



## Setting and negotiating Commonwealth Counsel rates

### Guidance material for agencies

#### Overview

*The Legal Services Directions 2005* (the Directions) require that to be engaged to perform Commonwealth legal work, counsel must have an approved Commonwealth rate (paragraph 4E).

OLSC has previously approved all initial and increased rates, consistent with the policy of exerting maximum downwards pressure on rates. This guidance material reflects the amended policy to streamline this process and enable agencies who are engaging counsel in accordance with the Directions to make their own informed decision about the rate of engagement below certain thresholds. Rates above the thresholds will still require approval by the Attorney-General or his or her delegate.

#### When counsel rates may be negotiated

OLSC will set an initial Commonwealth rate on application by an agency or counsel, as is currently the case. If a junior counsel who has an initial rate approved takes silk, OLSC will set an initial rate for senior counsel. Once an initial Commonwealth rate has been approved by OLSC, it is open to an agency and counsel to negotiate a different ongoing rate for a particular brief (paragraph 5 of Appendix D the Directions). However, there is no expectation that a rate be negotiated in each individual matter – the default position should be that the most recent rate approved by OLSC or agreed between counsel and the Department would apply.

An agency may negotiate a rate up to the threshold limit of \$2,300 (inclusive of GST) for junior counsel and \$3,500 (inclusive of GST) for senior counsel.

#### Factors to consider in negotiating a rate

When negotiating a new rate, an agency should take into consideration:

- Counsel's current rate and the year it was approved
- The per annum increase amount (the calculation)
- Any special circumstances of counsel
- Any special circumstances of the matter
- Value for money



Counsel's current rate and the year it was approved

An agency should first look at the last approved rate by OLSC to assist in negotiating a different rate. If the rate is above \$2,300 for JC or \$3,500 for SC, the agency must apply to OLSC for any increase of these rates.

The agency should look to the year the rate was approved. For example, for a JC with 10 years' experience whose rate was set 5 years ago, it may be reasonable to increase the rate by 5 times the per annum increase amount, reflect counsel's additional experience. If counsel has taken silk and moved to senior counsel since their last rate was approved, the agency should apply to OLSC for an initial senior counsel rate.

There may be circumstances where a higher or lower rate is appropriate (see further below).

The per annum increase amount (the calculation)

As a general rule, agencies should apply a per annum increase for each year since the last rate was set. The current year is taken as 1 year of experience (ie in 2014, a 2014 JC has 1 year experience, a 2013 2 years' experience, etc).

**For both junior and senior counsel, apply a \$75 per annum increase.**

For example: John is a 2005 junior counsel. His last rate was \$1,250 per day and it was approved on 30 July 2007. As it is 7 years since his rate was last approved, John's rate should be calculated as follows:

- Increase: 7 years at \$75 per annum = \$525
- New rate = Current rate (\$1,250) + increase (\$525) = \$1,775

John's new rate should be \$1,775 per day unless there are special circumstance that would warrant a higher rate.

Special circumstances of counsel

It may be appropriate to negotiate a higher rate for counsel if there are special circumstances about the counsel the agency wishes to engage.

Agencies should not feel obliged to consider special circumstances, either of counsel or of the matter. Agencies' default negotiation position should be counsel's current rate and any per annum increase.

Any additional increase based on special circumstances should not be considered unless actively sought by counsel. This will maintain consistency across the practice of agencies and ensure agencies and counsel are not required or expected to negotiate rates in each individual matter.

Special circumstances of counsel that may be relevant include:



- Counsel's particular experience in the legal subject matter
- Other experience that would be particularly valuable to the agency
- Location of counsel (e.g. Papua New Guinean practice)
- Availability - no other suitable counsel may be available

Special circumstances of the matter

The specific matter may also bring up a number of additional circumstances that lead to a higher rate for counsel being appropriate. Special circumstances may include:

- The matter is sufficiently important to the agency to warrant a high rate – this may be because the matter would set an important precedent or be of novel value
- The location of the matter (eg rural Australia)
- Length of the matter – eg Royal Commissions are significantly long

Value for money

Agencies are ultimately responsible, in accordance with the Directions, the Commonwealth Procurement Rules and the *Public Governance, Performance and Accountability Act 2013*, for obtaining value for money when engaging counsel.

