

## **Recommendation 31 – Legal Advice Protocols**

In his *Misfire* Report, the Ombudsperson expressed concern that legal advice provided to government was not followed, and noted a number of instances where there was confusion over the scope of legal advice that had been provided. While one aspect of his concerns (legal advice in the context of a recommendation to terminate employment with cause) was addressed in Recommendation 25, the remaining aspects are the focus of Recommendation 31 which reads as follows:

*By March 31, 2018, the Head of the Public Service establish written protocols that address:*

- a. Who has the authority to decide that government will not follow risk-based legal advice;*
- b. The process to be used when ministries decide to act contrary to legal advice, including how decisions in such situations are to be escalated, disputes resolved and outcomes documented; and*
- c. The process to be followed when limited legal advice is obtained, including who needs to be advised that the scope of the advice is limited.*

### **Scope**

This protocol applies to legal advice provided by the Legal Services Branch to ministries of government, except for the following:

- 1) Legal advice provided regarding litigation for or against the government;
  - Section 2(i) of the *Attorney General Act*, RSBC 1996, c. 22, provides that it is the Attorney General who has regulation and conduct of such litigation. Therefore, it is not open to Ministries or their staff to act against legal advice in the context of litigation.
  - Note: Ministries and ministry staff do not instruct outside counsel in the conduct of litigation. To the extent that client ministry representatives work with outside counsel during litigation, those representatives must liaise, and confirm positions to be taken by the government, with the Ministry of Attorney General.
- 2) Legal advice provided by the Office of Legislative Counsel.
  - The Office of Legislative Counsel already has procedures in place regarding how to identify and communicate legal risk to government.

This protocol applies to all risk based legal advice (as that term is described in the following section) provided, whether by formal opinion, email, or communicated orally. Where risk based legal advice is initially provided orally, legal counsel must follow up in writing as soon as practical.

This protocol also applies to legal advice provided by external legal counsel. If the LSB legal counsel supervising the retainer is of the opinion that the advice from external counsel is risk based legal advice, this protocol applies.

### **What is Risk-Based Legal Advice?**

There is almost always some level of risk to government action. However, this protocol is not intended to apply to all legal advice where any risk is identified. This protocol will only be triggered when legal advice indicates that it is more likely than not that contemplated government action is not authorized by law in circumstances that could lead to:

- i. government being exposed to financial liability;
- ii. sensitive personal information being disclosed;
- iii. a breach of government's obligations under a memorandum of understanding, treaty, interprovincial or international agreement, or other agreement; or
- iv. government otherwise being brought into disrepute

Note: There are also circumstances where legal counsel advises that the proposed course of action is not authorized by law. This is not risk based legal advice, and when advice like this is received, public servants do not have the option to disregard this advice. The relevant process to be followed if a ministry wishes to question this legal advice is set out in the following section.

### **Where the Legal Advice states that a proposed course of action is clearly unlawful.**

Legal advice that states a proposed course of action is contrary to law or lacks legal authority is not risk based legal advice. Public servants do not have the option to disregard this advice, but where a ministry has a legitimate basis to question the legal advice, that may be done through the process described below.

If a ministry is reluctant to accept this legal advice, ministry staff must forward the advice, along with relevant background information and their basis for questioning the advice to the program area Assistant Deputy Minister (ADM)<sup>1</sup>.

If legal counsel is aware that the ministry staff do not accept the legal advice, or that the staff may act contrary to the legal advice, he or she should advise their group supervisor as soon as possible, who will in turn advise the Assistant Deputy Attorney General's (ADAG) Office.

If the ADM wishes to confirm that the legal advice has approval of the ADAG, he or she should notify the office of the ADAG and request a meeting. The ADAG may require notification to take a specific form. The ADAG, or delegate and the ADM will meet to discuss the issue. The result of that discussion will be documented in writing from the Legal Services Branch to the program area ADM.

