



Guidelines for

Agreements and Memoranda of Understanding

Including some Commercial Factsheets

The assistance of the ACT Government Solicitor in the creation of these Guidelines is acknowledged.

DATE: JAN 2015

These Guidelines were drafted by Governance and Legal Liaison (G&LL) Section to assist ETD staff, including schools, in understanding and developing agreements and Memorandums of Understanding (MoUs). G&LL can be contacted for assistance at:

Manager, Governance and Legal Liaison
Governance and Assurance Branch
Education and Training Directorate
Email: det.legal.liaison@act.gov.au
Phone: 02 6205 9151

For assistance with agreements and MoUs relating to the hire or lease of school facilities including for a school canteen or an after-school-hours care centre, contact can be made with:

Manager, Financial Services
Strategic Finance
Education and Training Directorate
Email: peter.podnar@act.gov.au
Phone: 02 6205 3145

For assistance with agreements and MoUs involving sponsorships, contact can be made with:

Manager, Media & Communications Section
Governance and Assurance Branch
Education and Training Directorate
Email: DET.Media@act.gov.au
Phone: 02 6205 4196

TABLE OF CONTENTS

1. Part 1 - Introduction	4
Definitions	Error!
Bookmark not defined.	
Why have agreements?	4
What makes a good agreement?	5
Who owns agreements?	5
Who is responsible for developing agreements within the Directorate?	6
A note of caution	6
Who is responsible for reviewing agreements?	6
The role of Governance and Legal Liaison	6
Roles and Responsibilities of Stakeholders	7
2. Part 2 - Developing an agreement	8
What is the appropriate form of agreement to use?	8
How should an agreement be developed?	8
Types of agreements	9
What sort of Document to use	12
Commercial Fact Sheets	13
Who should sign for the Directorate?	13
Who dates the agreement or MoU and what date is used?	13
Agreements and MoUs put to you by other parties	14
Where can I get further information?	14
3. Part 3 – Register	15
What is the Register?	15
What ‘significant’ agreements and MoUs will the Register hold?	15
What agreements will the Register NOT hold?	15
How will the Register help?	16
What do I need to do?	16
4. Part 4 - COMMERCIAL FACT SHEETS	17
Information Sheet 1 - Contracts and MOUs	18
Information Sheet 2 - Contract Entities	21
Information Sheet 3 - Insurance	25
Information Sheet 4 - Copyright	29
Information Sheet 5 - Privacy	32

Part 1 - Introduction

The purpose of this manual is to assist Education and Training Directorate staff in the development of legal agreements and Memoranda of Understanding (MoUs).

The guidelines in this manual will assist you to:

1. decide when an agreement is needed
2. decide the appropriate form of agreement to use
3. determine what particular clauses should be included in the agreement
4. identify issues on which assistance may be needed
5. identify issues that commonly cause problems.

The Commercial Fact Sheets in Part 4 will assist you by further explaining the issues associated with contracting, potential liabilities and ways to address these.

Definitions

“agreement”

Any agreement, oral or written where the Directorate and a third party make promises e.g. to supply goods or services in exchange for money or some other valuable commodity (e.g. sponsorship).

For example, a purchase by a school of a shade-shelter where a third party agrees to supply the shelter in exchange for the school paying an agreed price would be an agreement but a gift of the shade shelter by a third party would not be as the school is not giving anything in return for the shelter.

“Agreement and MoUs Register”

A register, maintained by Legal Liaison containing details of agreements and Memoranda of Understanding entered into by the Directorate.

Memorandum of Understanding (“MoU”)

An understanding between two or more parties that seeks to document expectations, goals and outcomes of a particular collaboration. An MoU is rarely legally binding and so is not an agreement. An MoU is often entered into between ACT Government agencies which, as part of the same entity, cannot enter into agreements. It may also be entered into as a precursor to a binding agreement in order that the parties can set out the broad parameters of a negotiation, timelines and processes that they hope will then result in a binding agreement.

Why have agreements?

In most cases, where parties agree terms where goods or services change hands in exchange for money, as a matter of law, an agreement usually comes into place, without the necessity for any formalities.

However, there is a risk with verbal or sparsely documented agreements that the parties may have different understandings of the details of the agreement and this may lead to disputes or the arrangement breaking down.

Formalising all of the key details of arrangements in a written agreement:

- helps to clearly define the arrangements between the parties
- sets out each party's obligations
- states when and where the obligations will be carried out
- provides for a means of dealing with any disagreements
- will help avoid and resolve disputes between the parties, and
- will prevent the arrangement breaking down.

What makes a good agreement?

A good agreement should clearly set out all of the key terms of the agreement between the parties in relation to the subject matter and should:

- be written in clear and plain English
- be unambiguous
- set out the responsibilities of both parties, including:
 - what is to be done
 - the quantity/ amount/ hours
 - when the obligations are to be performed
 - how the quality is to be measured
 - when payments are to be made
 - any requirements for payment (e.g. a proper tax invoice)
 - what can be done if the responsibilities are not met (short of terminating the agreement)
- provide for both parties to comply with their legal obligations (e.g. privacy, control of records)
- appropriately allocate risk, for example by the use of exclusion/indemnity clauses and requirements for insurance where appropriate
- provide for a dispute resolution process, including terminating the agreement for intractable issues
- set out the duration of the agreement and a process for extending the agreement or ending it early.

Who owns agreements?

Directors are the “owners” of agreements in their branches. School principals “own” the agreements in their schools. Directors and principals are responsible for arranging agreements, ensuring they are signed and providing copies to Governance and Legal Liaison for inclusion in the Agreement and MoU Register (refer Part 3 – REGISTER).

All agreements and MoUs must be signed by a person with the appropriate financial delegation or appropriate authority to sign the particular agreement. If there is any question as to the correct person to sign an agreement or MoU, the director of the line area or the relevant schools network leader should be consulted.

Even though MoUs are not usually binding agreements, they will often require a course of action by the Directorate that may or may not accord with approved policy and direction and accordingly, similar considerations should be given to the execution of MoUs.

Who is responsible for developing agreements within the Directorate?

Staff in line areas or schools, managers or principals, are responsible for identifying the need for agreements or MoUs with other parties and for seeking approval from their director or school network leader to develop the agreement.

Contact should be made with Governance and Legal Liaison or, for agreements relating to use of school facilities, with Strategic Finance or, for agreements relating to sponsorships, with Media and Communications to ensure that the subject matter of the agreement is not already covered by another agreement and for guidance on the most appropriate agreement structure. The engagement of the ACT Government Solicitor at an early stage, through Governance and Legal Liaison, may also assist in properly structuring the intended arrangements and ensuring time and effort is not wasted.

A note of caution

Agreements and MoUs should not be signed without advice from Governance and Legal Liaison.

In some circumstances individuals or organisations will provide their own form of agreement to a school for signature. Such agreements should not be signed until they have been carefully scrutinised to ensure the terms are reasonable. Advice from Governance and Legal Liaison should be sought if there are any concerns.

For example, a number of organisations have been known to send forms to schools that appear, at first glance, to be a request for free inclusion in some form of directory. However, on closer inspection, these documents are order forms committing the school to paying for an advertisement. All documents that ask for a signature should be scrutinised carefully. If there is any doubt, advice should be obtained.

Who is responsible for reviewing agreements?

Areas responsible for individual agreements (and MoUs) should periodically review their agreements and be alert to any agreements expiring in the next six months, so that appropriate arrangements can be put in place to renegotiate, renew or terminate the agreement.