Agencies should actively seek to keep Commonwealth legal costs down in recognition that and Commonwealth work is often regular or high profile in nature and that the Commonwealth always pays its bills. Commonwealth rates are generally significantly lower than counsels' commercial rates. Agencies should rely on the Commonwealth's bargaining power when negotiating rates with counsel.

s 47E(d) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

***Most counsel should fall under the threshold unless there are specific reasons why they should have a higher rate.***

In making such an application, an agency should provide the following information to OLSC:



- the special expertise or skill of the counsel who is proposed to be briefed
- the availability of counsel generally to appear in the matter
- the specific request of an agency that a particular person be briefed and the reasons for that preference
- the importance of the matter, including any special sensitivity
- the normal market daily fee at which the relevant counsel is briefed

s 47E(d) [Redacted]

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]
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- [Redacted]
- [Redacted]

## Engagement of Counsel

### Background

Counsel play a unique role in the legal profession due to their function as advocates and their independence from other legal practitioners. They are primarily engaged for their advocacy skills which can be essential to the efficient and effective resolution of complex disputes. Counsel with extensive experience in dispute resolution may also be strategically engaged to provide advice on the prospects of success prior to the commencement of a matter. Many counsel are also specialists in particular areas of the law and can be briefed directly by other legal practitioners for legal advice.<sup>1</sup>

Capable and highly skilled counsel are essential to the Commonwealth due to the nature and impact of Commonwealth legal work. s 47E(d)

Ready access to high quality and appropriately experienced counsel is therefore an essential part of supporting the Attorney-General as the First Law Officer in his or her responsibilities to manage Commonwealth litigation and ensure that the Commonwealth can effectively manage its legal risks.

The manner in which the Commonwealth engages counsel must be flexible enough to meet short time frames but robust enough to ensure value for money. The management of counsel fees is currently overseen by OLSC. This function forms part of the initial responsibilities and purposes of OLSC at its establishment<sup>2</sup> and was originally undertaken by the Attorney-General's Department's Legal Practice area which managed the centralised procurement of counsel services. The centralised nature of the arrangement was recognised by s 22(1) as essential to enabling the Commonwealth to effectively exploit its "significant purchasing power" to achieve savings.<sup>3</sup>

#### OLSC undertakes the management of counsel fees by:

- approving "initial rates" for counsel seeking to be engaged by the Commonwealth<sup>4</sup>
- approving one-off and ongoing rates that are higher than relevant base thresholds (\$2300 for JC and \$3500 for SC)<sup>5</sup> but below the \$5000 per day threshold that requires personal approval by the Attorney-General<sup>6</sup>
- facilitating the making of requests by entities to the Attorney-General for one-off or ongoing rates higher than \$5000 per day<sup>7</sup>,
- providing guidelines to entities on counsel fee negotiations, and
- maintaining a repository of initial rates for counsel.

<sup>1</sup> <http://www.austbar.asn.au/>

<sup>2</sup> Logan.

<sup>3</sup> Logan reference....

<sup>4</sup> Paragraph 4E of the LSDs requires counsel to have an initial rate approved by OLSC, even where the rate being sought is below relevant thresholds.

<sup>5</sup> Paragraph 5 of the LSDs

<sup>6</sup> Paragraph 9 of the LSDs

<sup>7</sup> Paragraphs 9 and 14 of the LSDs

s 47C(1)

In practice, entities will interact with OLSC at key stages of the process for engaging counsel. Entities will often first contact OLSC to confirm whether a counsel they seek to engage has an approved initial rate. If there is no initial rate, the entity or the counsel seeking to be engaged will apply to OLSC for an initial rate to be approved. In doing so, OLSC will have primary regard to the years of experience a counsel has either as a JC or SC.

Once a counsel has an initial rate approved, entities may contact OLSC again to seek approval of a one-off or ongoing rate that is greater than the relevant base thresholds in the LSDs but under the \$5000 per day threshold that requires personal approval by the Attorney-General. s 47E(d)

s 47C(1)

#### Issues

An effective framework for engaging counsel services for the Commonwealth should reflect and acknowledge the circumstances in which and purposes for which counsel are commonly engaged for Commonwealth work. It is critical to the management of Commonwealth legal risk that counsel with the right expertise be available and can be engaged in a timely and cost effective manner. An effective framework must be flexible and responsive enough to deal effectively with urgent deadlines and robust enough to not diminish the Commonwealth's capacity to achieve value for money and access high quality counsel. In this context, it is necessary to consider:

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<sup>8</sup> Paragraph 12 of the LSDs

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## 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/](http://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

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**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

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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:

**Agency** – A non-corporate Commonwealth entity or a corporate Commonwealth entity within the meaning of the *Legal Services Directions 2017* (see paragraph 15, Part 4 of Schedule 1).

**Applicant** – The person or entity making an application for a Commonwealth counsel rate. The applicant may be an agency, law firm, chambers or counsel.

