
Appendix D—Engagement of counsel

- 1 The Commonwealth policy in engaging counsel is to seek to rely on its position as a major purchaser of legal services in agreeing on the level of fees payable to counsel engaged on behalf of the Commonwealth or Commonwealth agencies.
- 2 Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women. While the selection of counsel needs to take into account the interests of the Commonwealth in securing suitable and expert counsel in a particular case, this is not to occur in a manner which results in a narrow pool of counsel for any particular category of Commonwealth work.

Application

- 3 The policy applies to the engagement of counsel by Commonwealth agencies themselves or by private lawyers who are acting for the Commonwealth or Commonwealth agencies. The policy also applies to lawyers who, although not from the bar, are briefed as counsel in lieu of a private barrister to conduct or advise on litigation for the Commonwealth or Commonwealth agencies.
- 4 The policy applies to briefs to advise and briefs to appear before courts, tribunals and inquiries. It also applies to the use of counsel to represent the Commonwealth or Commonwealth agencies in arbitration and other alternative dispute resolution processes. Briefs should ordinarily be marked with an hourly rate up to a maximum daily rate inclusive of conferences, consultations, preparation and other necessary work. A fee on brief (inclusive of preparation time) is only to be marked if it is considered more economical than agreeing to pay a fee based on the appropriate hourly or daily rate for the counsel.

Bankruptcy

- 4A A brief issued to counsel is to contain a condition that, in accepting the brief, counsel is taken to warrant that he or she has not, at any time, been declared bankrupt, unless counsel advises of any such bankruptcy.
- 4B Counsel who have been declared bankrupt, and who have been the subject of an adverse disciplinary finding by a professional body in relation to the circumstances of that bankruptcy, are only to be engaged as counsel with the approval of the Attorney-General.

Note: OLSC can provide advice on counsel for whom approval is required under paragraph 4B.

Rules about selection of counsel

- 4C All barristers are to be selected for their skills and competency independently of their gender. A Commonwealth agency is to ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief.

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- 4D In selecting counsel, all reasonable endeavours are to be made to:
- (a) identify all counsel in the relevant practice area; and
 - (b) genuinely consider engaging such counsel; and
 - (c) regularly monitor and review the engagement of counsel; and
 - (d) select female counsel with relevant seniority, expertise and experience in the relevant practice area, with a view to:
 - (i) senior female barristers accounting for at least 25% of all briefs or 25% of the value of all brief fees paid to senior barristers; and
 - (ii) junior female barristers accounting for at least 30% of all briefs or 30% of the value of all brief fees paid to junior barristers.

Note: Commonwealth agencies are encouraged to publish annually, in a manner that does not disclose the rates paid to individual counsel, information that allows assessment of whether the targets in subparagraphs (d)(i) and (ii) are being met in relation to counsel engaged on their behalf (whether directly or through external lawyers).

Guidance material is available at
www.ag.gov.au/LegalSystem/LegalServicesCoordination/

Fees payable to counsel

- 4E A Commonwealth agency that proposes to brief a counsel who does not have an approved rate for performing Commonwealth legal work, is to ask OLSC to approve an initial rate, even if the agency proposes to brief the counsel at a rate below the applicable threshold specified in paragraph 5. If OLSC is asked to approve an initial rate, OLSC is to make a decision about the request within a reasonable time and tell the agency about its decision as soon as practicable after the decision is made.
- 5 Senior counsel are not to be paid a daily rate above \$3,500 (inclusive of GST) without the approval of the Attorney-General. Junior counsel are not to be paid a daily rate above \$2,300 (inclusive of GST) without such approval. Any out of chamber fee is to be treated as part of the daily rate for the purpose of considering the appropriateness of that rate. Where an out of chamber fee is agreed or approved, it is to be marked separately on the brief.
- 6 Hourly rates greater than one-sixth of the daily rate are not to be agreed with counsel unless approved by the Attorney-General.
- 7 A cancellation fee is to be agreed with counsel only in exceptional circumstances (eg to cover the possibility of a matter being resolved shortly before a lengthy trial). Any such fee is to be agreed at the time counsel is engaged for a trial. A cancellation fee greater than two days of counsel's normal Commonwealth rate is to be approved by the Attorney-General before it is agreed with counsel.
- 8 Payment of retainers (concerning counsel's availability for future matters), both new and renewed, is not ordinarily to be agreed with counsel and, if considered to be justified, the terms of the agreement are first to be approved by the Attorney-General.