The originals of agreements and MoUs should be stored in an appropriately secure location. A copy of the agreement or MoU, signed and dated, should be provided to Governance and Legal Liaison (refer Part 3 – REGISTER).

The role of Governance and Legal Liaison

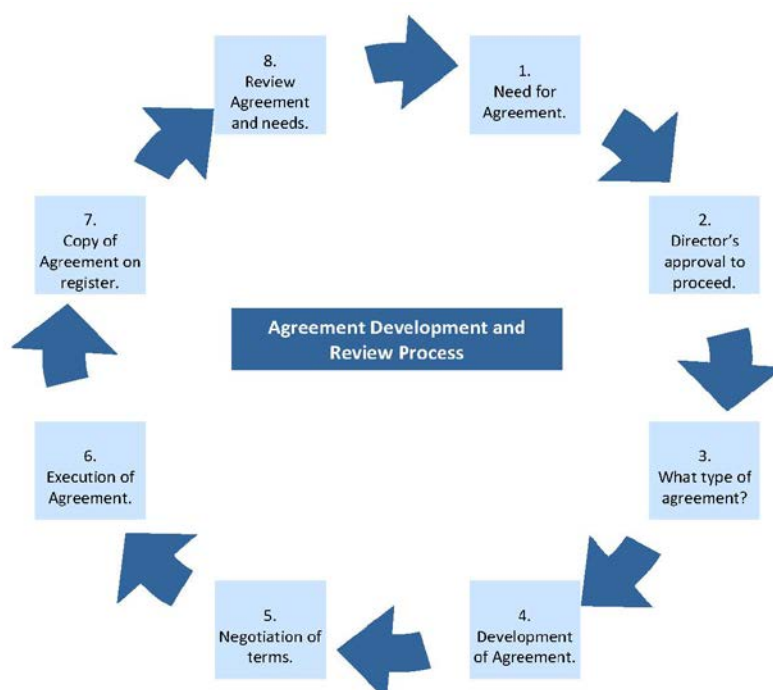
- Governance and Legal Liaison has the following roles in the process:
- Maintaining a library of proformas and precedent agreements
- Assisting line areas as to the appropriate form of agreement
- Providing assistance where needed in the development of draft agreements
- Arranging for the provision of legal advice from the ACT Government Solicitor (ACTGS)

- Maintaining the Agreements and Memoranda of Understanding Register

Roles and Responsibilities of Stakeholders

Roles and Responsibilities

1. Determining the need for an agreement is the role of the line area which includes a school.
2. Approving the development of an agreement is the role of the line area Director.
3. Determining the form of an agreement is the role of the line area Director in conjunction with Governance and Legal Liaison.
4. Providing precedents and proforma is the role of Governance and Legal Liaison.
5. Negotiating with the other party and developing the agreements is the responsibility of the line area.
6. Providing assistance in the development of draft agreements is the role of Governance and Legal Liaison.
7. Seeking legal advice from the ACT Government Solicitor is the responsibility of the line area through Governance and Legal Liaison.
8. Arranging the execution of the agreement is the responsibility of the line area Director.
9. Providing a copy of significant agreements to Governance and Legal Liaison is the responsibility of the line area Director (for advice on what constitutes a 'significant' agreement, contact Governance and legal Liaison at DET.Legal.Liaison@act.gov.au or phone 6205 9151).
10. Storing the executed agreement on the appropriate file is the responsibility of the line area.
11. Reviewing the need for an agreement and any variations is the responsibility of the line area.
12. Noting the agreement in the Register and storing the copy of the signed and dated electronic version of a significant agreement or MoU is the responsibility of Governance and Legal Liaison (refer to Part 3 – REGISTER).



Part 2 - Developing an agreement

This section provides information about the process involved in developing an agreement and assists with deciding the appropriate form of agreement to use.

It includes information on different types of agreements and when they should or should not be used.

What is the appropriate form of agreement to use?

The appropriate form of agreement to use will be determined by factors such as the status of the parties, the nature of the activities involved and the risks associated with the activities.

Reference should be made to relevant Directorate policies and procedures. It may be useful to perform a risk assessment on the activity to be undertaken, so that appropriate terms can be included in the agreement to minimise that risk. This is further discussed at section 13 and in the Commercial Fact Sheets in Part 4.

Staff need to consider the purpose and scope of the agreement before deciding the appropriate form of agreement to use. Various forms of agreements are discussed later in this section under the heading 'Types of agreements'.

More detailed information is available in [Commercial Fact Sheet 1 - Contracts and MoUs](#) (Part 4).

How should an agreement be developed?

Once a director (or school network leader) has agreed to develop an agreement, the following steps should be undertaken:

- Step 1: Director should arrange for an appropriate staff member (including principals) to negotiate the general terms of the agreement with representatives of the other party. If the agreement is to be for a large amount of money, extends for a long period of time, or is otherwise complex, consideration should be given to obtaining brief, preliminary advice from Governance and Legal Liaison and - through Governance and Legal Liaison the ACT Government Solicitor - to ensure the most viable and appropriate structure and terms are negotiated.
- Step 2: When the general parameters of the agreement have been settled and approved by the director or school network leader, Governance and Legal Liaison is available to discuss the form of agreement to use and may be able to provide precedents or proforma agreements as a starting point. Governance and Legal Liaison should be included early in the process.
- Step 3: Governance and Legal Liaison will provide assistance where needed in the development of draft agreements. It may be necessary to obtain legal advice from the ACT Government Solicitor regarding legalities and essential provisions. It is important that Governance and Legal Liaison becomes involved at a reasonable time to ensure that timely formal legal advice can be sought and received if required.
- Step 4: Once the agreement has been returned by Governance and Legal Liaison, the final form of the agreement needs to be cleared by representatives of the Directorate and

the other party. Arrangements can then be made for signing by the appropriate representatives of the Directorate and the other party. For significant or newsworthy agreements, it may be appropriate to organise a formal signing ceremony. Media and Communications and Ministerial and Commonwealth Relations (MCR) should be consulted in this instance.

Step 5: Original agreements should be stored securely. Copies of the signed agreements must be supplied to Governance and Legal Liaison to be entered onto the Register of Agreements and MoUs (refer Part 3 – REGISTER).

Types of agreements

Various types of arrangements are considered below.

Some arrangements will not need any formalities. For example, a gift to a school, without any obligation on the school, can be accepted informally, except that the gift should be reported to Strategic Finance (using the Gift Register form under G on the A-Z Index) under the [Director General's Financial Instructions](#) (Section 2.5 - Official Hospitality).

It is generally the case that most arrangements that require formalities will come under one of the following categories:

- A. Procurement of Goods and Services
- B. Sponsorship Agreement
- C. Deed of Grant
- D. Licence Agreement
- E. Hire Agreement

Contract Entities and Engaging Contractors is discussed in Commercial Fact Sheets 2 and 3.

Procurement of goods and services

'Procurement is defined in the *Government Procurement Act 2001* as:

procurement—

- (a) means the process of acquiring goods, services, works or property by purchase, lease, rental or exchange; and
- (b) includes the process of disposing of goods, works or property including by sale.

This means that if the school or line area is buying or renting goods or services, whether payment is made in money or by exchange of other goods/services, then the [Government Procurement Act 2001](#) applies.

There are different requirements in relation to obtaining quotations and involving Shared Services Procurement, depending on the value of the procurement.

