

## GUIDANCE NOTE NO 1

*The Office of Legal Services Coordination (OLSC) provides Guidance Notes in order to assist Australian Government Departments and Agencies, and legal services providers (as applicable), to comply with the Legal Services Directions, procure legal services, and deal with legal issues in an efficient and effective manner.*

*OLSC welcomes feedback on this Guidance Note.*

### **The Administrative Appeals Tribunal Act 1975: Obligation to assist the Tribunal**

The obligation on the Commonwealth and its agencies to ‘use its best endeavours to assist the tribunal to make its decision’ is set out at paragraph 4 of Appendix B to the Directions, and forms part of the Model Litigant Obligation.

The obligation in the Directions to assist the tribunal echoes the addition of subsection 33(1AA) to the *Administrative Appeals Tribunal Act 1975* in 2005, which requires Government decision-makers to use their best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

The key point under both section 33(1AA) and the Legal Services Directions is that, rather than seeking to defend their original decision in the Tribunal, agencies need to focus on assisting the Tribunal to arrive at the correct or preferable decision.

#### **What does this mean?**

The ‘duty to assist’ recognises that there may be additional actions agencies can take in Tribunal proceedings to ensure the process runs smoothly and the right outcome is reached – and that agencies have a duty to take these actions.

This recognises the position of the Tribunal in reviewing the decision; that is, it considers the matter afresh ‘in the shoes’ of the original decision maker. This is in contrast to court litigation, which is adversarial and based on the review and defence of decisions.

Assisting the Tribunal to arrive at the correct or preferable decision may involve taking steps such as:

- making information easily available to the Tribunal
- avoiding delays
- presenting new material where relevant, and
- providing specialist evidence when it may assist.

This list is not intended to be exhaustive, but to provide an example of conduct that would fulfil this obligation. The content of the obligation may change in the circumstances of each proceeding.

The courts have also commented that the ‘duty to assist’ the tribunal extends to requiring the Commonwealth to furnish the Tribunal with all available evidence that

is centrally relevant to the matter, even where it is not raised or advanced by the applicant.<sup>1</sup>

### **Further guidance on the duty to assist**

Further guidance on the expected standard of conduct for the Commonwealth and its agencies before courts and tribunals is set out in the remainder of Appendix B to the Directions.<sup>2</sup>

### **Where can I get further information?**

Further information can be accessed through the OLSC website at [www.ag.gov.au/olsc](http://www.ag.gov.au/olsc) and the AAT website at [www.aat.gov.au](http://www.aat.gov.au).

OLSC is always available to discuss any queries or questions you may have regarding the duty to assist, the model litigant obligation or any other aspect of the Directions.

Janette Dines  
Assistant Secretary  
Office of Legal Services Coordination  
Telephone: (02) 6141 3640  
E-mail: [olsc@ag.gov.au](mailto:olsc@ag.gov.au)

First date of issue: 31 March 2005  
Last date of issue: 21 April 2010

---

<sup>1</sup> *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1608.

<sup>2</sup> Note that the obligation to act as a model litigant applies to proceedings before tribunals.