Appendix D Engagement of counsel

Approval

- 9 Unless agreed otherwise by the Attorney-General, requests for approval to pay counsel amounts higher than the rates referred to in paragraphs 5 and 6, and approvals required by paragraphs 7 and 8 for cancellation fees and retainers, are to be made to OLSC. Proposals to pay senior counsel in excess of \$5,000 per day (inclusive of GST) will be referred by OLSC to the Attorney-General for decision.
- 10 Approval is to be sought as far as possible in advance of the scheduled date for the delivery of a brief to counsel. In considering a request to pay counsel above the specified rate, the following factors will be taken into account:
- (a) the special expertise or skill of the counsel who is proposed to be briefed
 - (b) the availability of counsel generally to appear in the matter
 - (c) the probable total cost of counsel's fees in the matter
 - (d) the specific request of a Commonwealth agency that a particular person be briefed and the reasons for that preference
 - (e) the importance of the matter, including any special sensitivity, and
 - (f) the normal market daily fee at which the relevant counsel is briefed.
- 11 If approval for a daily fee in excess of \$3,500 or \$2,300 (as applicable) has been given, subsequent approval for using the same barrister at the approved rate is not required unless, at the time the approval is given, the fee is designated as a 'one-off' rate.

Other matters

- 12 The fees referred to in paragraph 5 are not to be regarded as the standard or starting point for fee negotiations. In many cases, particularly in relation to junior counsel, the normal market rates of counsel may be less, or even considerably less, than the threshold fees.
- 13 Counsel are not to be paid more than reasonable costs of accommodation and travel, taking into account levels applicable to Senior Executive Service officers in the Australian Public Service. Accommodation and class of travel is not to be approved so as to increase the approved Commonwealth daily rate.

Administration of the policy

- 14 OLSC will normally consult AGS, in light of its experience with the conduct of Commonwealth litigation and with the engagement of counsel generally, in considering whether a fee in excess of the limits in paragraph 5 of this Appendix should be approved and in making recommendations to the Attorney-General in respect of a request to approve a fee in excess of \$5,000.
- 15 Subject to the availability of counsel at the approved rates, the choice of counsel is a matter for individual Commonwealth agencies, taking into account any advice from the solicitors instructed by the agency. However, Commonwealth agencies and their instructing solicitors are encouraged to inform OLSC, either in

general terms or in relation to a specific matter, if they have any concerns about the operation of the policy.

- 16 To facilitate administration, Commonwealth agencies are to provide OLSC, upon request, with information or access to information about the engagement of all or certain counsel.

Definitions

4. In this document, the following terms are defined as follows:

s 22(1)

Approved Commonwealth counsel rate – An amount or level of payment for a counsel approved by the decision maker. Approval may be as an ‘ongoing’ counsel rate or a ‘one-off’ counsel rate.

s 22(1)

Increase Rate – An increase to an already approved Commonwealth Counsel rate.

Initial Rate – The first ongoing rate approved for a counsel. It may be because counsel has not previously had a rate, or when counsel either joins the bar or takes silk.

s 22(1)

‘One-off’ counsel rate – An OLSC-approved rate for counsel acting for the Commonwealth in a specific matter and only applies to the matter described in the approval.