**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.

**Brief** - The engagement of counsel to provide legal services in a matter.

s 47E(d)

**Counsel** – Barristers from the private bar or legal practitioners (in a jurisdiction like the ACT where the profession is fused) briefed as barristers to advise or appear in tribunal or court proceedings. This may include a solicitor-advocate, junior counsel or senior counsel. It also includes certain AGS employees briefed as counsel, described as either AGS JC or AGS SC in the database.

**Counsel Rate Table** – The internal document that sets out daily rates against a counsel’s years of experience.

**Decision maker** – The person who makes the decision whether to approve an application for a Commonwealth counsel rate and is determined by the *Legal Services Directions 2017* and the *Attorney-General’s Statutory Powers – Delegation 2020 (No 1)*). A table listing relevant decision makers is at paragraph 23 of this document.

**Enquiries** – Requests for information on approved Commonwealth Counsel rates. Enquiries may come from agencies, law firms or counsel directly, and may include requests made via telephone, email or file notes. Enquiries may be made in relation to whether a Counsel has a rate, the date of approval and/or the amount, or other information.

**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.

**Junior counsel (JC)** – A barrister (who is an independent specialist advocate and advisor in law) who is yet to attain the rank of Senior Counsel or King’s Counsel. A junior counsel may assist a Senior King’s Counsel in large or very complex matters. A junior counsel may also be briefed on their own in simpler matters.

**‘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.

**Senior or King’s Counsel (SC/KC)** – A barrister of seniority and eminence. Some jurisdictions use ‘Senior Counsel’ and some prefer ‘King’s Counsel’ but the terms are equivalent. The designation as a ‘Senior/King’s Counsel’ publicly identifies barristers whose legal standing and achievements justify an expectation of outstanding service as advocates and advisers, benefitting the administration of justice. They are also colloquially known as ‘silks’.

s 22(1)

**Threshold amount** – The maximum amount under the Directions that can be paid to counsel after an ongoing rate has been set without the Attorney-General’s or OLSC delegate’s further approval. For JC the threshold is \$2,300, and for SC/KC it is \$3,500. OLSC must be consulted before a one-off or new ongoing rate over the threshold is agreed with counsel. An application for a new rate may need to be made.

## 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.

#### *Solicitors*

18. Appendix D also applies to solicitors 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 (paragraph 3 of Appendix D).

19. OLSC will only approve an ongoing counsel rate for a solicitor when the request is supported by an Agency wishing to brief the solicitor-advocate. In this circumstance, the ongoing counsel rate will apply only to work done as counsel for the agency that supported the application.

20. If a solicitor-advocate is granted an ongoing counsel rate it will generally be at the first year JC rate, as per the counsel rate table. However, once a solicitor-advocate has an approved Commonwealth counsel rate, an Agency may negotiate a rate up to the threshold amount for JC's. Once OLSC has approved an ongoing rate for a solicitor-advocate, OLSC will not consider any applications for increases to the rate unless there are exceptional circumstances. The purpose of this is to maintain consistency with the policy for JC's. A new ongoing rate would be granted if the solicitor joins the bar.

21. A solicitor-advocate who is admitted in an amalgamated jurisdiction (SA, VIC, WA, ACT, TAS and NT) may have had relevant experience in counsel work beyond a first year JC. For example, they may have considerable experience before tribunals, at a State Solicitor's office, a prosecutorial body, or public defender and have significant experience in counsel work. In these instances, an agency may wish to support a rate above the first year JC rate when the application is made. Generally, these applications receive the first-year JC rate unless exceptional circumstances apply.

s 22(1)



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 47E(d)

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 47E(d), s 22(1)



s 22(1)

s 22(1)

*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)

### 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)**

s 22(1)

## 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	John Briggs (JC – 2019)
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 rate, within OLSC policy
- 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]

**PDR Number** MC21-017511

**Date of Letter** 15 April 2021

**ATTORNEY REPLY**

**CORRESPONDENTS**

Mr Andrew Muller  
 President  
 ACT Bar Association

Ms Prue Bindon  
 Chair  
 Equal Employment Opportunity Committee  
 ACT Bar Association

**SUBJECT:** § 22(1) - ACT Bar - briefing concerns with respect to the engagement of counsel by the Commonwealth

**DEADLINE FOR RESPONSE:** N/A

**HISTORY:**

<b>Date received by MO:</b>	27 April 2021
<b>Date received by Dept:</b>	28 April 2021
<b>Date due in MO:</b>	14 May 2021
<b>Date sent to MO:</b>	14 May 2021
<b>Date returned for redraft:</b>	N/A
<b>Date redrafted and returned to MO:</b>	N/A
<b>Reason if overdue:</b>	N/A



