

## EXPLANATORY STATEMENT

### ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

#### *Judiciary Act 1903*

#### *Legal Services Amendment Directions 2008 (No.3)*

##### *Legislative background*

Under section 55ZF of the *Judiciary Act 1903*, the Attorney-General may issue legal services directions applying generally to Commonwealth legal work (as defined in that section) or in relation to Commonwealth legal work performed in relation to a particular matter. The power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its agencies, including Commonwealth litigation, and for the provision of legal advice to Cabinet.

Legal Services Directions were initially issued under this provision in 1999. They are administered by the Attorney-General with the assistance of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department. OLSC provides assistance and advice to agencies about the operation of the Directions. OLSC also publishes relevant information about the Directions (such as Guidance Notes on their interpretation and emerging issues) on its website:

<http://www.ag.gov.au/olsc> .

##### *Policy background to the Legal Services Directions*

The Directions set out requirements for sound practice in the provision of legal services to the Commonwealth. The Directions are an important mechanism to manage, in a whole-of-government manner, legal, financial and reputation risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

For example, the rules about the conduct of tied work ensure that the Commonwealth minimises the risk that portfolio-specific approaches to questions of constitutional law or public international law (for instance) will impair the Commonwealth advancing and maintaining a consistent and clear position on such matters.

Another example of how the Directions provide support for good practice can be found in paragraph 10 which sets out requirements for consultation with an agency in relation to a request for advice concerning the interpretation of legislation administered by that agency. Such requirements minimise both the chance for unnecessary and inefficient duplication of work and the chance of inconsistent positions being taken by agencies on the same legislative provisions.

The Directions are a legislative instrument and have the force of law. Sanctions can be imposed for non-compliance. These sanctions may include the issue of a specific Direction by the Attorney-General, in relation to the conduct of a particular matter or the use of a particular legal services provider. They may also include adverse comment on an agency or a legal services provider being made to the Attorney-General or the relevant Minister.

## *Contacting OLSC*

Questions about the Directions can be directed to OLSC at:

Telephone: (02) 6250 6611

Facsimile: (02) 6250 5968

Mail: Assistant Secretary  
Office of Legal Services Coordination  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Email: [olsc@ag.gov.au](mailto:olsc@ag.gov.au)

Website: <http://www.ag.gov.au/olsc>

## **SECTIONS**

### **Section 1**

Section 1 of the instrument sets out the name of the instrument.

### **Section 2**

Section 2 specifies that the instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

### **Section 3**

Section 3 provides that Schedule 1 amends the *Legal Services Directions 2005*.

## **SCHEDULE 1: Amendment**

### **Paragraph 10A      Advice on constitutional law matters**

The Attorney-General and the Attorney-General's Department are responsible for constitutional law under the Administrative Arrangements Order. New paragraph 10A is intended to ensure that the Attorney-General's Department is aware of requests for advice, and advice, about constitutional law issues. This will enable the Department to coordinate requests for advice across agencies where appropriate, avoid unnecessary duplication and ensure the Department and the Attorney-General have up-to-date information about advice on constitutional law issues. It will also ensure that the Solicitor-General is appropriately involved.

New paragraph 10A.1 of the Directions provides that an agency which is subject to the *Financial Management and Accountability Act 1997* (FMA agency) that seeks legal advice from the Australian Government Solicitor (AGS) on a constitutional law issue must give a copy of the request for advice to the Secretary of the Attorney-General's Department at the same time as the

request is made to AGS. Subparagraph 10A.1(b) provides that in the case of oral requests for advice, the FMA agency must, as soon as practicable, confirm the request in writing and give a copy of the request to the Secretary of the Attorney-General's Department.

New paragraph 10A.2 provides that the Attorney-General's Department or AGS may consult with the Solicitor-General about whether the advice should be given by the Solicitor-General or AGS. Generally, only very complex or otherwise significant requests for advice would be dealt with by the Solicitor-General.

New paragraph 10A.3 provides that AGS must give a copy of any final advice to the Attorney-General's Department and to the Solicitor-General.