

## Legal Services - Engagement of External Providers for Employment Related Matters

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**Functional Sub group** Corporate Administration - Purchasing  
Personnel/Workforce - Industrial and Employee Relations  
Personnel/Workforce - Occupational Health & Safety

**Summary** The Department has established a panel of legal service providers for employment related matters, occupational health and safety, and visiting practitioner contract and appointment related matters. All NSW Health entities to whom the policy applies must use one of the panel firms in respect of any matter where external legal services are required. Prior to engaging one of the panel firms, the approval of the General Counsel of the NSW Health Department must be obtained.

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**Applies to** Area Health Services/Chief Executive Governed Statutory Health Corporation, Board Governed Statutory Health Corporations, Public Health System Support Division, Community Health Centres, NSW Ambulance Service, NSW Dept of Health, Public Health Units, Public Hospitals

**Audience** Directors of Workforce Development, human resources, administration

**Distributed to** Public Health System, Community Health Centres, NSW Ambulance Service, NSW Department of Health, Public Health Units, Public Hospitals

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**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This Policy Directive may be varied, withdrawn or replaced at any time.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.

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## LEGAL SERVICES – ENGAGEMENT OF EXTERNAL PROVIDERS FOR EMPLOYMENT RELATED MATTERS

### 1. INTRODUCTION

NSW Health has established an Employment Legal Services Panel to support NSW Health entities in dealing with matters related to employment in the NSW Health Service and issues arising in the appointment of visiting practitioners.

The Panel has been established for an initial 2 year period from 1 July 2007 to 30 June 2009 with provision for extensions of up to three one year periods. NSW Health has elected to continue the Panel for at least one further year until 30 June 2010.

This Policy Directive sets out the process to be followed by NSW Health entities when engaging Panel Members or other legal service providers (such as independent Counsel) to provide for Employment Legal Services.

### 2. 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.

**“Department”** means the NSW Department of Health.

**“Director-General”** means the Director-General of the Department.

**“Employment Legal Services”** means the provision of legal services (including advice and legal representation, and services ancillary thereto) in relation to:

- (i) any grievance, complaint, claim, action, suit, demand or proceedings (excluding a workers compensation type claim or claim concerning a new or varied industrial award or concerning an award interpretation) made or brought by or on behalf of an employee or group of employees of the NSW Health Service; or
- (ii) any prosecution under OH & S legislation or industrial relations legislation; or
- (iii) any contract or appointment related matter concerning a visiting medical or dental officer or other independent contractor within the NSW public health system.

**“Employment Legal Services Panel”** means the panel of eligible legal service providers established following an expression of interest process

**“NSW Health entity”** means the Department, an area health service or statutory health corporation as defined in the Health Services Act 1997, the NSW

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Ambulance Service, an administrative unit of the Health Administration Corporation including Health Technology, Health Services Support, Health Infrastructure and any administrative unit or division under the control of the Director-General or Health Administration Corporation in which staff of the NSW Health Service are employed.

“**Panel Member**” means a legal service provider on the Employment Legal Services Panel.

## 3. SERVICES AND CHARGING

### 3.1 Legal Services covered

This Policy Directive (PD) deals with Employment Legal Services, as defined in paragraph 2. This effectively covers all legal service requirements arising out of employment related matters such as follows:

- claims by individual employees (including anti-discrimination claims arising out of employment);
- GREAT appeals;
- disputes or claims in respect of appointment, engagement or remuneration of visiting practitioners;
- advice and assistance in respect of disciplinary matters;
- general occupational health and safety advisings; and
- WorkCover prosecutions.

The PD and the Panel does **not** cover employment matters such as:

- workers compensation claims - these will continue to be managed through existing TMF arrangements;
- claims for new awards and award variations - these will continue to be managed by the Department.

The Panel will also **not** cover non-employment issues, such as commercial arrangements, claims management and medico legal advising work.

A short profile of Panel Members (including contact details) are set out in Annexure A.

### 3.2 Charging

All Panel Members have agreed to charge matters at an “approved contract hourly rate”, based on a calculation of the proportion of time Panel Members have identified different team members (ie Partner, Senior Associate, Lawyer etc) will spend on matters and their hourly rate. Panel Members have agreed to hold their charge out rates constant for the initial two year term of the panel.