‘Ongoing’ counsel rate – The OLSC- approved rate that allows counsel to be briefed by an Agency in order to act for the Commonwealth.

s 22(1)

PART A – Policy

Background

5. The *Legal Services Directions 2017* (the Directions) are issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*. The Directions give effect to the Attorney-General's responsibilities as the First Law Officer for arrangements governing the delivery and management of Commonwealth legal work, including engagement of counsel. The Office of Legal Services Coordination (OLSC) administers the Directions.
6. Appendix D provides the framework for the engagement of counsel to ensure that agencies can obtain high quality legal services.
7. The framework is designed to generate downward pressure on counsel rates to take advantage of the Commonwealth's bulk-purchasing power. This assists the Commonwealth to ensure it receives value for money as a major purchaser of legal services.
8. Counsel are to be engaged by or on behalf of an Agency in accordance with Appendix D of the Directions (Paragraph 6.1 of the Directions). While the choice of counsel is a matter for individual agencies (considering the Directions, advice from their lawyers, and subject to the availability of counsel with an approved Commonwealth counsel rate), they are encouraged to brief a wide range of counsel. This ensures that there is a wide pool of experienced counsel available to perform Commonwealth legal work.

Applications

Applying to OLSC for a counsel rate

9. Appendix D requires Commonwealth agencies to only engage counsel with a Commonwealth approved rate. Most requests are for counsel who are at the state or territory Bar. Occasionally, OLSC may receive requests from solicitors seeking an ongoing Commonwealth counsel rate. Further information regarding applications from solicitors is included below.

Ongoing rates

10. To apply for an **ongoing rate** an applicant must complete an application form available [here](#). All applications are to be received and assessed by OLSC. However, applications for rates over \$5,000 require a decision by the Attorney-General.
11. An applicant may apply for a new ongoing Commonwealth rate (inclusive of GST) to be set if:
 - counsel does not have an ongoing Commonwealth rate
 - counsel has taken silk since their ongoing Commonwealth rate was approved, or
 - exceptional circumstances exist to review a rate.
12. Once an ongoing rate has been set, agencies can negotiate up to the threshold amount without seeking approval by the Attorney-General or their delegate (\$2,300 for JC and \$3,500 for SC (paragraph 5 of Appendix D)).

One-off rates

13. An agency may wish to pay counsel a higher **'one-off' rate** for their work on a particular matter. To be eligible for a one-off rate counsel must have an ongoing rate. The one-off rate expires after the matter for which that rate was approved is finalised. While not an exhaustive list, reasons why there might be a need for a one-off rate include:
 - the matter is significant or particularly sensitive
 - the matter demands a high level of counsel's expertise
 - there is an upcoming court event or key dates, creating urgency
 - unavailability of counsel with similar expertise, creating pressure

- there is a specific preference for a counsel and, for example, the Solicitor-General is unavailable

14. While OLSC receives applications from agencies, law firms, chambers or directly from counsel, OLSC generally requests that the Agency submit the application where:

- a one-off counsel rate above a threshold amount is required for a particular brief, or
- a Commonwealth counsel rate is sought for a solicitor who is acting as counsel (solicitor-advocate).

15. The application process for applications for an ongoing rate and those for a one-off rate is the same.

16. OLSC can receive one application for a one-off rate for the same counsel in two different matters. OLSC will then determine whether this application can be processed as one request or as two separate requests.

17. Similarly, OLSC can process one application for one-off rates for multiple counsel in the same matter.

s 22(1)

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Relevant factors

28. s 47E(d)

29. Ordinarily, the assessment begins with consideration of the following factors:

- *The year of admission to the Bar* – this is demonstrative of counsel’s seniority in comparison with other counsel. In the case of more junior counsel with less experience (0, 1 or 2 years), utilising the Counsel Rate Table (referencing the relevant starting rate against counsel’s year of admission) may be enough to determine a suitable rate. s 22(1)
- *The commercial rate of Counsel* – this usually reflects the experience and/or expertise of the Counsel, and is a particularly relevant consideration where an applicant is more senior.

