



GUIDANCE NOTE 11

Briefing the Solicitor-General

1. This Guidance Note sets out the manner in which the Solicitor-General is to be briefed in order to perform the functions of his or her office.
2. This Guidance Note applies to those persons and bodies listed in s 12(a) of the *Law Officers Act 1964* (the **Act**), being:
 - the Crown in right of the Commonwealth;
 - the Commonwealth;
 - a person suing or being sued on behalf of the Commonwealth;
 - a Minister;
 - an officer of the Commonwealth;
 - a person holding office under an Act or a law of a Territory;
 - a body established by an Act or a law of a Territory; and
 - any other person or body for whom the Attorney-General requests the Solicitor-General to act.

Functions of the Solicitor-General

3. The Solicitor-General's functions, as Second Law Officer, are found in s 12 of the Act. These functions include acting as counsel for the persons and bodies listed in paragraph 2 above (s 12(a)) and furnishing opinions on questions of law (s 12(b)).

Requests to brief the Solicitor-General in court matters: s 12(a)

High Court proceedings

4. The solicitors representing a person or body referred to in paragraph 2 above must provide the Solicitor-General with a request to be briefed to appear in every civil matter where the person or body:
 - is a party to, or intervener in, an appeal before the High Court;
 - is a party to, or intervener in, a proceeding within the original jurisdiction of the High Court, other than:
 - proceedings of a kind that are routinely remitted; or
 - proceedings that appear likely to be disposed of by a single Justice (noting that, if circumstances change and the matter is referred to a Full Court, the Solicitor-General must receive a request to be briefed to appear).

Significant legal proceedings

5. In addition, the solicitors representing a person or body referred to in paragraph 2 above must provide the Solicitor-General with a request to be briefed to appear in every civil matter that raises novel or difficult points of legal principle of very high precedential or other importance to the Commonwealth, including matters that:
 - relate to the implementation of Government policy or decisions of the highest importance;
 - raise legal issues resulting in conflict between agencies; and/or
 - have significant financial implications or other very important whole-of-Government implications.

Applications for special leave

6. The following steps should be taken by the solicitors representing a person or body referred to in paragraph 2 above who is contemplating seeking special leave to appeal to the High Court:
 - *first*, the solicitors must notify the Solicitor-General, as soon as possible, that the person or body is contemplating seeking special leave. This should generally occur within a few days of the judgment sought to be appealed being handed down;
 - *secondly*, following notification of the contemplated special leave application, the solicitors must provide the Solicitor-General with a copy of the judgment under appeal and, as soon as practicable thereafter, the advice of junior or senior counsel briefed in the matter on the prospects of special leave being granted and the prospects of success on appeal; and
 - *thirdly*, if, having received counsel's advice, the person or body intends to make a special leave application, the solicitors must provide the Solicitor-General with a draft special leave application prepared by counsel and a request to be briefed.
7. When the Solicitor-General is provided with a draft special leave application, he or she will form an independent view in relation to whether the application should be made. However, in appropriate cases the Solicitor-General may advise, prior to receiving a copy of the draft special leave application, that a special leave application should not be made.
8. Where a person or body referred to in paragraph 2 above is the respondent to a special leave application, it will be sufficient for the solicitors representing the person or body to notify the Solicitor-General, and to provide a request to be briefed, in:
 - all cases of the kind referred to in paragraph 5 above (significant legal proceedings), which should be brought to the Solicitor-General's attention as soon as possible after the special leave application is served on the person or body;
 - any special leave application which is to receive an oral hearing; and
 - any matter where special leave is granted without an oral hearing (which, on the grant of special leave, becomes a matter falling within paragraph 4 above).

Requests to brief the Solicitor-General for opinion on questions of law: s 12(b)

9. In accordance with s 12(b) of the Act, the functions of the Solicitor-General include furnishing his or her opinion on questions of law referred to the Solicitor-General by the Attorney-General.
10. Requests for such an opinion should be reserved for the most significant questions of law, including circumstances where the matter in issue:
 - raises novel, difficult or important points of legal principle;
 - relates to the implementation of Government policy or decisions of high importance;
 - is likely to become the subject of a constitutional challenge, or of a challenge in the High Court;
 - concerns draft legislation that was the subject of previous advice from the Solicitor-General, if the draft legislation has been materially amended since the provision of that previous advice;
 - raises legal issues resulting in conflict between agencies; and/or
 - has significant financial implications or other very important whole-of-Government implications.
11. Any person or body listed in paragraph 2 above who wishes to seek the opinion of the Solicitor-General on a question of law should, in the first instance, email Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au), copying the Attorney-General's office (attorney@ag.gov.au) and the Office of Legal Services Coordination (olsc@ag.gov.au), indicating:
 - the proposed question or questions of law on which the Solicitor-General's opinion is sought; and
 - the date by which the opinion is required, together with the reason any such date has been selected.

Note: To the extent that the request includes copies of, or otherwise reveals the content of, advice to a former Government, this material should be sent under cover of a separate email and not be included in the email copied to the Attorney-General's office.
12. Following such an approach, Counsel Assisting will discuss whether the Solicitor-General is available to provide an opinion, the form of the proposed question or questions, and the material with which the Solicitor-General should be briefed if he or she agrees to provide the opinion requested.
13. Following such consideration, Counsel Assisting will provide the proposed questions to the Attorney-General's office and seek the Attorney-General's consent to the referral or will direct the person or body requesting the opinion and consent to do so through the Office of Legal Services Coordination.
14. The Solicitor-General will provide a copy of written opinions to the Attorney-General.