The ACT Government Purchasing Guide is available from the [Shared Services Procurement](#) website.

The [Government Procurement Regulation 2007](#) sets out quotation and tender thresholds for the Territory's procurement activities and specifies the minimum number of quotations that must be sought from suppliers at different threshold levels. While below a particular threshold there are no requirements other than obtaining the required number of quotations, there is a need, in evaluating the quotations, to seek value for money.

In this context, it is likely that some suppliers may wish to supply under their own terms and conditions. Care should be taken before entering into such an arrangement that the terms are reasonable. Clauses that need to be looked out for and avoided include those that permit the supplier to vary the nature of the goods, the price or the delivery dates without notice, and clauses that seek to exclude the supplier's liability to an unreasonable extent.

Note: Where procurement is part of a standing order arrangement, there is no requirement to comply with the rules in relation to quotations. For example, the Directorate has a panel arrangement with Office Max for the provision of stationery.

Further information should be sought from Shared Services Procurement, who are able to provide standard contracts.

There are some specific purpose contracts prepared by the ACT Government Solicitor for the Directorate.

B. Sponsorship agreement

These are arrangements where a commercial body provides goods, services or money in exchange for the Directorate according that body certain rights – such as use of logos and signage at Territory events and on publications. Sponsorship issues for the Directorate are dealt with by the [Corporate Sponsorship](#) policy, which includes standard sponsorship agreements.

The Corporate Sponsorship Policy and Agreements are found on the Education and Training Directorate website under Publications and Policies.

C. Money paid purely as a grant (Deed of Grant)

Where money is paid purely as a grant to assist an organisation carrying out its normal activities, such as the ACT Council of Parents and Citizens Associations, this arrangement can be embodied in a deed of grant, which is a formal legal agreement. The Deed of Grant should include appropriate accountability conditions, to ensure the monies are used for the purposes of the grant.

The Director General's Financial Instructions 2.6 – Grants Administration covers the process in relation to grants.

The [Director General's Financial Instructions](#) are on the Employee Intranet Index under Administration/School/Office Finance.

D. Licence agreement

Licence agreements are generally used in the school context to permit outside parties to use school facilities on a regular and ongoing basis. Two examples are school canteens (where the canteen is run other than by the P&C) and school-age care programs.

Because these activities involve the use of premises on Territory Land, there are formalities that have to be fulfilled, including pre-contractual notices that have to be given to the intending licensee.

In addition, as the outside party is carrying out a commercial or quasi-commercial operation, there are requirements for the operator to carry appropriate insurance. In the event that someone is injured, there may be a dispute as to whether the injury was caused by the manner in which the activities were carried out by the operator or by the state of the premises. The insurance cover should be sighted prior to the operator commencing to use the premises.

Appropriate operating approvals from relevant regulatory authorities may also be needed. For example, to operate a school aged care program all operators, including school P&C's must hold a current Provider Licence approved by the Children's Policy and Regulatory Unit.

A new [licence agreement](#) for school-age care and school canteens is in the final stages of development, incorporating legislation under the Working with Vulnerable People (Background Checking) Act 2011. The Strategic Finance section (see contact details below) can provide school Principals with guidance on completing the standard template agreements.

Schools should always request and retain with the Licence a copy of current proof of insurance and operating approvals for the life of the Licence.

E. Facility Hire Agreement

A facility hire agreement is an agreement for the use of school facilities on an ad-hoc or occasional basis, generally in return for payment, for example hire of a school hall or oval.

As for licence agreements, it is a requirement that hirers obtain appropriate insurance and a certificate of currency, which must be sighted before the hire commences.

In some cases, such as the use of school halls, it is advisable to agree on matters such as access to the hall, any rules about cleaning after the activities and any requirements for putting away chairs or other equipment.

It is important to ensure the hirer has appropriate insurance to protect the Territory in the event of an incident during the hiring.

Information relating to the hiring out of schools facilities is contained in the Community Use of School Facilities policy and [Module 7 of the School Management Manual](#).

Further information on Use of School Facilities is available from Strategic Finance section at Peter.Podnar@act.gov.au, telephone 6205 3145.

F. Memorandum of Understanding (MoU)

An MoU should clearly state that it is not legally binding and merely sets out expectations, goals and outcomes in relation to a particular collaboration between the Directorate and another Territory Directorate or external organisation. An MoU and the activities it outlines might also be a precursor to a binding agreement – but need not be.

The parties to an MoU need not be legal entities. An MoU is often entered into between ACT Government Directorates (such as the Education and Training Directorate) or parts of Directorates, which, as part of the same entity (the Territory), cannot enter into agreements with each other.

An MoU is not binding. It does not need to follow any formality in the way it is set out or its contents. However for it to have any value, it should be clear and well thought-out. Any matters that are intended to be legally binding should be covered by a formal agreement. For example, matters such as intellectual property, ownership of material produced, indemnities, etc, where there is a risk of litigation, should not be left to an MoU.

This may mean that an MoU is not appropriate and the whole arrangement ought to be covered by a formal agreement. In some cases an MoU can be used and the parts required to be binding can be dealt with separately e.g. with a Deed of Grant.

The following list sets out various scenarios where the use of an MoU is or is not appropriate.

What sort of Document to use

1. Is the other party an Act Government agency or a non-legal entity such as a sister school? Consider an MoU.
2. Is it intended that the arrangement is not binding? Refer to [Commercial Fact Sheet 1](#) and use an MoU.
3. Is it intended to create legal rights/obligations? Refer to [Commercial Fact sheet 1](#) and use an agreement.
4. Is the Directorate buying or selling something? This is procurement and an MoU is not appropriate. Refer to the information on procurement.
5. Are there any risks identified for the Territory? For example, does it involve:
 - Duty of care consideration
 - Privacy and/or confidentiality issues
 - Intellectual property ownership of material
 - Potential liabilities e.g. injury or damage
 - Indemnities
 - Insurance arrangements?An MoU will almost never be appropriate if any of these issues are to be dealt with. Refer to Commercial Fact Sheets. A legally binding agreement would best protect the interests of the Territory.
6. Does the arrangement relate to the provision of goods and/or services at no charge? An MoU may be appropriate unless the arrangement is that of a sponsorship or the arrangement puts another obligation of the Territory. See [Corporate Sponsorship Policy](#). Further information on sponsorship agreements is available from the Media & Communications unit at DETMedia@act.gov.au or on 6205 4196.
7. Does the arrangement involve the use of school facilities? This should be an agreement which may be a licence agreement or hire agreement unless the other party is part of the Territory. Further information and assistance can be provided by Strategic Finance by telephoning 6205 3145.

Information on drafting an MoU is contained in Part 3 of this manual.

Commercial Fact Sheets

Further information is also available in the Commercial Fact Sheets in Part 4. These include:

1. Contracts and MoUs
2. Contract Entities
3. Insurances
4. Copyright
5. Privacy

Who should sign for the Directorate?

The person who signs an agreement on behalf of a school or on behalf of an administrative part of the Directorate is signing on behalf of the Territory which is the legal entity. Who signs which agreement (or MoU) will depend on several factors:

- If funding is involved, the person must have the relevant financial delegation. The [Director General's Financial Delegations](#) should be checked.
- If the agreement or MoU involves a collaborative or cooperative arrangement which has a high profile, significant undertakings and/or involves possible media attention, then the person signing for the Directorate may need to be at director level or above
- In some cases, it may be appropriate for the Director-General to sign an agreement or MoU.
- Otherwise, principals and managers may be the appropriate person to sign.

