



GUIDANCE NOTE 8 (for reporting period 2018-2019)

Reporting of legal services expenditure (for financial year ending 30 June 2019)

1. This Guidance Note reflects amendments made under the *Legal Services Amendment (Multi-use List) Direction 2018*, and is relevant for the 2018-19 reporting year.
2. The amendments to the *Legal Services Directions 2017* (the Directions), which commenced on 1 July 2018:
 - remove references to the Legal Services Multi-Use List (LSMUL)
 - reflect procurement arrangements until the whole of government panel commences operation, and
 - preserve the current reporting obligations for Commonwealth entities over the transition period (2018-19 reporting).

To whom does the obligation apply?

3. All non-corporate Commonwealth entities and most corporate Commonwealth entities regulated by the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) are required to report on legal services expenditure, to OLSC within 60 days of the end of financial year using the approved template. The obligations is as follows:
 - the accountable authority of a non-corporate Commonwealth entity is responsible for ensuring the entity reports its legal services expenditure to OLSC (subparagraph 11.1(da) of the Directions) and
 - is extended to corporate Commonwealth entities by subparagraph 12.3(f) of the Directions
4. A non-corporate Commonwealth entity must publish its legal services expenditure for the previous year by 30 October each year (subparagraph 11.1 (da) of the Directions. There is no required format for the information to be published. Most entities publish this data in their annual report or on their website
5. The reporting and publishing obligations do not apply to corporate Commonwealth entities which are Government Business Enterprises, *Corporations Act 2001* (Cth) companies controlled by the Commonwealth, or entities that are otherwise exempt from complying with the Directions.

What are entities required to provide for the legal services expenditure report?

6. The legal services expenditure report includes the following information from entities:
 - total internal legal services expenditure
 - total value of disbursements (excluding counsel)

- total value of counsel briefs (broken down by method of brief (direct or indirect), gender,¹ and seniority (junior or senior barristers)²).
 - total value of professional fees paid, broken down by service provider
 - total number of counsel briefed, broken down by method of brief (direct or indirect) gender and seniority, and
 - whether the entity has met the Gender Equitable targets set out in paragraph 4D(d) of Appendix D to the Directions.³
7. The OLSC reporting template will calculate total internal, external and overall expenditure figures from the information the entity provides in the completed template.

How to calculate the information required

Internal legal services expenditure

8. Internal legal services expenditure is the total amount of expenditure within an entity on legal work undertaken by in-house lawyers. Such work can be undertaken either by a dedicated legal unit (for example, the Legal Services Branch in an entity), or by individual lawyers working within business lines.
9. If there is a dedicated legal unit within an entity, OLSC expects that the entire costs of that unit will be included in the entity's internal legal services expenditure. (See below for information about fully costing internal legal services.)
10. If an entity has legally qualified officers engaged in non-legal roles (for example, they are embedded with operational teams), the entity should determine whether the officer is allocated work because of their legal qualifications or skills, or the work is allocated regardless of legal qualifications or skills. If work is allocated due to legal qualifications and skills (or partially so) the cost of that officer (or a pro rata amount) is to be included in the total internal legal services expenditure for the entity.
11. OLSC requires entities to follow the methodology set out in the Australian National Audit Office Better Practice Guide *Legal Services Arrangements in Australian Government Agencies* (the ANAO Guide) of August 2006 in costing internal legal services. In line with the ANAO Guide, the full cost of an internal legal unit must include:
- direct salary costs (administrative staff, paralegals, General Counsel etc). Costs should be calculated by reference to workplace agreements.
 - indirect salary costs (superannuation, leave entitlements, other salary contributions)
 - direct overhead (costs of desks, computer, stationery)
 - indirect overhead (apportioned rent, electricity)
 - legal unit overhead (specialist software licences, cost of law library), and

¹ In accordance with the Australian Government Guidelines on the Recognition of Sex and Gender, entities will report gender data in three categories: 'M', 'F' and 'X'.

² Please note the terms 'junior barristers' and 'senior barristers' have different meanings to 'Junior Counsel' and 'Senior Counsel': see Equitable Briefing section

³ See Equitable Briefing section

- learning and development overhead of officers – including training in legal and non-legal skills.

Direct and indirect overhead

12. Direct overhead costs should be captured within the legal unit cost centre. This should include costs such as:

- organisational services costs, such as office consumables, travel and accommodation costs, postage, courier services, publishing and printing, management overheads, and taxi and car hire charges
- average cost per employee for the provision of corporate IT
- professional development, and
- the average cost per employee workers' compensation premiums (using the actual premium paid by the entity).

13. Indirect overhead records may not be easily accessible within an entity's financial system. However, entities should interrogate their systems, with reference to cost centres and other means of recording/categorising expenditure, to calculate the cost of indirect overheads as accurately as possible. Indirect overheads include:

- property operating expenses including apportioned rent/lease costs, related utility service charges, repairs and maintenance, and building security services, and
- desktop information and communication technology services (operation and maintenance) costs, including desktop computer rental/lease costs (as opposed to purchase costs), standard bulk software user licence costs, standard help desk services, routine maintenance costs, and telecommunications costs.