Process for briefing the Solicitor-General

15. Any request to brief the Solicitor-General to appear as counsel or to provide an opinion on a question of law should be made as early as possible.
16. All briefing requests must:
 - provide an overview of the factual and legal background to the matter;
 - set out clearly the key issues in dispute or the legal question or questions that need to be answered, and the reasons why the matter is considered to warrant the involvement of the Solicitor-General;
 - set out the key dates in the matter; and
 - attach any documents which will allow the Solicitor-General to form an opinion on whether he or she should accept a brief (including existing advice, pleadings, cases and correspondence).
17. Briefing requests should be made by email to Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au), copied to the Attorney-General's Office (attorney@ag.gov.au).

Note: To the extent that the request includes copies of, or otherwise reveals the content of, advice to a former Government, this material should be sent under cover of a separate email and not be included in the email copied to the Attorney-General's office.
18. The Solicitor-General may agree to a briefing request on the condition that he or she is briefed with one or more other counsel.
19. If the Solicitor-General accepts a request to be briefed, he or she must be briefed to the standard that would be required by any senior counsel. Unless the Solicitor-General has otherwise agreed, briefs to the Solicitor-General must be prepared by the Australian Government Solicitor or an external legal services provider.
20. Every brief must at a minimum:
 - provide an analysis of the main issues in the matter;
 - summarise and include copies of any previous legal advice (including previous Solicitor-General advice);
 - include copies of relevant legislation, cases or journal articles; and
 - provide any other relevant information.
21. All briefs should be provided electronically. Generally, only core documents should be provided in hard copy. Authorities should not be provided in hard copy. Two copies of the hard copy component of a brief should be provided: one to the Solicitor-General in his Melbourne chambers, and one to Counsel-Assisting the Solicitor-General in the Solicitor-General's Canberra chambers.

Canberra
Solicitor-General's Chambers
Robert Garran Offices
3–5 National Circuit
Barton ACT 2600

Melbourne
Solicitor-General's Chambers
c/- Level 34
600 Bourke Street
Melbourne Vic 3000

22. Any questions about the content of a briefing request or a brief should be directed to Counsel Assisting the Solicitor-General by email to S-G_Briefing@ag.gov.au or by phone on (02) 6141 4118.

Fee on brief

23. The Solicitor-General's services are budget-funded. Persons or bodies are not billed for the Solicitor-General's work. Should counsel from the private bar or the Australian Government Solicitor be briefed jointly with the Solicitor-General, the engagement will be subject to the usual arrangements for engagement of counsel as set out in Appendix D to the *Legal Services Directions 2017*.
24. In the event that a costs order is made in favour of a person or body referred to in paragraph 2 above, the solicitors for the person or body must consult Counsel Assisting the Solicitor-General about the amount of time the Solicitor-General has spent on the matter. For the purpose of calculating costs in favour of the person or body, the daily rate for the Solicitor-General is \$5,000 (including GST). The hourly rate is calculated at one-sixth of the daily rate (including GST).

Confidentiality of Solicitor-General opinions

25. Opinions of a Solicitor-General are confidential to the Australian Government. The Office of Legal Services Coordination and the Solicitor-General's chambers must be consulted before any opinion of the Solicitor-General, or a former Solicitor-General, is provided to a person or body outside the Australian Government (including external counsel and solicitors retained by the Commonwealth).
26. A request to share an opinion of the Solicitor-General or a former Solicitor-General should be made by email to Counsel Assisting the Solicitor-General (S-G_Briefing@ag.gov.au) and the Office of Legal Services Coordination (olsc@ag.gov.au). The request should clearly indicate:
- the name of the person(s) or body(ies) with whom the opinion is proposed to be shared;
 - the reasons why the opinion should be shared;
 - any conditions to the proposed sharing of the opinion; and
 - confirmation that consent has been received from the client(s) to whom the opinion was furnished.
27. In considering a request made under paragraph 26 above, the Office of Legal Services Coordination may seek the views of any other relevant Commonwealth entity including, for example, the entity which has administrative responsibility for the relevant area of law.
28. If the Solicitor-General or the Office of Legal Services Coordination identifies that a request made under paragraph 26 above raises particular sensitivities (which generally will not be the case with a request to share an opinion with external counsel briefed to advise or appear with the Solicitor-General), the decision on whether it should be so shared will be referred to the Attorney-General. Sensitivities may arise from, amongst other things, the nature of the advice, the identity of the client(s) to whom the opinion was furnished and/or the identity of the person(s) or body(ies) with whom the opinion is proposed to be shared.

29. Any approval to share an opinion is subject to such conditions as may be imposed by the Solicitor-General, the Office of Legal Services Coordination and/or the Attorney-General, and is limited to the person(s) and/or body(ies) named in the approval as an authorised recipient.

Significant Issues Reports

30. The requirement in paragraph 3 of the *Legal Services Directions 2017* to report on significant issues is not satisfied by a request to brief the Solicitor-General. In all matters in which the Solicitor-General has been briefed, the briefing agency must report to the Office of Legal Services Coordination if the matters raise a significant issue for the purpose of paragraph 3. Guidance on significant issues is contained in Guidance Note 7—Reporting on Significant Issues.

Office of Legal Services Coordination

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