Who dates the agreement or MoU and what date is used?

Generally agreements or MoUs, when ready for signature, are forwarded by the party which prepared the document to the other party to sign first. Two original documents should be forwarded and then returned signed by the other party, but not dated.

The originating party then signs both copies and DATES both documents at the time of signing. This is called 'executing' the agreement. An agreement between multiple parties does not become effective until it is signed by all parties and therefore it should be dated when the last party (usually the Territory which is the legal entity but in practice it will be the Directorate) signs.

It is important that agreements and MoUs be dated as there can be agreed actions to commence following the date of signing. The date also often provides the start date and allows for calculation of the end date of the agreement e.g. the term of an agreement is often expressed as follows: This agreement commences on the date it is signed and continues for 3 years. In this case if the document is not dated there will be great difficulty determining the start and end dates of the agreement.

One complete document, now signed by both parties and dated should be retained by the agreement "owner" and the second returned to the other party.

In some circumstances agreements or MoUs may be signed by both parties at the same time and the document can then be dated on that day.

Agreements and MoUs put to you by other parties

These Guidelines are written in the context of the Directorate (including schools) creating an agreement or an MoU. However schools and sections within the Central Office of the Directorate may also be approached by other agencies or organisations to sign a document that they have prepared.

Care should be taken in these circumstances.

Generally the Territory prefers its own forms of agreements as they contain terms that properly protect all of the Territory's rights and interests, but this is not always practicable. In these cases, similar considerations and approaches should be used to those set out in these Guidelines when schools and Central Office sections originate an agreement or MoU.

Where can I get further information?

Commercial Fact Sheets at Part 4 provide further information.

Further information and assistance can be provided by Governance and Legal Liaison by telephoning 6205 9151 or by email to det.legal.liaison@act.gov.au.

Part 3 – Register

What is the Register?

The Register will list all new agreements and MoUs entered into by line areas (including schools and sections within Central Office) other than those listed below under What agreements will the Register NOT hold? The Register will hold a signed copy of significant agreements and MoUs.

This will apply to all new agreements and MoUs from 1 July 2013.

Information in the Register will include:

- name of parties
- relevant line area or school
- title of agreement or MoU
- term of agreement
- type of agreement – this might be a licence agreement about the use of facilities, the provision of services or funding grants.
- purpose of agreement or MoU – this might be about:
 - administrative arrangements
 - cooperation/collaboration
 - funding and grants for specific purposes
 - long or short term use of facilities
 - provision of identified services to and by the Directorate
 - sponsorships.

What ‘significant’ agreements and MoUs will the Register hold?

The Register will include copies of signed agreements and MoUs where the other party is:

- another ACT government agency or institution
- a Commonwealth or State agency or institution
- a non-government institution, organisation or business (unless excluded below)
- an overseas government or institution

or which involve:

- significant commitment of resources, financial or other
- arrangements involving sensitive information or significant undertakings
- arrangements which may be of interest to the public or to the media.

What agreements will the Register NOT hold?

The Register will NOT include at this time:

- routine procurements for goods and services such as waste management contracts, and
- contracts which are supported by Shared Services Procurement such as cleaning contracts.

This information about exclusions will be revised as the Register is developed. However schools and sections will need to hold signed copies on appropriate files.

How will the Register help?

- Over time, proforma and template agreements and MoUs will create a Library of such documents and provide precedents and guidance to facilitate the development of similar agreements and MoUs.
- This will also provide for consistency and coordination across the school system and the Directorate. It should also make the process more streamlined and assist to ensure all relevant considerations are covered off so that the arrangements suitably manage any risk and are compliant with relevant legislation and government requirements.
 - This makes it important that the first parts of the Register are completed at the initial phase, that is, once approval from a director is given for the development of an agreement or MoU.
 - It also provides the opportunity for Governance and Legal Liaison to provide general support to line areas.
 - Registering a proposal early will assist to ensure that issues are addressed in a timely and constructive manner and that legal advice from the ACT Government Solicitor where needed is requested at an early stage.

There are also some specific-purpose agreements and templates prepared by the ACT Government Solicitor for the Directorate. Some are available through [Index](#), the [ETD website](#) and others through the Governance and Legal Liaison, Strategic Finance and Media & Communications sections.

What do I need to do?

1. Once approval from the relevant director has been obtained, register the proposed development of an agreement or MoU or the review of a current one by contacting Governance and Legal Liaison at det.legal.liaison@act.gov.au or on 6205 9151.
2. Once the structure and content of the agreement or MoU has been finalised, forward to Governance and Legal Liaison prior to signing.
3. When both parties have signed and the agreement or MoU has been dated, forward a scanned copy by email to det.legal.liaison@act.gov.au. An original copy should be retained and filed by the line area.

Part 4 - COMMERCIAL FACT SHEETS

The following information has been prepared by the ACT Government Solicitor to provide practical insights into some key elements around contracting, agreements and MoUs.

However they are of general guidance and relevant Directorate policies and procedures should also be referenced.

Information Sheet 1 - Contracts and MOUs

Introduction

Legal agreements can take any form provided they clearly set out the agreed roles, expectations and obligations of all parties involved. A binding agreement may therefore be in forms such as “formal” legal agreements but may even be a simple exchange of correspondence. If the intent of the parties is clear and performance based on that intent follows, legal formalities such as signing, although ideal, may not be necessary. However great care should always be taken where a binding agreement is entered into without proper documents and formalities as this may give rise to unexpected obligations for the Territory or may not properly protect the Territory’s interests.

A Memorandum of Understanding (MoU) is generally not a binding legal agreement and is sometimes used as a precursor to a formal binding agreement or as a way of setting out an agreed (but not binding) collaboration between two or more parties. Another example of their use is for documenting arrangements between two Territory Directorates as these are not separate legal entities (the Territory is the legal entity) and they are not able to enter into binding agreements as the Territory can’t enter into a contract with itself.

MoUs are often overused or misused. Detailed MoUs which are said to be not legally binding, but which contain obligations such as delivery of service or payments or reporting that clearly are meant to create binding obligations do no more than create confusion. It is therefore very important when commencing negotiations in relation to a new relationship to give careful consideration to whether the negotiations are to culminate in a binding or non-binding agreement. Schools are encouraged to seek early advice from the ACT Government Solicitor through the Directorate’s Governance and Legal Liaison section to assist in this process and avoid any confusion or wasted effort.

When to use an MoU?

An MoU must clearly state it is not legally binding. It is not uncommon, particularly where an MOU was the wrong choice of document from the start, for the document to be headed up as an MOU, but contain a whole bunch of apparently legally binding obligations around payments and obligations and then fail to say the document is not legally binding. Apart from a mess in trying to establish whether the parties actually intended to enter into a binding legal relations (a requirement for a legally binding agreement) it is quite possible this document would be found to be binding on the parties and not be an MOU at all!

In this discussion of an MoU it is assumed the MoU clearly states it is not legally binding on the parties.

As briefly mentioned above, where arrangements are agreed between two Territory Directorates this can be done only with an MoU as Directorates are not legal entities in their own right and are part of the one legal entity: the Territory which cannot contract with itself.

MoUs are most commonly used as a precursor to a binding legal relationship – this is also sometimes called a Heads of Agreement. So if two (or more) parties want to set out in writing a clear understanding of their broad intentions and good faith undertakings to continue to negotiate towards a binding agreement while they work out the fine details, an MoU can be very useful. Importantly, provided the document is said not to be legally binding there is no formality required in its form or signing however consideration should be given to the appropriate person to sign for the Directorate depending upon the profile or potential issues arising from the MOU.