If, after that discussion, the advice is confirmed and the ADM still questions the advice, the issue must be escalated by the ADAG and the ADM to the program area Deputy Minister and the Deputy Attorney General. The Deputy Minister and Deputy Attorney General will involve the Deputy Minister to the Premier when appropriate. The results of any discussion will be documented in writing by the Ministry of Attorney General.

If there continues to be no resolution, the Deputy Attorney General will raise the issue with the Attorney General.

### **Recommendation 31(A): Who has the authority to decide that government will not follow risk-based legal advice?**

#### Statutory Decision Makers

In developing these protocols, the special role of the statutory decision maker ("SDM") has been recognized. As a SDM has been expressly tasked by the legislature to make a certain decision, it must be that person, or his/her authorized delegate, who has the authority to decide whether to follow legal advice. Requiring an SDM to seek approval to depart from risk based legal advice would be an inappropriate fettering of the SDM's discretion and is not permitted.

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<sup>1</sup> Note that this escalation process is not designed to replace dialogue between ministry staff and LSB counsel to discuss or seek clarification of the legal advice received.

## Legal Advice provided to a Ministry, other than to a Statutory Decision Maker

When risk based legal advice is provided to the government other than to a SDM, authorization to act contrary to that legal advice must be authorized in writing by the program area Assistant Deputy Minister who must, in turn, provide a written notice to the ADAG Legal Services Branch outlining the basis for acting contrary to the legal advice.

### **Recommendation 31(B): The process to be used if a Ministry decides to act contrary to legal advice**

#### Statutory Decision Makers

As discussed above, a SDM has the authority to decide not to follow risk based legal advice. However, in circumstances where relevant legal advice has been sought by or provided to someone in the ministry other than the SDM, who is gathering information or preparing briefing materials for the SDM, the following steps must be taken:

- 1) Where briefing materials are provided to a SDM by other government employees, those materials should include an express statement of whether legal advice was sought.
- 2) If legal advice was sought, a copy of both the question or questions posed to legal counsel and the advice received should be provided to the SDM. Although briefing materials may quote from the advice received, it is not adequate to only provide a summary of the legal advice received to the SDM.

## Legal Advice provided to a Ministry, other than to a Statutory Decision Maker

### *Steps to be taken by the Legal Services Branch (see Flowchart A)*

- When providing legal advice other than to a SDM, legal counsel must decide if the advice given qualifies as risk based legal advice.
  - If it does, legal counsel must clearly state, early in the legal advice (ideally in the Summary of a lengthy legal opinion) that this legal advice qualifies as risk based legal advice and if it is not followed, this protocol must be followed and appropriate approvals must be obtained.
- Where risk based legal advice is provided, and legal counsel believes, or becomes aware, that there is a serious likelihood the client will not follow that advice, legal

counsel must advise his or her supervisor. If the matter is urgent, legal counsel should notify both the supervisor and the office of the ADAG.

- Notification to the supervisor (and the office of the ADAG, where the matter is urgent) should be in writing, and must indicate the following:
  - Brief summary of advice, and to whom it was provided
  - Risks to government if advice not followed
  - Why legal counsel believes there is a serious likelihood the client will not follow the advice
  - The urgency of the matter
  - Any discussions that have occurred to date with ministry representatives
  - The potential or anticipated consequences of failing to follow the legal advice
- The ADAG may require notification to be in a specific form.
- Unless the matter is urgent, the supervisor should contact ministry representatives to discuss the risks to government of not following legal advice. After such contact, the supervisor will then forward legal counsel's notification to the office of the ADAG, including any additional relevant comments or updates. If the matter is urgent, the supervisor will immediately forward the information received from legal counsel, unless legal counsel also sent it to the ADAG directly.
- Upon receipt of notification from legal counsel or a supervisor, the ADAG office will check to see if it has received notification from the ministry of an intention not to follow the legal advice.
- If no such notification has been received, the ADAG will assess whether the risks are serious enough that he or she will proactively contact the program area ADM to discuss and/or escalate the matter to the Deputy Attorney General. If the risks are not found to be sufficiently serious for either of those steps, the ADAG is not required to take further action unless notification from the program ADM is received.
- If an ADM contacts the ADAG office, or if the ADAG (or delegate) proactively contacts the ministry program area, the Legal Services Branch will meet with the ADM to explain and answer questions about the risks to government of not following

the legal advice, and discuss possible alternate courses of action that avoid most or all of these risks.