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Panel firms are required to render all accounts at the approved contract hourly rate for each firm, multiplied by the number of hours incurred, plus any disbursements, regularly as agreed with NSW Health entities.

All matters will be charged at this rate, unless otherwise agreed between the Panel Member, NSW Health entity and the Department. Generally matters will be charged on a “do and charge” basis. However, for work of a more routine nature consideration can be given to requesting a fixed quotation.

Advice on the “approved contract hourly rate” and disbursement charges for each Panel Member will be provided to Directors of Workforce Development by separate memo. Directors should ensure appropriate staff are aware of rates when considering engagement of Panel Members. Directors should also note that information on charging and disbursements is confidential between the client and Panel Member and should be available only to appropriate staff and not be released outside the entity.

## **4. ENGAGING LEGAL SERVICE PROVIDERS**

### **4.1 Engagement of providers must be through the General Counsel, Department of Health**

The Director General, as employer for the NSW Health Service, has issued a delegation concerning approval to engage external lawyers to represent the employer in investigations, proceedings or other matters related to employment in the NSW Health Service.

Under the delegation the Department’s General Counsel will be responsible for allocating work to Panel Members where NSW Health entities wish to engage external legal services. This applies to Panel Members and other legal service providers (including Counsel). Where solicitor services are required, NSW Health entities must use only the Panel Members unless the General Counsel has given a specific approval under para 4.4 to use another provider.

### **4.2 Engaging Panel Members**

NSW Health entities must first identify (a) whether the services required are employment law services and (b) whether they can be undertaken in house.

If external services are required, a Brief to Engage should be forwarded to the General Counsel indicating:

- the reason why external advice or assistance is sought;
- a 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;
- an estimate of length of time the legal services will be required;

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- if the NSW Health entity has a preferred Panel Member, the name of the firm and the reason why that firm is recommended;
- the basis upon which the NSW Health entity proposes that the matter should be charged, if not in accordance with the Approved Hourly Contract Rate (see para 3.2 above);
- whether the matter raises issues required to be reported to the Department under Policy Directive PD2006\_009 *Legal Matters of Significance to Government* (in such cases, the brief will be taken as notification under that PD);
- whether the matter involves issues of Statewide significance;
- relevant Panel Member contact; and
- relevant contact at the NSW Health entity.

Briefs should be forwarded direct to the Department's Legal Branch via e-mail to: [legalmail@doh.health.nsw.gov.au](mailto:legalmail@doh.health.nsw.gov.au).

### **4.3 Engaging Counsel**

Where a Panel Member engaged pursuant to his policy directive proposes to engage Counsel to appear on behalf of a NSW Health Entity, or where a NSW Health Entity proposes to engage Counsel direct, the process at point 4.2 above should also be followed. The Brief to Engage should also indicate:

- the reason why Counsel is recommended instead of using the in-house advocacy services offered by Panel Members;
- if there is a preferred Counsel, the name of that Counsel and the reason why he or she is recommended; and
- the daily and hourly rates, and whether this rate is discounted from the Counsel's usual rate.

### **4.4 Engaging other Legal Service Providers**

As noted at 4.1 above, NSW Health entities are required to use Panel Members for employment law services. Under the Panel arrangement, NSW Health has however retained the capacity to engage other legal service providers if it is considered appropriate. Where a NSW Health entity considers a non-Panel legal service provider should be engaged, they are to follow the process at point 4.2 above. The Brief to Engage should also indicate:

- the reason why a non-Panel provider is proposed;
- quotes obtained from non-Panel providers;
- if there is a preferred firm, the reason why that firm is recommended; and
- the basis upon which the matter is to be charged, including hourly rates and other charges.

NSW Health entities should note that approval to use non-Panel legal service providers will only be given in exceptional circumstances.

#### **4.5 Urgent matters**

In cases where allocation by Legal Branch is required on an urgent basis the NSW Health entity may seek approval from the General Counsel by telephone.

In such cases, the NSW Health entity should follow up the verbal approval with a formal Brief including the information required under 4.2 above as soon as practicable.

Such situations are likely to be rare, and may include, for example, a major occupational health and safety incident occurring, or the commencement of urgent interlocutory court proceedings against a NSW Health entity requiring legal representation on behalf of the NSW Health entity outside normal working hours.

