



Constitutional Issues Arising in Commonwealth Prosecutions

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This guideline identifies the procedure for the CDPP in liaising with the Australian Government Solicitor (AGS) to address constitutional issues arising in Commonwealth criminal prosecutions.

The involvement of the CDPP in constitutional issues arises when a s78B notice is given to the Attorney-General under the *Judiciary Act 1903* (Cth) or the nature of the case raises constitutional issues.

1. Commonwealth Legal Work involving Constitutional Law Issues

Under the *Legal Services Directions 2005* Commonwealth legal work involving constitutional law issues is tied to AGS and the Attorney-General's Department (AGD). One purpose of tied work rules is to ensure a consistent and coherent legal position is taken in key strategic areas of law.

The tying of constitutional work does not affect the independent role of the CDPP. The *Legal Services Directions* are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly stipulated. The *Legal Services Directions* are not intended to override any legislative requirement or authority concerning an agency's function (in particular, the role of the CDPP).

Despite the exemption of the CDPP from the tied work rules in the *Legal Services Directions*, the CDPP informs AGS of matters which give rise to constitutional law issues to enable the CDPP to take into account any policy views on these issues and to utilise Commonwealth expertise.

2. Role of the Australian Government Solicitor

The Constitutional Litigation Unit at AGS is responsible for the coordination of constitutional litigation involving the Commonwealth or its agencies.

The AGS Constitutional Litigation Unit acts for the Attorney-General, in consultation with the Constitutional Policy Unit at AGD, in handling s78B notices given to the Attorney-General under s78B of the *Judiciary Act 1903* (Cth).

Upon receipt of a s78B notice AGS consults with relevant Commonwealth agencies about whether or not to intervene or whether to apply to remove the cause to the High Court.

3. Consultation between the CDPP and AGS

In a criminal matter involving the CDPP in which a s78B notice is received by the Attorney-General, the usual practice is for AGS to include the CDPP in its consultations.

In those matters involving a s78B notice in which the Attorney-General does not intervene, the usual practice of AGS is to assist the CDPP with the preparation of submissions on the constitutional issues, generally by providing comments on the draft of submissions. The input of AGS can be particularly useful due its expertise in constitutional law.

AGD has advised that when the Attorney-General intervenes, the preferred approach is for AGS to deal with the constitutional law issues and for the CDPP to deal with the criminal law issues. As this may not always be possible or practical, each matter should be approached on a case-by-case basis.

4. Procedure for Dealing with Constitutional Issues in Prosecutions

When it becomes apparent to the CDPP case officer that a prosecution involves a constitutional law issue, either because s78B notices have been issued or because of the nature of the issues being raised, the case officer should inform the Director's Co-ordination Unit (DCU). DCU will assist the case officer in liaising with AGS during the course of the constitutional issues. When there is doubt as to whether a constitutional law issue has arisen the case officer should consult with his or her supervisor.

AGS may also contact CDPP case officers directly to discuss the progress of constitutional issues. AGS will involve DCU in these discussions.

There are different levels of input that AGS may have on constitutional matters involving the CDPP. For example, AGS may provide comments on CDPP submissions. When the Attorney-General decides to intervene in a matter, AGS is responsible for preparing the Attorney-General's submissions and will address the Constitutional issues raised. In this situation the CDPP remains a party and may also address Constitutional issues. AGS and CDPP will consult in relation to the matter. Whatever the level of involvement and input that AGS may have on constitutional matters involving the CDPP, it is important that the CDPP informs AGS of constitutional issues and makes available its submissions for comments in a timely manner. Case officers should provide this information to DCU as soon as possible. DCU will then inform AGS of constitutional issues and assist the case officer in liaising with them on these issues.