And following on from that there is no need for many of the provisions normally found in a binding legal contract such as term and termination, assignment, applicable law, etc, etc. The document can be an email, a letter or just typed up in plain friendly English on plain paper.

The only note of caution in using an MoU that has language such as: “the parties will in good faith use their best endeavours to...” is that while this is not legally binding, it may be “morally” binding. So even if a party has an absolute right to walk away from the relationship and the terms of the MoU at any time, there may be adverse political or other non-legal ramifications in doing so. So care should always be taken when indicating how firm the intention is to do the things outlined in the MoU.

When NOT to use an MoU...

An MoU should never be used in circumstances where you have a clear expectation that the other party/s will deliver on their promises. For instance when there are payment or service delivery obligations and where the parties will invest considerable time and effort in return for those payments or promises. Any party can walk away from an MoU at any time and there is no legal recourse.

The use of MoUs just because it seems they are more easily put in place, when really a binding legal agreement is intended, is fraught with difficulty. While the parties comply with their “obligations” under an agreement there is hardly ever an issue and hardly any reason to refer to the “contract”. However the importance of a binding legal document is not when things are all going to plan – it’s when they come off the rails including when an unforeseen event or accident occurs which results in a large dollar claim or one party is unable to continue to perform or a party fails to perform up the standard agreed. Only a binding legal agreement will be of use in these circumstances.

The best advice is to get advice early in the negotiations, so that an informed choice can be made as to the most appropriate document chosen to represent the negotiation outcomes. In many cases it is unlikely to be an MoU.

A couple of common issues with Contracts

Extending a contract term

Often a contract will say that the term of the contract can be extended before the expiry of the current contract by written agreement of the parties. So the first thing to understand is that you cannot extend the contract after it has expired – you must enter into a new contract. But assuming you have put a note in your diary and the contract has not already expired, you are then able to simply extend the existing contract and all of the terms and conditions will continue to apply. This can be done simply (for small or less complex contracts) by writing to the other party and indicating that the Territory is willing to extend the contract by (say) 2 years and all of the other terms and conditions set out in the contract will continue to apply for that period. The other party/ies should be asked to sign a duplicate of that letter to indicate they agree to the extension and continuation of the existing terms. The letter signed by all parties should be kept with the original contract as it will then form part of that contract and will be very important if any issues arise in the future.

However if the contract is of a moderate or high value, has complex terms or you wish to not only extend the term but vary a couple of the provisions of the contract (e.g. price) it is better to prepare a Deed of Amendment to effect the change to the contract. Legal Liaison should be consulted on the process to achieve this.

The terms of the [Government Procurement Act 2001](#) should also be considered when renewing a contract as it may be necessary to carry out a new procurement process rather than just extend an existing contract. Governance and Legal Liaison should be consulted if there is any concern in relation to this issue.

Why use schedules and attachments to contracts?

Schedules to contracts are part of the contract and are often used for expediency and convenience in locating some key provisions such as services, price, terms, contact details etc all in one easy to refer place. They are often used in contracts prepared by government as they allow for a standard set of terms applicable to a wide range of circumstances to be set out in the “body” of the contract and the specifics like price, term, insurances, services, special conditions etc are set out in schedules. Ideally (but not always) very little change should ever be made to the standard terms in the body of the document – with all changes or specifics of the arrangement being set out in the schedules.

Attachments (also referred to as Annexures) are usually stand-alone documents in their own right. They might be another agreement that has some relevance to the current agreement and is referred to in the current agreement in some way. Attachments only form part of the contract to the extent they are specifically referred to, which differs from Schedules which are an intrinsic part of the contract. Advice should be obtained from Governance and Legal Liaison in relation to the necessity for Attachments/Annexures.

Information Sheet 2 - Contract Entities

It is extremely important that you understand the type of party you are dealing with and how they must sign a contract, otherwise the contract may be invalid.

Sole Proprietorship

Summary of legal entity

Sole proprietorship is an individual trading on his or her own. The individual is the business and is not a separate legal entity. The individual therefore enters into a contract in their own right. The individual is in control of everything and is free to employ people, engage contractors or apply for finance. Sole proprietorship ceases to exist once the individual leaves the business or is deceased. The individual is personally liable for any debts and can sue or be sued as an individual. Thus the individual assumes all responsibilities of the business and is the risk bearer of personal assets.

How a sole proprietor validly signs

It is the individual who enters into contracts with other parties, and not the business. Therefore, the individual who is party to the contract needs to sign it in order for the contract to be legally binding. The individual's signature should be witnessed by a person at least 18 years of age who is not a party to the contract. For the contract to be valid, both parties must have the capacity to contract. For example, minors may not have capacity to enter into a contract.

General (unincorporated) Partnerships

Summary of legal entity

In the ACT, partnerships are governed by the Partnership Act 1963 (ACT). It is an association of two or more people running a business together, but not as a company. Partners running the business own the business with a view to profit, are directly in control of all decisions, and all profits made by the business belong jointly to all partners. However, a partnership is not a separate legal entity and therefore partners assume all responsibilities of the business and are risk bearers of personal assets. According to s10 of the Partnership Act 1963 (ACT), all partners are bound by the acts of one or more partners acting on behalf of the firm.

How it is established

Partners could decide if they want to establish the partnership under the names of all partners, or under a business name. There is a requirement to obtain an ABN for the partnership, and this can be applied through the ATO. The partnership itself will also need its own TFN. If the partnership is to be registered under a business name, this would have to be registered with the Office of Regulatory Services. If the partnership will be operating in multiple jurisdictions, the business name will have to be registered in every State or Territory where the business will be operating.

How it validly signs

The individual partner enters into contracts with other parties. Similar to a sole proprietorship, each individual who is partner should sign it in order for the contract to be legally binding. Each individual's signature should be witnessed by a person at least 18 years of age who is not a party to the contract. In a situation where one of the partners claims to have authority to sign on behalf of the others, they must produce the authority (signed by all other partners) for them to do so.

Searching to confirm the identity of the partnership

There is no register that can be searched that provides details of an unincorporated partnership so you must rely on the documents the partnership gives you.

Incorporated Associations

Summary of legal entity

An Incorporated Association is a not-for-profit body corporate which is a legal entity in its own right and is capable of acquiring, holding and disposing of real and personal property. It is also capable of suing and being sued in its own name. An Incorporated Association is a legal entity that is separate and distinct from that of its individual members. It cannot however be carried on for profit and is therefore most often used by community groups.

How it is established

An Incorporated Association is generally incorporated in the ACT under the Associations Incorporations Act 1991 (ACT). It is established when five or more persons authorise a person of at least 18 years of age residing in ACT to apply to incorporate an association. An application form has to be lodged with the Office of Regulatory Services.

How it validly signs

An Incorporated Association must sign in accordance with its Association rules. In the absence of relevant rules concerning the signing of documents, s34 of the Associations Incorporations Regulations 1991 (ACT) would apply. Section 34 stipulates the need for a common seal and that the document is signed by either two members of the committee, or of one member of the committee and/or the secretary. The word Incorporated or Inc should always appear after the name of an incorporated association.

Searching to confirm the identity of the Association

The ACT Office of Regulatory Services holds a register of Associations that can be searched in order to confirm the Association exists, its correct name and its officers (i.e. those people who can sign on its behalf).