Legal unit overhead

14. Legal unit overhead costs should be captured within the legal unit cost centre. It is expected that this category will include costs such as:

- staff training and development specific to the legal unit
- developing/maintaining a law library, and any specialist software licences, and
- software/database systems for knowledge and matter management purposes.

Total external legal services expenditure

15. External legal services expenditure is comprised of the total value of briefs to counsel, the total value of disbursements (excluding counsel), and the total value of professional fees paid. The template automatically sums the component figures. Only enter the relevant component value and leave the calculations for the template to complete.⁴

⁴ In situations, where entities have a fixed fee arrangement which covers professional fees and counsel fees, they may find it difficult to disaggregate these expenses for the purposes of reporting. In those cases, OLSC will accept an entity's best estimate of the breakdown between professional fees and counsel.

16. Expenditure data should be reported on an **accruals basis**; that is, reporting on work undertaken during the financial year, rather than work paid during the financial year. Using accruals accounting is consistent with the general Commonwealth financial and accounting frameworks.

Total value of disbursements (excluding counsel)

17. Disbursements are costs incurred for goods and services, that are **not** counsel or professional fees. For example, disbursements could include filing fees, expert witnesses, and administrative fees such as binding and photocopying, travel and accommodation fees where payable.
18. OLSC appreciates there may be difficulties in determining the exact amount of disbursements, depending on how legal services providers invoice and how financial systems capture this information. We ask that details of disbursements be provided where possible, and where it would not require a significant diversion of resources from other tasks. Where appropriate, further details on disbursements can be provided in the commentary section of the template.

Professional fees

19. Professional fees are the fees charged by external legal services providers for their professional services; that is, the work done by the provider lawyers. Only report professional fees, not any counsel fees or disbursements paid to that provider
20. Each external legal service provider's professional fees should be entered separately on the template. The template lists many provider names, including the Australian Government Solicitor (AGS). If a provider is not listed, please add the provider's name and fees incurred in the blank fields provided. Carefully check the name of a provider as a firm may have changed its name or merged.
21. Some entities incur professional fees by engaging external legal services providers overseas. OLSC does not require the name of each overseas legal services provider. Instead provide one consolidated value for these professional fees.

Other professional fees – Government legal service providers

22. Some entities provide billable legal services, such as the Office of Parliamentary Counsel (OPC). Only services billed to entities should be recorded as a professional fee.
23. If an entity has received legal services from another government provider, record the name of this provider and the fees incurred in the additional blank fields provided.

Counsel

24. The definition of Counsel includes barristers at the private bar or legal practitioners (in a jurisdiction like the ACT where the profession is fused) who are briefed as counsel to advise or appear in tribunal or court proceedings. AGS in-house counsel who may not be members of an independent State or Territory bar association are also included.
25. When counting counsel for legal expenditure reporting purposes, the Solicitor-General is not included. Refer to Guidance Note 11 for further information.
26. Where counsel is briefed in an appeal from a first instance judgment, the appeal is counted as a second brief.

Equitable Briefing

27. As of 1 July 2018, the Directions include Commonwealth targets for briefing female barristers. This supports the objectives of the Law Council of Australia's Equitable Briefing Policy (Law Council Policy). The targets are a means of encouraging consideration be given to briefing practices, with a view to increasing female participation at the bar.
28. Paragraph 4D(d) of Appendix D of the Directions requires Commonwealth entities to use all reasonable endeavours to select female barristers with relevant seniority, expertise and experience in the relevant practice area, with a view to increasing briefing rates so that:
 - senior female barristers account for at least 25% of all briefs, or 25% of the value of all brief fees paid to senior barristers; and
 - junior female barristers accounting for at least 30% of all briefs, or 30% of the value of all brief fees paid to junior barristers.
29. To reflect the Government's strong commitment to increasing the briefing rates for female barristers, the Attorney-General has adopted a higher target for senior female barristers than the 20% target in the Law Council Policy. The Government strongly supports the career progression and retention of female barristers for Commonwealth legal work and is seeking to ensure a more equitable, diverse and inclusive legal profession in Australia.
30. The 2018-19 template asks Commonwealth entities to provide information about their gender equitable briefing practices during the 2018-19 financial year. Information on the number and value of briefs to counsel is requested. The template automatically adds the data elements so entities should only enter the components.
31. For the purposes of reporting on gender equitable briefing only, the definitions of senior barrister and junior barrister are as follows:
 - a senior barrister includes:
 - a barrister of 10 or more years standing at the private bar
 - counsel who has 10 or more years' experience in being briefed as a barrister to advise or appear,⁵ or
 - a barrister who is Queen's Counsel or Senior Counsel.
 - a junior barrister means all other barristers or counsel.
32. For the purposes of reporting on gender-equitable briefing in the 2018-19 year when categorising a barrister as having 10 or more years' experience, an agency is not required to determine the date a barrister signed the Bar Roll. Counsel in their tenth anniversary year (called to the bar in 2009) may be recorded as 'senior' whether or not the event occurred before or after 30 June 2019. This is intended to simplify reporting for agencies in this transition year.

