

Secretary's Instruction 10

Legal Services

Purpose

The portfolio is bound by a range of requirements in relation to the procurement and delivery of legal services. The purpose of this instruction is to ensure compliance with the relevant requirements and to ensure that legal services are delivered to the department in a coordinated and effective manner.

Background

As a large, complex organisation with significant policy, program management and service delivery responsibilities, the portfolio is a large consumer of legal services which are provided both in-house and through external legal services providers.

Legal services are services of a legal nature and include, but are not limited to:

- legal advice on any matter, whether domestic or international law (for example, advice about the interpretation of portfolio legislation, commercial and contractual matters, personnel and workplace relations matters and interpretation of international law instruments such as the Refugees Convention);
- handling of litigation, prosecutions and matters before the courts / tribunals (including some in-house advocacy before the Administrative Appeals Tribunal, the Fair Work Commission or a court in an application for an Apprehended Violence Order or similar order);
- legal advice on procurement, grants, and other agreement making;
- managing the legislative change process (acts, regulations and legislative instruments);
- legal advice on, and drafting of, instruments of delegation;
- legal advice on operational matters and the exercise of powers;
- legal advice on customs and trade law;
- legal training (for example, refugee law training, use of force training); and
- legal process advice (probity).

The *Legal Services Directions 2005* ('the Directions') are themselves a legislative instrument made under the *Judiciary Act 1901*. The Directions require legal services to be delivered in a consistent and coordinated manner, so as to protect the Australian Government's legal and financial position. The Directions have the force of law and sanctions can be imposed for non-compliance. To ensure compliance with the Directions, departmental staff must follow this Secretary's Instruction.

The Legal Division is headed by a General Counsel and comprises four legal branches.

Why must the Legal Division be involved in the provision of legal services?

In addition to the requirement for the delivery of coordinated and consistent legal services, the Directions require the Secretary of DIBP to provide an annual certification to the Attorney-General's Department as to the department's compliance with the Directions. In order for the Secretary to fulfill these reporting obligations, the General Counsel needs oversight over the sourcing procedures of all legal services within the department.

The Legal Division also needs to know about, and be involved in, any potential litigation that may result in damages or compensation in order to meet the department's obligation to notify Comcover (the

Commonwealth's insurer) of pending litigation. If proper procedures are not followed Comcover may deny coverage or liability and the relevant policy area of the department will have to bear the cost of the litigation.

The Legal Division is able to seek external legal services in a strategic manner and ensure the efficient and effective expenditure of Commonwealth monies.

Mandate

Secretary's Instructions are delivered under the authority of the department head, as outlined in the *Public Service Act 1999* and **must** be complied with.

The General Counsel is also authorised to outline the policies and procedural framework for legal services in the portfolio (which includes, for the purpose of this Secretary's Instruction, the Office of the Migration Agents Registration Authority).

The Legal Division is required to:

1. provide the Minister and the portfolio with timely, high quality, strategic and practical legal services through merging established legal expertise with an understanding of the policy and business needs of the portfolio;
2. engage cooperatively and supportively with policy and business areas;
3. identify possible strategies for minimising risk;
4. take responsibility for the legal content of advice provided; and
5. work with business areas to maintain legal professional privilege, where appropriate.

The General Counsel will determine how legal services are provided in the portfolio.

External legal services are provided by private legal firms which are selected through a competitive process (including the Australian Government Solicitor), the Attorney-General's Department and the Department of Foreign Affairs and Trade.

The Legal Division will determine whether services should be provided internally or referred to an external legal services provider. This allows for services to be provided internally where they can be, ensures that external advice is captured for future internal use and ensures that the department's legal expenditure represents value for money.

External legal services **must not** be sought by officers, other than Legal Officers in the Legal Division, without first obtaining written authorisation from the General Counsel or the relevant Assistant Secretary in Legal Division. A request to engage a specific external legal services provider must be made by an SES officer with appropriate reasons supporting the request. Where the Legal Division agrees that a client area can contact an external legal services provider directly a billing number will be provided.

Departmental officers¹, other than legal officers in the Legal Division, should not:

1. give, or purport to give legal advice to their colleagues, or anybody else, without written authorisation from General Counsel; or
2. provide the Legal Division with unbalanced or incomplete background or factual information; or
3. put the same request or a related request to more than one legal adviser, including Special

¹ For the avoidance of doubt, officers with legal qualifications located outside the Legal Division cannot give legal advice or provide a legal service in the course of their employment with the department.

Counsel, without disclosing the relevant request for advice to the first legal adviser; or

4. settle contracts or memoranda of understanding, initiate formal legislative changes (including instructing the Office of Parliamentary Counsel and/or seeking policy approval from the Minister for legislative change) or draft other legal documents without first seeking legal advice from the Legal Division; or
5. run litigation before a court or tribunal or instruct an external legal services provider to run such litigation.

Only the following have authority to seek advice from Special Counsel:

- the Minister's Office
- the Secretary
- SES officers or officers authorised by their relevant SES Manager.
- Legal Division staff.

Overseas posts

Where legal advice is sought locally by DIBP officers at an offshore Post which relates solely to the laws of the country (including in relation to locally engaged staff employment issues) in which the overseas Post is located or has responsibility, it can be facilitated at Post by the managing agency in accordance with the DFAT or Austrade Service Level Agreement as appropriate. This advice can be obtained by the delegate at Post without the requirement of a billing number issued by Legal Division. However, Legal Division must still be notified of all legal matters involving the department through any reporting process Legal Division coordinates to ensure compliance with the Legal Services Directions.

However, if the legal advice involves a question of Australian law (including any visas issues) or international law, the overseas Post must actively consult with the Legal Division. Further, the responsible person at Post must notify the Assistant Secretary, Litigation Branch, of any overseas litigation that is considered significant or sensitive. For questions of international law, the Legal Division will consult with the Attorney-General's Department and/or DFAT if the issue falls outside the scope of DIBP's exemption in relation to the provision of international law advice under the Legal Services Directions.

DFAT must be consulted should any legal issue arise at post that relates to the diplomatic immunities of posted officers, locally engaged staff, the mission or its archives (for example, where legal process is initiated against DIBP officers or DIBP posts). Foreign state immunity issues must also be referred to DFAT in the first instance (for example, where a litigant seeks to initiate legal process against the Commonwealth).

Authorisation

This Secretary's Instruction is issued under the authority of the Secretary, Michael Pezzullo, the Department of Immigration and Border Protection.