Trust

Summary of legal entity

A trust is a legal relationship where a trustee (who holds the trust property in their name) deals with that property for the benefit of beneficiaries. The property can be anything including money, land or a business. A trustee can be any legal entity capable of holding property including an individual, company or association.

The trust itself is not a separate legal entity in its own right and does not have limited liability. Trustees are obliged to act in good faith, avoid conflicts of interest, provide full disclosure to beneficiaries and are not allowed to make a profit from the Trust. It can come in various forms, including unit trusts or discretionary trusts.

Unit trusts are trusts which conduct a business for the benefit of unit trust holders. Unit trust holders are entitled to fixed portions of profits according to the number of units they hold in the trust.

Discretionary trusts operate much like unit trusts, except that the beneficiary's interest is not fixed at the point when the trust is created.

How it is established

A trust is established by a person called a "settlor" who settles the trust property upon the trustee to hold for the beneficiaries in accordance with the terms of a trust document. Despite not being a legal entity, a Trust will usually have its own ABN and TFN numbers which will be distinct from the ABN and TFN of the Trustee in their personal capacity.

How it validly signs

The Trustee signs legal documents on behalf of the Trust. Depending on the type of legal entity it is, the signing must comply with the requirements of the relevant entity type. So if the Trustee is a company, it must be signed by two directors or director and company secretary of the company.

Searching to confirm the identity of the trust

As it is not a legal entity there is no register for trusts. However the ABN lookup register as www.business.gov.au may record some details of the trust including its ABN number. If the trustee of the trust is a company see below for searching companies.

Company

Summary of legal entity

A company is a legal entity separate from its shareholders or members and can take a couple of different forms:

- Listed Public companies: They are identifiable by "Ltd" or "Limited" at the end of the company name. Such companies offer shares to members of the public in order

to raise money via the Australian Stock Exchange. Public companies must have at least one shareholder and at least three Directors.

- Public Companies Limited by Guarantee must be not for profit and accordingly are often used by large charities. They do not have shareholders, as they do not distribute profits, rather they have members. They also have “Ltd” or “Limited” after their name (unless they have exemption from ASIC which allows them to leave this off their name). Public companies limited by guarantee must have at least one shareholder and at least three Directors.
- Proprietary companies: Identifiable by “Pty Ltd” or “Pty Limited” at the end of the company name. Such companies must have at least 1 shareholder, and may have a sole director and secretary or they may have two or more directors and a company secretary.

How it is established

Companies are established by registering under the Corporations Act 2001 (Cth). Official information regarding the company is contained in the Australian Securities and Investment Corporation Register (ASIC Register).

How it validly signs

If the company has two or more Directors, they will need the signatures of two Directors, or the signatures of one Director and one company secretary. In either case, they do not need a company seal, and do not need anyone to witness the signature (s127 Corporations Act 2001 (Cth)).

If the company has a sole director/Secretary, only that Director’s signature is needed. A company seal is not needed, and the company does not need anyone to witness the signature (s127 Corporations Act 2001 (Cth)).

Large companies often authorise specific officers (usually by power of attorney) to sign on behalf of the company. In this case there is a specific wording that must be included in the signature block where the attorney signs noting the document is signed by an attorney and confirming the power of attorney has not been revoked and their signature must be witnessed by someone over the age of 18.

Searching to confirm the identity of the company

Information brokers will conduct a search of a company for a fee – more information can be obtained on asic.gov.au. It is very important to conduct a search of a company you intend to enter into a contract with as it will confirm their ACN and ABN numbers, their correct name and registered address and their office holders (directors and secretaries) who are able to sign documents on behalf of the company. Governance and Legal Liaison and the ACT Government Solicitor can assist with this search if necessary.

Information Sheet 3 - Insurance

1. Introduction

All Contractors and persons engaged in school facility hire agreements must hold appropriate insurance which covers accidents, injuries and damages while engaging in work or activities in the school premises.

You may be exposed to a range of risks because of the actions of contractors and service providers during the contract/engagement period, a post construction period and the post-contract or engagement period.

This information sheet summarises the sorts of issues to consider in relation to insurance. It should not form the basis of significant decisions regarding insurance that should be undertaken in consultation with the ACT Government Solicitor's (ACTGS) office and the ACT Insurance Authority (ACTIA) to ensure appropriate arrangements are made to protect the Territory's interests. ACTGS and ACTIA can assist and advise ETD about the insurances required to protect the Territory's interests, threshold amounts and associated issues.

2. Typical risks associated with engaging contractors/consultants

The following are typical risks associated with the engagement of consultants/contractors:

- i. **Engagement period risks** include:
 - A. financial loss and delay if the consultant fails to complete the project,
 - B. loss due to incorrect professional service
 - C. provision of incorrect advice causing an accident, injury, damage to property, and delay resulting in consequential financial loss.
- ii. **Post-engagement period risks** include:
 - D. consequences of defective documentation prepared by the consultant,
 - E. losses resulting from errors, omissions or a subsequent dispute with the consultant.

The following are typical risks associated with the engagement of contractors for construction/design services:

- i. For the **design and construction phase**, the **defects rectification phase** or the **post-construction period**, risks include:
 - a. injuries to workers
 - b. financial loss and delay if contractor fails to complete, such as when it goes into liquidation
 - c. damage to property, including damage to the asset being constructed
 - d. loss due to incorrect professional service
 - e. loss due to disputes

- f. fire and other perils including earthquake, lightning, storms, malicious damage (including vandalism) and explosion
- g. damages caused by contractor's/subcontractor's negligence
- h. accidents from hire equipment, or
- i. injuries arising from defectively installed products.

ii. The **post contract phase** may include:

- a. injuries to workers during rectification work
- b. damage to property during rectification work
- c. consequences of defective documentation prepared by the contractor, such as faulty playground equipment caused by miscalculation, or
- d. loss due to disputes.

3. **Typical insurances to cover possible risks**

Insurable and other risks can be categorised as follows:

- those covered by insurance required by legislation, such as workers' compensation insurance
- risks to all parties where the main contractor should be required to take out insurance to cover you, and all other service providers for property damage and personal injury costs arising from claims
- risks that are transferable to the contractor through indemnity clauses in the contract
- those where the level and/or nature of the risk is such that you accept the risk, which may or may not be covered by insurance and/or be insurable taking into account the market conditions, and
- those where it is prudent for you to arrange insurance to 'top up' the contractors' insurance.

Common types of insurance include:

- contract Works
- public liability (which covers people who suffer a loss to property or personal injury as a result of negligence)
- professional indemnity (this covers consultants providing professional services and advice such as designers, engineers, accountants, etc), and
- workers' compensation insurance.

4. **"Named insured", "interested party" or "noted" on the policy – What are the differences?**

You may consider if it is appropriate to require the contractor's insurance to extend to you. This can be done by requiring the contractor to:

- include you as a "Named Insured" on their policy / be an "interested party".

This entitles you to receive and give insurance notices (e.g. expiry/renewal or cancellation notices) and make a claim and enforce the policy directly against the insurer.

It can however, be difficult for the contractor to include you as a “Named Insured” and/or unreasonable to request this because the insurer may want additional underwriting information about you and require additional premium to be paid.

- “Note” your interests on their policy.

You are not a party to the insurance contract and are not entitled to make a claim under the policy. The notation simply puts the insurer on notice that you have an insurance interest. This may, however, assist you in having the claim proceeds paid to you.

