

PRIVATISATION OF GOVERNMENT LEGAL SERVICES

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Introduction

In this paper I am speaking in my private capacity, not on behalf of the Department of Social Security (DSS), although my work for DSS must influence my views to an extent.

A short history

I first became aware of plans for the privatisation of Commonwealth legal services in 1989-90. A draft cabinet submission arrived at DSS and our views were sought. The draft came from the Attorney-General's Department (AG's). In essence the proposal was for agencies such as DSS to pay AG's on a user-pays basis for legal work done for us in certain categories.

Part of the rationale for the proposal was to stem the apparent exodus of AG's legal officers to private law firms where they were being offered much higher salaries.

The submission therefore favoured the introduction of a special award for legal officers giving them access to performance pay in an effort to close the gap between public service and private

law firm salaries. It contemplated that legal officers could exist in agencies outside AG's.

DSS's attitude to the first cabinet submission

The attitude within DSS to the draft submission was lukewarm at best. In that it suggested that we would pay for services previously provided free of charge, it was not appealing.

DSS was not attracted by the idea that it might have its own legal officers. Our own lawyers do legal work within the clerical stream. Our experience had been that many clerical staff members without legal qualifications had been equally useful as those with law degrees in the work we did. The introduction of a distinction of this type would be discriminatory and counter-productive.

It was the official DSS view that we would like the freedom to pay more to certain other professional groups whom we had trouble retaining. These included computer staff and accountancy experts.

Some of us were also somewhat concerned by sentiments in the first submission that were critical of the talents of the agencies' in-house lawyers.

It then seemed that AG's went back to square one and rethought much of the proposal.

What emerged

Subsequent versions of the submission allowed for the contracting out of some legal services to the private legal profession. They also accepted in-house lawyers as an established and enduring

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element in the provision of legal services to Commonwealth agencies.

There was a substantial view among agencies that, if an agency was to pay AG's for its legal services, it should have the option to choose a provider other than AG's. The emphasis then moved to defining what work would remain exclusive to AG's, what could go to external providers, and when the changes would occur.

Attention was given also to the respective roles of AG's and agency lawyers in providing legal services to agencies. AG's was to provide leadership to in-house lawyers.

The financial arrangements also became clearer. Agencies were to be given additional funds which, in broad terms, were to suffice for payment for their legal services. The quantum was based on historical usage of AG's.

Immediate impact on AG's/DSS relationship

Once the AG's submission was accepted by cabinet there were immediate improvements in the way AG's operated with the agencies. There was an immediate improvement in service. Timeliness improved. DSS was regularly surveyed by consultants providing feedback to AG's about AG's performance. AG's staff would visit us, in Tuggeranong, to discuss service issues or to provide on-the-spot advice.

AG's took seriously its obligation to provide leadership and assistance to in-house lawyers by offering seminars and conferences, some free, to agency lawyers. This has continued unabated.

DSS/AG's Memorandum of Arrangements

In 1992 DSS and AG's signed the first of the memoranda of arrangements that have existed between them. This has

proved extremely beneficial to DSS in a number of ways. It helps to educate the DSS network in the proper operation of the Department's legal services arrangements.

Role of in-house lawyers

It has also encouraged DSS and AG's to define the proper interaction between the legal services area in DSS, the rest of DSS and AG's. It has clarified and codified the appropriate role of the DSS in-house legal service. This is described as follows:

14.1 AGD [Attorney-General's Department] acknowledges the following role of the Client's legal and paralegal staff, operating consistently with the Guidelines:

- (a) representing the Secretary to the Client [Department] at AAT hearings and conferences;
- (b) providing instructions to AGS [Australian Government Solicitor] officers and, indirectly, to counsel representing the Secretary in AAT matters and court cases;
- (c) providing urgent or routine legal advice to the Minister and the Secretary on practical problems and policy proposals where advice on social security law or other areas of law is required;
- (d) arranging legal advice by AGD in matters where expertise does not exist within DSS or where it is essential that the legal advice is authoritative;
- (e) explaining to DSS staff, with the cooperation of AGD staff where necessary, what may or may not be possible as a matter of law and how, if possible, they might legally achieve their aims; and
- (f) maintaining an efficient and responsive link with AGD so that DSS staff requiring AGD assistance are assisted to the greatest degree possible.

Indications available of value of legal services

The arrangements have also served to clarify the money value of the legal services consumed by the Department. This accords with accountability theories in current public administration and assists management to make cost-effective decisions about legal services.