30. In some cases, it is necessary to take into account other information. Situations where this may be necessary include if the commercial rate of the counsel relative to seniority is high, or when the requested Commonwealth rate is higher than usual (indicating likely specialised expertise). s 22(1)

31. Experience which may be relevant to the determination of a rate includes but is not limited to:

- If the applicant may be highly specialised in a particular area, or come with significant other legal experience.
- Previous experience from practice as a solicitor, including if the counsel has worked in the State Solicitor’s office, a prosecutorial body, a public defender, or something similar.
- Whether before joining the bar, the barrister conducted work as a solicitor-advocate.
- Experience from practice internationally
 - This will be most relevant where a rate is sought to work in Australia:
 - Overseas-qualified lawyers need to apply to the state and territory admissions boards to determine what steps are needed to requalify (each situation is judged on a case-by-case basis), and
 - If the person is from New Zealand the occupation is recognised in Australia under the *Trans-Tasman Mutual Recognition Act 1997*
 - On very rare occasions, the Commonwealth may seek to engage foreign counsel in an overseas jurisdiction. In these cases, we would need to discuss the circumstances with the agency.
- Whether the matter to be briefed may have some special sensitivity which requires the services of a particular counsel.
- Whether a nominating agency has reason to brief that particular person. In this instance, the agency should include the reason for that preference in the application.

s 22(1), s 47E(d)

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Increase to ongoing rates

46. Generally, OLS policy is to not review applications for increases to approved Commonwealth rates which are less than or equal to a threshold amount. Once a counsel has an approved Commonwealth rate, an agency and counsel may choose to negotiate a competitive and comparable rate for a brief up to and including the relevant threshold amount without the need to consult with OLS. These negotiations should have regard to obligations outlined in Appendix D of the Directions and the agency's experience with counsel over the previous year.

s 47E(d)

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Counsel Rate Table

- 59. The Counsel Rate Table is an **internal document** that sets out the relevant starting rate for counsel according to the year they were admitted. It is referred to as part of the assessment process for determining a Commonwealth counsel rate.
- 60. The document is updated annually at the start of each calendar year, with \$75 being added to each cohort's starting rate reflecting additional experience.
- 61. In most instances the Counsel Rate Table will generally be used as a guide, rather than relied upon to make a decision. However, it is OLS policy to rely on it for counsel with 0, 1 or 2 years' experience where there is no reason to utilise any other methods of assessment. s 47E(d)

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s 22(1)

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Template P: No automatic increase in Fees

[Return to Guide](#)

Dear Mr/Ms [NAME]

Thank you for your enquiry of [date]. There is no automatic increase to rates for barristers under the *Legal Services Directions 2017*, however, there is flexibility for agencies to negotiate. Once OLSC has set an ongoing rate for counsel, an agency and counsel may choose to negotiate a rate up to and including the relevant threshold without any further need to consult with OLSC. The ability for an agency to negotiate is subject to the normal value for money principles that apply in all Commonwealth expenditure.

The maximum threshold rates an agency can negotiate up to are:

- senior counsel - \$3,500 inclusive of GST
- junior counsel - \$2,300 inclusive of GST

If a junior counsel takes silk, they may apply to OLSC for an increase to their ongoing Commonwealth rate.

In some circumstances, it may be appropriate to request a rate above the thresholds for a one-off brief. Applications for a one-off rate should be made to OLSC by the agency intending to brief counsel and include additional information as set out in the application form on the OLSC [website](#).

If you have any further questions, please email olsc@ag.gov.au or call (02) 6141 3642.

Kind regards

Action Officer

PART D - Annexures

Annex A: Example analysis –ongoing rate relying on Counsel Rate Table

Dear Approver

Please find an ongoing counsel rate application for your approval.

