

## EXPLANATORY STATEMENT

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

#### *Judiciary Act 1903*

#### *Legal Services Amendment Direction 2012 (No. 1)*

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 at [www.ag.gov.au/olsc](http://www.ag.gov.au/olsc).

The Directions set out requirements for sound practice in the provision of legal services to the Commonwealth.

The *Legal Services Amendment Direction 2012 (No. 1)* supports the implementation of the Legal Services Multi-Use List. Schedule 1 extends the application of the Directions to non-FMA bodies. Appendix F provides Commonwealth agencies with requirements in relation to the procurement of legal work.

This direction commences on 1 June 2012.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required as the amendments impact on Commonwealth agencies and Commonwealth authorities and any impact on business or the non-profit sector does not appear to be more than minor.

The Amendment Direction is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The amendments made by the Amendment Direction do not engage any of the applicable rights or freedoms under that Act.

The *Legislative Instruments Act 2003* requires an explanatory statement to describe the nature of any consultation that has been carried out.

OLSC held public consultation sessions on legal services procurement reform for government and industry representatives in February 2011 and July 2011. Further briefing sessions were held in December 2011, March 2012 and May 2012. OLSC consulted with lead Commonwealth agencies and members of the General Counsel Working Group (GCWG) to develop the legal services procurement policy and the subsequent amendments to the Directions.

The Legal Services Multi-Use List Guidance Material (the Guidance Material), referenced in Appendix F, was developed in consultation with the Department of Finance and Deregulation and the GCWG.

Schedule 1 extends the application of the Directions to non-FMA bodies. Schedule 1 replaces the words “government business enterprise prescribed under the CAC Act or a Corporations Act company controlled by the Commonwealth” in subparagraph 12.1 with the terms used in the *Commonwealth Authorities and Companies Act 1997*. The amendment is designed to ensure consistent language in the description of bodies that are not agencies regulated by the *Financial Management and Accountability Act 1997*, nor government business enterprises under the *Commonwealth Authorities and Companies Act 1997*, nor a Corporations Act body controlled by the Commonwealth.

Subparagraph 12.3A provides for the requirement for Commonwealth companies and government business enterprises to comply with existing paragraph 9A.1 when purchasing legal services from the Legal Services Multi-Use List.

Paragraph 14 is amended to include definitions relied on in the amendments to subparagraph 12.1 and Appendix F.

Appendix F sets out directions in relation to the procurement of Commonwealth legal work.

### **Definitions for Appendix F**

The definitions contained in new paragraph 1 provide interpretative assistance and further information on terms used in Appendix F.

The Legal Services Multi-Use List arrangements do not apply to the engagement of Counsel, as supported by the definition of an external legal services provider at paragraph 1.

### **Definition for Pro Bono Legal Work**

A definition of pro bono legal work is contained in paragraph 2. The definition provides interpretative assistance on the term used in new paragraph 5.

### **Agencies may only use approved providers**

Paragraph 3 sets out a Commonwealth agency’s obligation to use the Legal Services Multi-Use List.

Subparagraph 3.1 provides for the mandatory use of the Legal Services Multi-Use List by a Commonwealth agency to procure ongoing legal services on and from 1 June 2013.

Paragraph 3.1(b) provides that a Commonwealth agency utilising the Legal Services Multi-Use List arrangements must comply with the Guidance Material issued by the Attorney-General’s Department. The Guidance Material provides information on the use and operation of the Legal Services Multi-Use List and can be accessed on the Attorney-General’s Department website at [www.ag.gov.au/lsmul](http://www.ag.gov.au/lsmul) or by emailing OLSC at [olsc@ag.gov.au](mailto:olsc@ag.gov.au).

Subparagraph 3.2 concerns the use of the Legal Services Multi-Use List by a

Commonwealth agency between 1 June 2012 and 1 June 2013. Subparagraph 3.2 provides for a transitional period in which a Commonwealth agency may procure legal services from an existing procurement arrangement in place immediately before 1 June 2012, or the Commonwealth agency may otherwise utilise the Legal Services Multi-Use List in accordance with subparagraph 3.1.

### **Use of LSMUL by approved Commonwealth companies and approved government business enterprises**

Under new paragraph 4 an agency which is a body regulated by the *Commonwealth Authorities and Companies Act 1997*, including government business enterprises and Corporations Act bodies controlled by the Commonwealth, may use the Legal Services Multi-Use List arrangements set out in paragraph 3 on approval by the Office of Legal Services Coordination.

### **Matters to be taken into account when engaging a legal services provider**

Paragraph 5 outlines the requirement for agencies to take into account a legal services provider's involvement in pro bono legal work as defined in paragraph 2.

Commonwealth agencies are required to take into account pro bono legal work undertaken by law firms when engaging them to provide legal services.

An agency should take into account the type of work that is performed under a policy of the legal service provider that promotes pro bono work being undertaken by staff.

### **Reporting on Commonwealth legal work undertaken by external legal services providers**

Agencies who use the Legal Services Multi-Use List pursuant to paragraph 3 are required to report to OLSC about matters relating to the performance of external services providers under paragraph 6.

### **OLSC must publish reports on LSMUL**

Paragraph 7 requires OLSC to make information about service provider performance available to Commonwealth agencies. This reporting will support whole of government information sharing about service provider performance to ensure informed purchasing decisions can be made by the Commonwealth about external legal services.

### **Agencies must provide assistance**

Paragraph 8 requires a Commonwealth agency to provide all reasonable assistance to the Attorney-General or the Attorney-General's Department in response to an inquiry about procurement of legal services from an external legal services provider.

### **Providers must report to OLSC each year**

Under paragraph 9, agencies are required to ensure that all contracts entered into by them with legal services providers contain a clause that requires legal services providers to report to OLSC within 30 days after the end of each financial year using a template approved by OLSC that specifies the matters to be reported.

This reporting will allow for the monitoring of legal services expenditure by the Commonwealth as well as the levels of pro bono legal work undertaken by service providers included on the Legal Services Multi-Use List.

Authority: Section 55ZF of the  
*Judiciary Act 1903.*