#### **4.6 Routine inquiries**

As part of day to day work, minor routine enquiries may arise in which a Health entity wishes to seek a short verbal advice or clarification from a Panel Member. Circumstances in which this may occur include where it is not clear whether a particular matter gives rise to any legal issues at all, and a brief discussion with a lawyer may assist in clarifying this and whether more detailed consideration or further legal advice may be required, or seeking a second point of view or quick opinion on a matter.

Panel Members have indicated such minor “sound out” advice will be provided at no charge. Routine inquiries such as this are not subject to the approval requirements noted at 4.2 above. Panel Members will advise the entity if the query is likely to involve additional work such that a charge will be imposed. In such case, the approval process will need to be followed.

#### **4.7 Allocation to Panel Members**

Upon receipt of the Brief to Engage, the General Counsel will allocate the matter to a Panel Member or approve engagement of Counsel or other legal service provider having regard to the following:

- the nature and complexity of the work;
- achieving an appropriate distribution of work across the four Panel Members;
- any specific issues raised in the Brief to Engage; and
- the likely time and cost involved.

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Legal Branch will liaise with the NSW Health entity in relation to issues arising (including if the General Counsel considers a provider other than the one recommended by the NSW Health entity should be engaged), and notify the nominated contact officer of the allocation/approval as soon as practicable.

Nothing in this Policy Directive restricts the capacity of the General Counsel to allocate work to Panel Members and non-panel legal service providers if the General Counsel considers this appropriate.

## **4.8 Instructions**

The General Counsel will also make an assessment of whether the matter raises issues of Statewide significance, or other issues requiring more direct involvement by the Department. In such cases, the General Counsel may determine the Department will be responsible for instructing the legal service provider in any particular matter, either solely or jointly with another NSW Health entity. In other cases the relevant NSW Health entity will be responsible for instructing the legal service provider.

## **4.9 Policy Directive and other NSW Health policies on purchasing**

To the extent of any inconsistency between this Policy Directive and the NSW Health Purchasing and Supply Manual for Public Health Organisations, this Policy Directive shall apply.

## **5. REPORTING OF EMPLOYMENT LEGAL SERVICES PANEL SERVICES**

The Department will obtain six monthly reports from Panel Members in relation to services provided, including charges.

NSW Health entities will be required to report on Employment Legal Services obtained from Panel Members in the previous period. Reports should include:

- Name of matter
- Type of matter (ie unfair dismissal, discrimination matter etc)
- Costs incurred over the quarter.
- Whether the services have been provided were satisfactory.

Professor Debora Picone AM  
**Director-General**

## **ANNEXURE A**

### **Firms on the Panel**

Four firms have been appointed to the Panel, they are, listed in alphabetical order:

#### **Bartier Perry**

The firm offers full range of Workplace Relations legal services, including dealing with contract and termination disputes, policies and procedures, Equal Employment Opportunity and Occupational Health & Safety. They have a strong health background and in this context have previously advised on VMO/VDO matters. They provide direct advice and support and in house advocacy services.

Contact Partner: Mark Paul. See <http://www.bartier.com.au>

#### **Clayton Utz**

The Workplace Relations, Employment and Safety group offers advice, representation and support on all decisions and legal strategies relating to employment, industrial, EEO/discrimination and occupational health and safety matters, including in-house advocacy services. They have extensive expertise across a broad range of government services including health.

Contact Partner: Joe Catanzariti. See <http://www.claytonutz.com>

#### **Lander and Rogers**

The Workplace Relations and Safety Team of Landers and Rogers areas of practice include public sector employment law, strategic and policy advice, representation and advocacy, workplace, industrial and human relations, occupational health and safety, equal employment opportunity - including discrimination and harassment, risk management and training, unfair, unlawful and wrongful termination disputes and litigation.

Contact Partner: Mark Sullivan. See <http://www.landerson.com.au>

#### **Maddocks**

The Workplace Services Group provides advice, in-house advocacy and HR support services on a broad range of workplace issues, including industrial relations, employment contracts, OHS compliance and defence proceedings, EEO, discrimination and harassment prevention and complaints, workplace disputes, investigations, disciplinary and termination actions. The firm has a diverse client base including in the health sector, statutory corporations and all tiers of government.

Contact Partner: Darren Gardner. See: <http://www.maddocks.com.au>