This is often used where the insurance policy covers loss or damage to property owned by you and you have an insurable interest in the property.

Example: In a hire purchase contract, the financier often requires the borrower to insure the equipment against loss or damage until the final instalment is paid.

Also, particularly for major construction projects, the Territory takes out its own construction risks insurance policy to provide protection against liability and other losses which might arise from the project. The policy’s coverage (arranged through ACTIA) extends to contractors and subcontractors.

If such an arrangement is in place, then the Territory does not ordinarily need to rely on the contractor’s insurance arrangements, whether as a named insured, interested party or a noted party. The relevant project team needs to make a case by case assessment for each contractor/consultant agreement it negotiates as to whether being named on a contractor’s policy is required.

5. Proof of insurance: Certificates of Currency

You reduce your exposure to risk by ensuring insurance policies taken out by contractors comply with the conditions of the contract and are current at the commencement and for the duration of the contract. Evidence should be sought and obtained regarding policy currency by obtaining an original Certificate of Currency. However, because policies can be cancelled at any stage, you should confirm the currency of a policy annually during the term of the contract.

What you should NEVER accept is a copy of a premium notice, even if it looks like it has been paid, as that is not satisfactory evidence of the existence of the policy.

6. Contract provisions

All contracts should have insurance clauses, which might read along the lines of:

1. Contractors must maintain the following current insurance policies (remove insurance policy that is not applicable):
 - professional indemnity insurance of [\$x] million (in respect of each claim) and [\$x million] (in the annual aggregate), and
 - public Liability insurance of [\$x million] (in respect of each claim), and

- workers' compensation insurance with a licensed insurer under the ACT Workers Compensation Act 1951 in respect of the Contractor's employees.
- 2. On request by the School Principal, the Contractor must provide an original Certificate of Currency for relevant insurances.
- 3. The Contractor must provide an original Certificate of Currency for each policy, as requested, to the Territory within 5 business days of receiving the request.

A couple of points to note regarding **professional indemnity insurance**:

- Some professions are subject to a national professional standards regime that prescribes particular limits on liability. This would affect the amount of professional indemnity specified in the contract.
- Often, the Territory should consider whether a contractor/consultant should be required to obtain run-off professional indemnity insurance to cover the period after a contract expires. This is particularly important if the Territory will be relying on advice from a consultant.

Information Sheet 4 - Copyright

Intellectual Property

Copyright, patents and trademarks are often referred to as intellectual property because they are not physical forms of property, they are intangible rights that cannot be touched but can be enforced against others by the owner.

Copyright

Copyright does not protect ideas and information, but protects the ways in which the ideas and information are expressed – by writing or recording the copyright material. Unlike trademarks and patents, if a written or recorded work satisfies the requirements of the Copyright Act, copyright automatically exists and there is no requirement for approval of the copyright.

Copyright is a type of property that is founded on a person's creative skill and labour. It is designed to prevent the unauthorised use by others of a work, that is, the original form in which an idea or information has been expressed by the creator.

What does copyright protect?

Literary works: Most materials that are reduced to writing or some other material form by a creator and which are not trivial in content are literary or dramatic works. Such works may be in electronic or hard copy form. Such works include letters, e-mails, articles, novels, poetry, song lyrics, timetables, databases and computer programs. No level of literary merit is required for copyright to subsist in a work. However, single words, slogans or titles are not usually protected as literary works.

Artistic works: Artistic works include paintings, photographs, sculptures, engravings, sketches, blueprints, drawings, plans, maps and buildings or models of buildings, irrespective of the artistic quality of the work. They may exist in electronic or hardcopy form. There is also a category called 'work of artistic craftsmanship' that must satisfy the added criteria of aesthetic appeal and be the result of the work of a skilled craftsman in order for it to be protected by copyright. Items such as hand-woven tapestry, handmade jewellery or crafted furniture may fit into this category.

Works must be 'original': Works are only protected by copyright law if they are 'original' works. A copyright work will be considered original if it is the product of the creator's own intellectual effort and has not been copied from another person's work. However an original work could be a compilation of other works, eg in an original anthology or selection, where the permission of the copyright owners of those individual works compiled would be needed.

Who is a copyright owner?

Works: Usually the creator of a literary, dramatic, musical or artistic work is the first owner of the copyright in it, but there are several exceptions. One important exception is that copyright in works made during the course of employment are owned by the employer and not the employee. All copyright ownership rules (except those that relate

to moral rights) may be varied by agreement and this is usually the case in the standard Territory services agreement, where the Territory claims ownership of the copyright in the things produced by the contractor. This is very important if the Territory wishes to use or reproduce the things e.g. reports produced by the contractor for its own purposes.

How do you obtain copyright protection?

No formalities - including no registration: The Copyright Act does not require the completion of formalities (such as publication, registration or the payment of fees) in order to obtain protection in Australia, or any other country which is also a party to an international copyright treaty. This is unlike the position with patents, trade marks, designs and plant breeder's rights where registration is a precondition to protection. Copyright protection is granted automatically from the time an original work is created.

Copyright notice

Although copyright protection in Australia is not dependent upon formal notice, it is best practice and advisable for copyright owners to place a copyright notice in a prominent place on their work. There is no set form of words for a copyright notice, but such a notice may state:

This work is copyright. Apart from any use permitted under the Copyright Act 1968, no part may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of (name and address of copyright owner and the year in which the work was made).

Moral Rights

Copyright creators also have a number of non-economic rights. These are known as moral rights. Moral rights recognised in Australia are the right of integrity of authorship, the right of attribution of authorship and the right against false attribution of authorship.

Moral rights are designed to protect the reputation and integrity of the creator's work, and come under the *Copyright Amendment (Moral Rights) Act 2000*. For example, it protects creators from their work being used in a derogatory way which negatively impact on the creator's character or reputation. This right applies to artistic works, musical works, dramatic works, written material, computer programs and films. Importantly, moral rights exist separately to copyright, so even if the Territory has claimed ownership of copyright in a work under a contract or because it has been created by an employee, that contractor or employee still hold the moral rights in the work which must be respected.

Moral rights apply to all creators of literary, dramatic, musical and artistic works, film-makers (producers, directors and screenwriters) and also for performers for their live performances and sound recording of their performances.

A range of remedies is available for an infringement of moral rights. These include an order for damages, an injunction or a public apology. The Copyright Act provides a general reasonableness defence to actions for infringement of the right of integrity of authorship and the right of attribution of authorship. It also provides specific defences to

actions for infringement of the right of integrity of authorship in relation to certain treatment of buildings and moveable artistic works.

So what does this all mean in practice?

Copyright and moral rights need to be carefully considered every time the Directorate enters into an arrangement where e.g. reports, other documents, photographs or plans are to be used or produced. Unless it is appropriate to do otherwise, the Directorate should always insist (in the contract) that it owns the copyright in all materials produced for it by a third party contractor. That will ensure that the Directorate is then free to use these items as it wishes in the future.

However it is still likely the Directorate will be obliged to recognise the moral rights of the author of the material irrespective of the Directorate owning the copyright.

Employees who create works as part of their employment do not own the copyright – the employer does. However if it can be argued the work is created outside the scope of employment duties of the employee, the employee may be able to claim copyright. It is therefore important that as an employer the Directorate takes care when an employee creates a work that might be outside their usual duties that the Directorate might wish to assert copyright over.