Application Information	
Deadline	N/A
Counsel Name	§ 47F(1)
Rate type	Ongoing
Agency requesting	N/A
Requested rate	N/A
Counsel's commercial rate	\$2,200
Counsel's current ongoing rate and date of approval	N/A
Background	Counsel is seeking an initial rate.

Recommendation

I recommend you approve an ongoing rate of **\$1,100**.

This is on the basis that:

- The rate is 50% of counsel's commercial rates § 47E(d)
- The rate is for a first year counsel in accordance with the Counsel Rate table
- The application does not provide information that would require further analysis.

Please see below a proposed response email:

Kind regards

[Action officer]



Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-017511

Mr Andrew Muller
President
ACT Bar Association
PO Box 789
Canberra ACT 2601

03 JUN 2021

Ms Prue Bindon
Chair
Equal Employment Opportunity Committee
ACT Bar Association
PO Box 789
CANBERRA ACT 2601

By email: ceo@actbar.com.au

Dear Mr Muller and Ms Bindon

Thank you for your letter regarding the ACT Bar Association's concerns over the engagement of counsel by the Commonwealth. I appreciate the time you have taken to bring these matters to my attention.

I acknowledge the important role counsel play in the provision of high quality legal services to the Commonwealth and value a strong partnership with the profession in furthering our shared interests.

Your understanding of the Commonwealth's counsel rate regime is correct in all material respects, and I agree that there is a need for improved communication to Commonwealth agencies about the regime. The regime operates on the basis of setting maximum daily rates, not limits on hourly rates. Daily rates negotiated between an agency and counsel should be both cost-effective and reflect fair remuneration for a full day of the counsel's work.

I am very conscious of the gendered impacts of the briefing practices of agencies. The Commonwealth is committed to meeting or exceeding the equitable briefing targets set out in the *Legal Services Directions 2017*, and I am proud to say that agencies have done so in each year since the target was introduced. More can always be done in this space, and it is important for government to work closely with the profession to this end.

I have asked Michael Johnson, Assistant Secretary of the Office of Legal Services Coordination, to meet with you to discuss your concerns in more detail as well as possible responses. He will be in touch with you directly to organise a convenient time.

I trust this information is of assistance and thank you again for bringing these matters to my attention.

Yours sincerely

Senator the Hon Michaelia Cash
02/06 2021



OLSC Counsel Rate Table – From 1 January 2024

Rates are inclusive of GST

Junior Counsel \$75 increase (1yr +)		
Years exp	Current rate	Hourly rate
(24) 1 year	\$1,100	\$183
(23) 2 year	\$1,175	\$196
(22) 3 years	\$1,250	\$208
(21) 4 years	\$1,325	\$221
(20) 5 years	\$1,400	\$233
(19) 6 years	\$1,475	\$246
(18) 7 years	\$1,550	\$258
(17) 8 years	\$1,625	\$271
(16) 9 years	\$1,700	\$283
(15) 10 years	\$1,775	\$296
(14) 11 years	\$1,850	\$308
(13) 12 years	\$1,925	\$321
(12) 13 years	\$2,000	\$333
(11) 14 years	\$2,075	\$346
(10) 15 years	\$2,150	\$358
(9) 16 years	\$2,225	\$371
(8) 17 years	\$2,300	\$383
(7) 18 years		
(6) 19 years		
(5) 20 years		
(4) 21 years		

Senior Counsel \$75 increase (1yr +)		
Years exp	Current rate	Hourly rate
(24) 1 year	\$2,825	\$471
(23) 2 year	\$2,900	\$483
(22) 3 years	\$2,975	\$496
(21) 4 years	\$3,050	\$508
(20) 5 years	\$3,125	\$521
(19) 6 years	\$3,200	\$533
(18) 7 years	\$3,275	\$546
(17) 8 years	\$3,350	\$558
(16) 9 years	\$3,425	\$571
(15) 10 years	\$3,500	\$583
(14) 11 years		
(13) 12 years		
(12) 13 years		