- Legal counsel must keep notes of the discussion and, if the ultimate decision by the ministry is to not follow the risk based legal advice, keep a copy of the ministry decision on file. If the ADM and ADAG office reach a mutually agreed upon course of action, that course of action will be documented by the Legal Services Branch and provided to the ADM.

*Steps to be taken within the Ministry – Flowchart B*

- When a ministry receives legal advice, and is considering a course of action that does not follow the legal advice, it must determine if the advice qualifies as risk based legal advice. If it is not readily ascertainable from the advice itself, such as a clear statement in the email or opinion that the advice qualifies as risk based legal advice, the ministry must clarify with legal counsel. If the advice is received directly from external counsel, a ministry should assume it is risk based legal advice, unless informed otherwise by counsel with the Legal Services Branch.
  - Note: If the advice indicates that there is no authority for a proposed course of action (as opposed to risk that there is no authority), the matter must be immediately escalated as set out earlier in this protocol.
- Unless the risk based legal advice has been provided directly to someone with the authority to decide not to follow it, the ministry must provide the program area ADM with a copy of the legal advice and information about the proposed course of action. The ADM must also be provided with background regarding the proposed course of action, why the ministry does not want to follow the legal advice, any discussions about the matter with legal counsel, other courses of action considered, and strategies to mitigate the risks to government if the risk based legal advice is not followed.
- If the ADM agrees with the recommendation not to follow the risk based legal advice, he or she must contact the office of the ADAG and advise the ADAG that the ministry is considering not following legal advice. The ADAG may require a specific form or manner of notification. The ADM and the ADAG (or representative of the ADAG) will engage in a discussion before the final decision is reached. The ADM and ADAG should, when discussing the matter, consider whether it is necessary in the

circumstances to document any risk mitigation strategies the Ministry intends to adopt. This procedure should be followed when the legal advice is provided directly to the ADM, or to a Deputy Minister, as well.

- If, after a discussion with the ADAG or designated senior legal counsel, the ADM accepts the recommendation, that acceptance must be communicated in writing and a copy must be provided to the ADAG's office.

#### *Dispute Resolution Mechanism*

- If after the discussion between the ADM and ADAG, either one feels that this matter should be escalated to the Deputy Minister before a final decision is reached, they may refer the matter to the relevant Deputy Minister and Deputy Attorney General for decision.
- The final decision will be documented in writing and will be provided by the client ministry to the Deputy Attorney General and ADAG.

#### **Recommendation 31(C): The process to be followed when limited legal advice is obtained**

- When providing legal advice, legal counsel must articulate the ways in which their legal advice is limited (including, but not limited to, the need for urgent advice, incomplete information currently available, and any anticipated events that would require the advice being updated). To the extent possible, legal counsel should also articulate how the advice is limited and if advice has not been given on any related matters (for example, if counsel is only providing advice on the form of a document and not the content of the document itself, or if the advice only relates to process rather than the merits of a decision, counsel should clearly indicate this).
  - If advice is provided in a meeting or over the phone, legal counsel should follow up in writing setting out the advice and any relevant limits.
- In circumstances where legal advice is limited, a copy of the actual advice provided (including the questions asked and to whom the advice was originally provided) must

be given to anyone within a client ministry who may rely on the advice<sup>2</sup>, in addition to any summary in a briefing note or other document.

- Where a summary of the limited legal advice is included in a briefing note or other document prepared by the client ministry, that summary must include a notation that the legal advice was limited. The notation must also indicate how the advice was limited and expressly indicate any relevant matters where no legal advice was provided.

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<sup>2</sup> Care must be taken to only forward legal advice as appropriate within Government so as not to waive privilege over the materials. There must be no dissemination of legal advice to anyone, other than government personnel, without the express written consent of the LSB legal counsel responsible for the matter.