Care should also be taken with works produced by students. While it is not an infringement of copyright for example to copy a work for educational purposes, if a student were to create a creative and valuable story book as part of an assignment, the student owns the copyright from the time they produce the written book. It is not open to the Directorate to publish and sell the book for profit without the consent of the student via their guardian. A real life example of this issue came up when students attended a workshop on cyber-bullying and were asked to come up with ideas to address the issue. As noted previously, ideas are not subject to copyright, however if a student developed a strategy to address cyber bullying and reduced that strategy to writing the student would own the copyright and it would not be open to the Directorate or workshop facilitator to exploit that strategy.

Another important issue to note is that it is the creator, not the owner of the equipment used to create the copyright work who owns the copyright. Imagine what this meant for the photographer whose camera was grabbed by Usain Bolt while doing his victory lap at the London 2012 Olympic Games, with Usain then proceeding to take a whole bunch of pictures that no doubt would be very valuable.

Information Sheet 5 - Privacy

1. Introduction

Privacy concerns the confidentiality of information about the schools' students and staff which contractors or other visitors might gain access to while working in or with the school. Up to 31 August 2014, the Privacy Act 1988 (Cth) applied to ACT government agencies. On and from 1 September 2014, the Information Privacy Act 2014 (ACT) gives rights to individuals in relation to how their personal information is handled by ACT public sector agencies, including schools.

The ACT has also enacted the Human Rights Act which incorporates a right for an individual not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

2. Information Privacy Act

The Information Privacy Act gives rights in relation to how personal information is handled by the schools which must comply with the Territory Privacy Principles (TPPs) set out in the Act. The TPPs cover the management, collection, storage, access, use and disclosure of personal information about a person. The Education and Training Directorate may also develop TPP codes that set out how the TPPs are to be applied or complied with. If the Directorate adopts a TPP code, schools will be bound to comply with that code.

It is important for school staff to comply with the TPPs because there are criminal offences for non-compliance in the Information Privacy Act which can apply to school employees. Similarly, school employees could face disciplinary action under section 9 of the Public Sector Management Act 1994 for unauthorised disclosure of information they acquire during the course of their employment.

3. What is personal information?

Personal information is any information from which a person's identity is apparent or is reasonably identifiable, even without mentioning their name. Personal information is not limited to a specific list and can include a person's opinions or ideas. It does not matter whether the information is true or not. Personal information which is considered "sensitive information" is subject to more prescriptive restrictions on its collection and use.

Some examples of personal information include about an individual's:

- date and place of birth
- race or ethnicity (sensitive information)
- religious beliefs or affiliations (sensitive information)
- financial records
- criminal record (sensitive information)
- sexual orientation or practices (sensitive information)
- political/professional/trade association/union membership (sensitive information)
- opinions, and

- photos/images and sound recordings.

Personal information does not include “personal health information” (which is covered under the *Health Records (Privacy and Access) Act 1997* (ACT)). The restrictions on dealing with personal health information are again more prescriptive. “Personal health information” (PHI) is any personal information (whether or not recorded in a health record) which identifies a person or from which the person’s identity is apparent, and which relates to the health, an illness or a disability of a person.

4. Dealing with personal information and PHI

a) Management of personal information

Should be open and transparent. Schools should implement practices, systems and procedures to ensure compliance with the TPPs, applicable TPP codes, and appropriate handling of complaints/inquiries.

b) Storage, collection, use or disclosure of personal information/PHI

Schools should:

- protect personal information/PHI from misuse, loss or unauthorised modification/disclosure;
- keep personal information/PHI up to date and accurate;
- collect personal information/PHI only for a lawful purpose directly related to the school’s function or activity;
- generally, collect personal information from the relevant child’s parent/guardian;
- disclose personal information/PHI only for the purpose for which the information was collected;
- correct personal information/PHI where it is incorrect, inaccurate, incomplete, irrelevant or misleading;
- not collect personal information/PHI by unlawful or unfair means;
- not disclose personal information to a person overseas unless reasonable steps are taken to ensure the person will not breach the TPP; and
- not destroy PHI until the day a child turns 25 (and then schools should keep a register of what records have been destroyed).

c) Disclosure of PHI specifically

Generally, PHI about a child can be disclosed only to the child (or the child’s parent/guardian). However, the following people may be entitled to access a child’s PHI:

- the child’s doctors, and members of the medical team treating the child’s health;
- a person authorised by the child’s parent/guardian to have access;
- people who need access to a health record for the purpose of managing, funding or assessing the quality of health services provided; and
- in some circumstances, an immediate family member (eg a sibling), a person responsible for the person’s care (eg a babysitter) or an entity carrying out research or compilation or analysis of statistics.

d) Notification

Schools should inform the child's parent/guardian:

- that the school has collected personal information/PHI about the child;
- if the collection of PHI/personal information is required by law;
- why the school needs the PHI/personal information;
- the identities of the members of the child's medical "treating team" who will have access to PHI;
- to whom the PHI/personal information will be disclosed (and any party to whom that person is likely to disclose the information);
- in respect of personal information, how the parent/guardian may make a complaint; and
- where possible, a child's parent/guardian should be given the option of not having the child identified (it may be possible to facilitate the use of a pseudonym) when dealing with a child's personal information.

e) Consent, access regarding personal information/PHI

Schools should:

- obtain a parent's/guardian's consent to use or disclose personal information;
- permit parents/guardians access to their child's personal information; and
- take reasonable steps to enable a child's parent/guardian to ascertain what PHI has been collected, the purpose for which it was collected and what steps the parent/guardian can take to access the PHI/PHI records.

f) Unsolicited personal information

Personal information received by a school which was not requested should be either destroyed or de-identified, or treated in accordance with the TPPs.

5. So what does this all mean in practice?

Schools must protect and keep confidential any personal information or PHI they collect or otherwise hold in carrying out their functions. Permanent and contracted employees of the Territory are obliged under the *Public Sector Management Act 1994 (ACT)* to observe the confidentiality of this information.

A school storing personal information/PHI must take reasonable steps to ensure that the information is protected against unauthorised access, use, modification or disclosure. Where the information is given to another person in connection with the provision of a service to a school, the school must do everything it reasonably can to prevent unauthorised use or disclosure of the information.

Where it is necessary to obtain consent in relation to an individual's personal information/PHI, a parent/guardian will be able to do this. A child may also be able to give consent in relation to their personal information/PHI, however, this will depend on the child's maturity and understanding not just their age. Accordingly, best practice is to rely on parent/guardian consent.

It is important that contractors (or a contractor's subcontractors), people or organisations that come into contact with or otherwise have access to this personal information are contractually or otherwise obliged to respect the confidentiality of this personal information/PHI and to otherwise comply with the TPPs and any relevant TPP code (and the *Health Records (Privacy and Access) Act 1997 (ACT)* where applicable).

Accordingly, careful thought needs to be given to all circumstances where non-Territory third parties will or might have access to personal information/PHI held by the school. In accordance with its obligations under the TPPs, the school must take steps to ensure third parties will comply with the Territory's obligations under the TPPs. This should be in the form of appropriate terms in the contract with the third party or in the form of a signed undertaking. Special consideration will need to be given to the measures which should be in place if third parties are engaged to perform health services at schools where they might be required to collect or use the PHI of students. It is recommended you make contact with the Governance & Legal Liaison section to discuss appropriate arrangements.

As outside parties can obtain or have access to personal information as part of performing services or providing goods to schools, it is also important that contract provisions dealing with privacy and personal information are included in all contracts.