- whether the matter has whole-of-government implications, including:
  - whether it may create an important precedent for a significant number of future claims either on a point of law or because of its potential significance for decision-making by Government agencies; or

- whether it deals with issues that have policy or operational significance for the State;
- the size of the claim made by or against the State;
- whether the identity of the parties raises sensitive legal, political or policy issues;
- whether the matter raises legal, political or policy issues which are sensitive for the State;
- whether the matter has attracted or is likely to attract community and media attention;
- whether the effective conduct of the matter requires a significant level of coordination or cooperation between different agencies;
- whether the matter involves inter-governmental or intra-governmental issues or disputes;
- whether the matter relates to, or gives rise to issues concerning, the Constitution of Australia or the Constitution of Queensland;
- whether the matter raises native title or cultural heritage issues; or
- whether one agency's approach will adversely affect another agency or contradict a position taken by the State in another matter.

## **5. Notification of a significant litigation matter**

5.1 The Attorney-General must be notified about a significant litigation matter as soon as practically possible after an agency becomes aware of the existence or prospect of a significant litigation matter, including a matter within statutory pre-proceeding processes.

5.2 Generally, a determination of what is significant litigation will be made on a case by case basis and based on a consideration of factors such as those outlined in paragraph 4.3 (above).

5.3 However, the Attorney-General must be notified if the matter falls within one of the following categories of litigation:

- litigation relating to Constitutional matters;
- claims in which Ministers are witnesses or where Ministers' actions are a central feature of the allegations upon which the claims are based;
- litigation involving allegations of abuse of or serious violence against adults or children while in the care of the State;

- Indigenous wages claims;
- litigation concerning tendering processes where it is alleged that the process is lacking good faith in some way;
- medical malpractice claims involving:
  - large numbers of claimants;
  - allegations so serious as to amount to recklessness or criminal negligence; or
  - facts related to a Government review, inquiry or investigation;
- litigation in the Supreme Court’s protective “parens patriae” jurisdiction;
- judicial reviews brought by or on behalf of an agency;
- litigation involving claims of parliamentary privilege;
- litigation involving members of the media whether as a party or as witnesses;
- claims of unlawful detention by the State;
- litigation arising from the exercise of third party enforcement rights (e.g. where an Act provides that any person may seek an enforcement order to remedy or prevent the commission of an offence against the Act); and
- claims for amounts of \$5 million or more.

5.4 Notification should be by way of correspondence from the relevant Minister to the Attorney-General and include information about:

- the nature, history and current status of the matter;
- who the parties to the matter are;
- the legal service provider (ie Crown Law or other legal service provider); and
- why the matter is or could become a significant litigation matter.

5.5 The Attorney-General will determine whether a litigation matter is significant and should therefore be referred to Cabinet. If the Attorney-General considers a matter should be referred to Cabinet, he/she will seek the Premier’s approval prior to advising the department of this decision.

- 5.6 Significant litigation matters may be referred to Cabinet for information purposes only or for a decision about the strategic response to the litigation. Cabinet may then delegate responsibility for the management of the matter to the appropriate person, body or agency.
- 5.7 Cabinet must be informed about the existence of any actual or potential conflicts between agencies in relation to the significant litigation matter.

## **6. Reporting Process**

- 6.1 Chief Executives are responsible for ensuring that their agencies comply with the Directions. Each Chief Executive is also responsible for:
- ensuring that the relevant Minister is made aware of the agency's involvement in current or prospective significant litigation matters;
  - ensuring that officers within the agency are aware of these Directions and the need to comply with the Directions; and
  - ensuring that appropriate management strategies and practices are implemented to ensure compliance with these Directions within the agency, particularly in relation to notification and reporting requirements.
- 6.2 Ministers are responsible for ensuring that the Attorney-General is notified about significant litigation matters expeditiously.
- 6.3 The Attorney-General is responsible for ensuring that the Department of Justice and Attorney-General gives the Department of the Premier and Cabinet fortnightly updates on new significant litigation matters and significant developments in existing significant litigation matters.
- 6.4 The Attorney-General, as legal adviser to Cabinet, is responsible for determining whether a litigation matter is significant and should be referred to Cabinet. Cabinet is the pre-eminent decision-making body in Government and is responsible for the performance of Government.
- 6.5 Where the Attorney-General has decided that a matter should be referred to Cabinet, the Attorney-General must seek the Premier's agreement, as Chairperson of Cabinet, to the matter being referred to Cabinet, prior to notifying the department of the Attorney-General's decision.
- 6.6 Where the Attorney-General has decided to refer a significant litigation matter to Cabinet, the relevant Minister, jointly with the Attorney-General, will be responsible for ensuring that each such matter is brought to Cabinet for consideration by:
- bringing forward submissions to Cabinet for information purposes or for decisions on the proposed approach to managing the significant litigation matter; and

- ensuring that regular briefings are provided to Cabinet on the conduct of each significant litigation matter, as deemed appropriate by Cabinet.

## **7. Factors to be considered by agencies in developing a management framework for the conduct of a significant litigation matter**

7.1 A whole-of-government approach must be adopted in the development of a management framework for the conduct of a significant litigation matter, particularly where the legal issue has implications for Government beyond the agency directly involved. In this context, consultation should occur with all relevant agencies, particularly:

- the Department of the Premier and Cabinet;
- the Department of Justice and Attorney-General; and
- Queensland Treasury and Queensland Government Insurance Fund (QGIF).

7.2 The nature of the management framework for any significant litigation should be determined on a case by case basis. However, in developing a management framework for the conduct of a significant litigation matter, due regard must be given to:

- existing policies or Government commitments relevant to the significant litigation matter, to ensure that the matter is not conducted in a way that is inconsistent with those policies or commitments;
- the potential for any action taken during the conduct of the litigation to set a precedent, either as a point of law or in terms of expectations created, for the future conduct of litigation by the State;
- the obligation of the State to act as a model litigant (refer to the Model Litigant Principles), in particular the expectations of the community and the courts that the State will:
  - adhere to the highest standards of probity and fairness in its conduct of litigation; and
  - deal properly with taxpayers' money and, in particular, not spend it without due cause and due process; and
- ensuring that processes for sharing information across Government in relation to a significant litigation matter do not undermine any legal professional privilege or public interest immunity that would otherwise attach to that information.

7.3 The following information should, as a minimum, be included in a submission to Cabinet about the management framework for any significant litigation:

- who is managing the litigation;

- what resources are involved;
- anticipated timing of the progress and completion of the matter; and advice on prospects and strategy.