⁵ This will include an AGS lawyer/counsel or other counsel (in jurisdictions with a 'fused profession') who may also be briefed to appear or advise as counsel.

33. OLSC notes that some entities have already formally adopted the Law Council Policy. This is open to individual Commonwealth entities. Where an entity adopts the policy, the entity will also have separate reporting obligations to the Law Council of Australia.

Total number of direct briefs to counsel

34. Direct briefing is when an entity briefs a barrister directly, rather than through a law firm.⁶ The template seeks information on direct briefing for male and female counsel.
35. The number of direct briefs is the number of direct briefs to male counsel (separated into junior and senior male barristers) and the number of direct briefs to female counsel (separated into junior and senior female barristers). This data, read together with the value of briefs, provides information about counsel directly engaged by entities.
36. Where counsel is directly briefed on more than one occasion, count the number of briefs. For example, if one counsel is direct-briefed six times, the response is six briefs. A brief to the same counsel in an appeal is to be counted as a new brief.

Total number of indirect briefs to counsel

37. Indirect briefing is when a legal services provider briefs a barrister. The template also seeks information from entities about indirect briefing. It automatically adds the data components. Record the number of indirect briefs to counsel (broken down by gender and seniority). This data, read together with the value of briefs, provides information about counsel indirectly briefed by entities through a law firm.

Total value of direct briefs to counsel

38. This is the total value of all direct briefs the entity incurs for counsel (broken down by gender and seniority).

Total value of indirect briefs to counsel

39. This is the total value of indirect briefs the entity incurs for counsel (broken down by gender and seniority).
40. OLSC appreciates there may be difficulties in this transition year in recording equitable briefing data, depending on how legal services providers invoice or entity financial systems capture this information. If required, further information may be added in the commentary section of the template.

Machinery of Government Changes

41. Entities should report consistently with the Australian Public Service Commission and Department of Finance's reporting requirements for financial statements in the *Implementing Machinery of Government Changes Good Practice Guide*.

In respect of the period for which entities should prepare report legal services expenditure for a function/ activity/program that has been transferred to another entity:

- the transferring entity should report on that function/activity/program up to the date of transfer;

⁶ Note the restriction on in-house lawyers acting as solicitor on the record (paragraph 5 of the Directions).

- the gaining entity should report on the function/activity/program from the date of transfer; and
- entities should include a note to the financial statements explaining the reason for the partial reporting of a function (e.g. transfer of a function as a result of restructuring) and the impact of the restructuring on the entity.

The date of transfers are to be determined by reporting entities

Publication of Legal Services Expenditure Report

42. OLSC publishes an annual report of Commonwealth legal services expenditure on the Attorney General's Department's website.

43. This report is intended to include information about the following:

- total legal services
- total external legal services
- total internal legal services
- professional fees paid to external legal services providers
- total number of counsel briefs,
- total value of counsel briefs, divided by direct/indirect, gender and seniority
- total disbursements, and
- whether entities have met the targets set out in Paragraph 4D(d) of Appendix D of the Directions.

44. Before publication OLSC provides agencies a chance to review their expenditure totals.

Frequently asked questions

General questions		
1.	Does 'legal services expenditure' include briefs for court appearances and legal advice?	Legal services expenditure includes costs related to appearance in litigation, obtaining legal advice, and costs of counsel and disbursement costs, and the costs attributed to in-house lawyers.
2.	Do professional fees include counsel fees and/or other disbursements?	No.
3.	Should I report fees incurred by an entity for external lawyers who are outside Australia?	Yes, refer to the Professional Fee section.
4.	Should an award of costs be deducted from an agencies legal expenditure?	No.
5.	Should an entity report expenditure where another body has paid the legal fees?	No.
Reporting Figures – Counsel		
6.	When counting counsel, is the Solicitor-General included?	No.
7.	Are individual entities able to adopt the Law Council of Australia's Equitable Briefing Policy?	Yes, entities that adopt the Policy will also have separate reporting obligations to the Law Council of Australia.
8.	Are the reporting definitions for counsel the same as those in the Equitable Briefing Policy?	No, see Equitable Briefing section.
Submitting the Report		
9.	In what form should the reports be sent?	The reports must be completed using the OLSC template and submitted to LSER@ag.gov.au .
10.	When is the report due?	The report is due within 60 days after the end of the financial year. This is usually by 29 August, but if 29 August falls on a weekend, the report is due the next business day.
11.	What are the consequences of failing to report to OLSC in time?	A breach of the Directions may be recorded against entities that fail to report 60 days after the end of the financial year.

12.	Can I apply for an extension?	Yes, contact OLSC at LSER@ag.gov.au requesting the extension, detailing reasons for the delay and date the report will be submitted.
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