

**LEGAL SERVICES AMENDMENT (MULTI-USE LIST) DIRECTION 2018**  
**EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General  
in compliance with section 15G of the *Legislation Act 2003*

**INTRODUCTION**

Under section 55ZF of the *Judiciary Act 1903* (Judiciary Act), the Attorney-General may issue Legal Services Directions applying generally to Commonwealth legal work (as defined in that section).

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.

**OUTLINE**

The *Legal Services Directions 2017* (Directions) were issued under section 55ZF of the Judiciary Act. They are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act). This Direction is also a legislative instrument for the purposes of the Legislation Act.

This instruction amends the Directions to:

- give effect to transitional arrangements for the procurement of legal services upon the expiry of the Legal Services Multi-use List (LSMUL) on 30 June 2018
- raise the threshold value for a 'major claim' in Appendix C from \$25,000 to \$100,000, and
- set targets for Commonwealth entities in relation to briefing female barristers.

**CONSULTATION**

There is a general obligation on the rule-maker under section 17 of the *Legislation Act 2003* to be satisfied that any consultation that is appropriate and reasonably practical has been undertaken before a legislative instrument is made.

The proposed amendments to the Directions regarding the expiry of the LSMUL, a replacement procurement model and raising of the threshold value for a 'major claim' arise from recommendations in the Secretary's Review of Commonwealth Legal Services (Review). The development of these Review recommendations was informed by extensive consultations with Commonwealth entities, the legal sector and industry.

The Secretary of the Attorney-General's Department received unanimous support from the Secretaries' Equality and Diversity Council for the Commonwealth to adopt targets in line with the Law Council of Australia's Equitable Briefing Policy. A proposal for the Commonwealth to adopt such a policy by amending the Directions was put to the General Counsel Working Group, comprising of General Counsel and Heads of Legal from Commonwealth entities with the most significant external legal spend.

## **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR ID **23913**).

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Before this instrument was made, its impact on human right was assessed using tools and guidance published by the Attorney-General's Department. This Legislative Instrument is fully compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This instrument is compatible with human rights because it promotes:

- the freedom of discrimination in employment as engaged by Article 11 of the *Convention on the Elimination of All forms of Discrimination against Women*,
- protection against discrimination on the ground of sex as engaged by Article 26 of the *International Covenant on Civil and Political Rights*, and
- the right to fair wages and equal remuneration for work of equal value as engaged by Article 7 of the *International Covenant on Economic, Social and Cultural Rights*.

The LCA's Equitable Briefing Policy aims to bring about cultural change within the legal profession's gender briefing practices by encouraging genuine consideration of women barristers.

## NOTES ON SECTIONS

### **Section 1 Name of legislative instrument**

This section provides for the legislative instrument to be named as the Legal Services Amendment (Multi-Use List) Direction 2018. The legislative instrument may be cited by that name.

### **Section 2 Commencement**

This section provides for the legislative instrument to commence on 1 July 2018.

### **Section 3 Authority**

This section identifies the Act that authorises the making of the legislative instrument as the *Judiciary Act 1903*.

### **Section 4 Schedules**

#### **Schedule 1 – Legal Services Directions 2017**

Amendments were required to remove references to the Legal Services Multi-Use List (LSMUL) which expired on 30 June 2018, consequently Commonwealth entities can no longer purchase legal services using the LSMUL. Legal services procurement will be akin to ordinary procurement undertaken in accordance with the Commonwealth procurement framework.

#### **Paragraph 12.3A**

Due to the expiry of the LSMUL, paragraph 12.3A was repealed. The paragraph required an approved Commonwealth company or an approved government business enterprise to comply with paragraph 9A when purchasing legal services from the LSMUL.

#### **Paragraph 15**

The definition of *approved Commonwealth company* and *approved government business enterprise* have been repealed, the terms are redundant due to the removal of paragraph 4(1), see below.

#### **Appendix C – Handling monetary claims**

#### **Paragraph 3**

Paragraph 3 of the Appendix C imposes a threshold above which monetary claims are considered major claims and dealt with by specific rules. Previously this threshold was \$25,000 and it has been raised to \$100,000. Settlements for amounts not exceeding \$100,000 may now be approved by the accountable authority of a non-corporate Commonwealth entity, or the accountable authority's delegate, once satisfied that the settlement is in accordance with legal principle and practice. Settlement of any matters reported as significant under paragraph 3 will continue to require the approval of the Attorney-General regardless of the monetary value.

## **Appendix D – Engagement of counsel**

### **Paragraph 4D**

Paragraph 4D outlines the reasonable endeavours that are to be made by the Commonwealth in selecting counsel. Subparagraph 4D(d) has been inserted to encourage consideration of female counsel with relevant seniority, expertise and experience in the relevant practice area when selecting counsel, with a view to particular targets in relation to briefing female barristers.

The note following paragraph 4D has been amended to encourage Commonwealth agencies to publish information annually which will allow an assessment of whether in relation to briefing senior female barristers and junior female barristers targets in subparagraphs (d)(i) and (ii) are being met. The note also references that online Guidance material will be available to assist agencies.

## **Appendix F - Procurement of Commonwealth legal work**

### **Paragraph 1**

The definition of *LSMUL* was removed from the Definitions for Appendix F.

### **Paragraph 3**

Paragraph 3 has been repealed as the expiry of the LSMUL has made a Commonwealth entity's obligation to use the LSMUL obsolete.

### **Paragraph 4**

Paragraph 4(1) is obsolete due to the expiry of the LSMUL. The provision enabled OLSC to approve a Commonwealth company or government business enterprise to access the LSMUL. Paragraph 4(2) is also redundant as it required the above entities to comply with relevant guidance material issued by the Department when using the services of an LSMUL provider.

### **Paragraph 5**

Amendments to Paragraph 5 have removed references to the *LSMUL, approved Commonwealth company* and *approved government business enterprise*. The requirement of Commonwealth entities (other than a government business enterprise) to take into account a legal services provider's involvement in pro bono legal work remains as defined in paragraph 2 of Appendix F.

### **Paragraph 8**

Amendments to Paragraph 8 have removed references to the *LSMUL, approved Commonwealth company* and *approved government business enterprise*. The requirement continues to require a Commonwealth entity (other than a government business enterprise) 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.

### **Paragraph 9**

Paragraph 9 has been repealed to remove the obligation that a contract between a Commonwealth entity and an LSMUL provider requires that the provider report to OLSC

(a) in a form approved by OLSC and

(b) not later than 30 days after the end of each financial year.