This has been as true of the agency's own legal infrastructure. It has shown that the Legal Services Division within DSS is very cost-effective when compared to alternatives.

The next and current step

Like other Commonwealth agencies, DSS is in the process of selecting its external legal providers for the next few years. One of these will be AG's if only because of the legal work that AG's *must* continue to receive from agencies under the Attorney-General's *Directions for the Provision of Legal Services to Government Departments and Agencies* (1 July 1995). Examples are:

- advice on matters where AG's has control of the policy;
- treaty services;
- drafting of subordinate legislation;
- constitutional advice;
- litigation;
- major legal agreements;
- government to government work;
- statutory interpretation involving more than one agency.

DSS, while pleased in general with the work AG's does for us, and with AG's improved service in recent years, is looking forward to experimenting with

alternative providers. We therefore hope to have a panel of about three firms, one of which could be AG's, which will take our work.

We see value in fresh sources of input into our work. It will be stimulating to see where the private firms are coming from and where they think they can take us! At the same time, no doubt there will be extra effort required on our part to educate the private firms in what may be possible from our point of view.

The introduction of competition should ensure improved value for the money we spend on external legal services. The stress may, however, be on improved quality in service delivery and content. This can only be good for all parties, the public, DSS and AG's.

The Attorney-General's Directions

I intimated earlier that DSS was not strident in demanding access to the private profession. However, noting that the Government has decided to permit agencies to have recourse to private law firms, the Attorney-General's *Directions* have certain surprising aspects.

The AG's continuing monopoly in respect of litigation is surprising from a practical perspective. It is justified on grounds that have a foundation in the Judiciary Act through which the Attorney-General is responsible for Commonwealth litigation. Subsidiary, but consistent, justifications are based on the Commonwealth as model litigant and on the desire for consistency in how the Commonwealth puts its case in litigated matters. These are good arguments but need not require the AG's monopoly in all courts and subject matter. It is noteworthy that private firms can appear for the Commonwealth in a tribunal where, in a practical sense, similar sensitivities might be thought to apply.

At the same time I find it a surprise that the Attorney-General has permitted general legal advising on such matters as statutory interpretation and the meaning of secrecy provisions to be provided by the private profession. Until now it has been possible to obtain a definitive Commonwealth interpretation or view on these matters from AG's. From now on it will be possible, admittedly within limits, to shop for the advice that an agency finds convenient. I see a danger in this in that it will generate uncertainty and possible inter-agency conflict where these have in the past been avoidable.

In certain respects there may be a steep learning curve for private law firms in discovering the relevant authorities that are an integral part of the tools of trade of lawyers in AG's. They will not necessarily have access to the AG's opinions data base. The work involved in understanding and applying notions of the Commonwealth as a model litigant or model contractor may be difficult to learn and apply, especially where an agency, in a particular case, is tempted to be not the model litigant or contractor. Will the private firm do as the agency, its client, is requesting, or will it question the agency's instructions? What is ethical in instructions from a private client might not be ethical in instructions from a Commonwealth agency. The instructions from the Commonwealth agency could emanate from a relatively junior officer in a particular matter.

These problems, when they arise at present between DSS and AG's, tend to be resolved by discussion between senior officers. In the new environment it may be necessary for the private firm to develop a sensitivity to these types of issues and to foster the necessary working relationship with senior management in the Commonwealth agency.

Some challenges

There are some interesting challenges for Commonwealth agencies in the new arrangements.

The greatest will be to try to maximise the potential benefits that might flow from harnessing the synergies between AG's and private legal providers. Where AG's is a member of an agency's panel of external legal providers there will be situations where AG's and a private firm could each contribute in its own way to a large project. This is an issue that needs to be on the agenda in the selection process with both AG's and the private contenders tested on their experience and ideas in these areas. The different histories and backgrounds of AG's and the other provider should generate, in an appropriate case, a useful and creative outcome. Of course, if this is to occur a certain generosity of spirit will be required by both legal providers.

Conclusion

Securing the services of the private profession, operating smoothly with various providers of legal services, becoming acquainted with and adapting to new working arrangements - these are unusual challenges for Commonwealth departments of state, although a number of government business enterprises have been in this mode for some years. What is more, I expect that this is the start of a trend. Once these arrangements are in place it is difficult to imagine that there will not be further relaxation of the reins by the Attorney-General. More work will, in all likelihood, be available to the private profession.

It is perhaps ironic that something that was not a feature at all in the first cabinet submission on provision of Commonwealth legal services has become a virtual driving force.