**MINISTERIAL CORRESPONDENCE AUTHORISATION SHEET**

Ministerial Correspondence Details	
<b>Min Rep No:</b>	MC21-017511
<b>Subject:</b>	s 22(1) - ACT Bar - briefing concerns with respect to the engagement of counsel by the Commonwealth
<b>Deadline for response:</b>	N/A
<b>Correspondent:</b>	Mr Andrew Muller (President, ACT Bar Association) and Ms Prue Bindon (Chair of ACT Bar Association's Equal Employment Opportunity Committee)
<b>Summary/Overview:</b>	<p>Mr Muller and Ms Bindon, raise concerns about the Commonwealth's engagement of counsel under Appendix D to the <i>Legal Services Directions 2017</i> (Directions) (<b>Attachment A</b>) on behalf of the ACT Bar Association (ABA).</p> <p>The concerns relate to:</p> <ul style="list-style-type: none"> <li>• a lack of consistency among Commonwealth agencies and confusion about how counsel rates are determined</li> <li>• the capping of counsel fees through using a daily rate, and</li> <li>• the gendered impact of the above.</li> </ul> <p>The letter requests an education campaign be conducted to ensure Commonwealth agencies understand the counsel rate regime and abolishing the daily cap on fees, particularly as it applies to court, tribunal or inquiry hearings.</p> <p>The letter also proposes meeting with the Office of Legal Services Coordination (OLSC) to further discuss the issues, and separately suggests OLSC's involvement in ABA seminars for its members on the counsel rate regime.</p> <p>s 47C(1)</p>
<b>Special Points for Attention:</b>	<p>Commonwealth agencies are subject to the requirements of Appendix D to the Directions when engaging counsel. Among other things, Appendix D sets rules for the rates that can be paid to counsel by way of a cascading set of approvals. This counsel rate regime uses daily rate as its primary touchstone, s 47C(1)</p> <p>In engaging counsel, the Commonwealth seeks to use its purchasing power to maintain downward pressure on costs whilst also engaging counsel with expertise suitable to the matter at hand and fostering a broad and diverse pool of counsel familiar with government work. s 47C(1)</p>

Method for determining counsel rates (paragraphs 1-12 of letter)

The ABA’s understanding of the counsel rate regime as set out in its letter is essentially correct. Counsel must have an ‘initial’ rate approved by OLSC before undertaking Commonwealth legal work, after which agencies may negotiate a rate up to the relevant daily thresholds (\$2,300 for junior counsel and \$3,500 for senior counsel). OLSC may approve rates above these thresholds for a counsel, which can either be approved as ‘one-off’ for a single matter or ‘ongoing’ for all future work by that counsel. Your approval is required for daily rates above \$5,000. Noting agency ability to negotiate rates up to the daily thresholds, OLSC does not generally approve increases to the *initial rate* below the threshold unless the counsel has taken silk.

s 47C(1)

Limitation on hourly rates:

s 47C(1)

Appendix D sets out the maximum *daily rate* that can be negotiated with counsel. In general, the regime does not prescribe hourly rates. Once a daily rate is set, an agency may also negotiate an hourly rate to account for work undertaken of less than a day’s duration. If an hourly rate is negotiated, Appendix D prohibits hourly rates greater than one-sixth of the daily rate without your approval – the purpose of this limitation is to avoid counsel being able to bill the full daily rate when working fewer than six hours.

The negotiated daily rate should be set at a level that is both cost-effective and reflects fair remuneration for a full day of the counsel’s work. s 47C(1)

s 22(1)

	s 22(1) [Redacted]
<b>Previous Relevant Corro:</b>	Nil
<b>Authorised By:</b>	<p><b>Name:</b> Michael Johnson</p> <p><b>Position:</b> Assistant Secretary</p> <p><b>Division:</b> Office of Legal Services Coordination, Legal Services Policy Division</p> <p><b>Phone:</b> s 22(1) [Redacted]</p>

<b>Minister's Office Use</b> <i>(Relevant information to be inserted by DLO/Adviser as required)</i>



**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

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

By email: [ceo@actbar.com.au](mailto: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  
/ / 2021

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**Perth**

44 Outram Street, West Perth WA 6005

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02/06 2021



### OLSC Counsel Rate Table – From 1 January 2024

*Rates are inclusive of GST*

<b>Junior Counsel \$75 increase (1yr +)</b>		
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		

<b>Senior Counsel \$75 increase (1yr +)</b>		
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		

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