



Australian Government
Attorney-General's Department

Secretary's Review

of Commonwealth Legal Services

AGD Secretary's Review of Commonwealth Legal Services

Issues Paper One

10 November 2015

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1. About the issues paper

1. The Australian Government has asked the Secretary of the Attorney-General's Department (AGD) to conduct a review of Commonwealth legal services. The review will be completed by 30 June 2016.
2. This is the first issues paper to be published as part of the formal public consultation for the Review. Issues Paper One seeks submissions on overarching issues of relevance to the Review, the role of external legal services providers in the Commonwealth legal services market and options for improving procurement of external legal services. The Review will also release papers on other matters relating to Commonwealth legal services, including:
 - the role and structure of in-house legal practices
 - coordination and alignment of Commonwealth legal services.
3. The Secretary invites Commonwealth entities, private law firms and interested organisations and individuals to make submissions in response to this issues paper.
4. Submissions in response to this issues paper should be emailed to LSReview@ag.gov.au by 11 December 2015. An optional template for submissions is available from the AGD website at <http://www.ag.gov.au/LegalSystem/Secretarys-Review/Pages/Issues-papers.aspx>. Submissions will be treated confidentially and will not be published.

2. Questions raised in the issues paper

Question 1: Do you have any observations about the contextual factors identified in Part 3 of this paper?

Question 2: Are there any other critical contextual factors that should be considered as underpinning the Review?

Question 3: How do Commonwealth entities assess whether particular legal services they obtain represent value for money? In addition to cost, what factors are relevant in making this assessment? Are the considerations the same for the Australian Government Solicitor (AGS) compared to other external providers?

Question 4: Are there particular types of matters on which Commonwealth entities regularly or always obtain services from an external provider (including AGS)? Does the external provider add value that might not otherwise be available? If so, what is that value?

Question 5: For Commonwealth entities, what policies are in place and what factors are taken into account in deciding whether to engage an external provider?

Question 6: Are there factors (aside from any factors relating to the legal services multi-use list (LSMUL) and existing procurement processes) that negatively impact on the ability of external providers to compete in the Commonwealth legal services market?

Question 7: For Commonwealth entities, have you developed long-term partnerships with external providers? If so, what benefits and challenges have emerged in relation to those partnerships?

Question 8: Are there factors that make it difficult for external providers to sustain a Commonwealth practice in particular areas of law or in relation to particular types of services? How might those difficulties be overcome?

Question 9: Is the sustainability of external legal services, including services provided by AGS, an important consideration in ensuring the Commonwealth's ongoing capacity to manage legal risk?

Question 10: What aspects of the LSMUL should be maintained or built on? What improvements to the framework or capability of the LSMUL should be considered?

Question 11: For Commonwealth entities, how does your entity develop and maintain its informed purchaser capability?

Question 12: Has the LSMUL made any difference to Commonwealth entities' capacity to act as an informed purchaser of legal services? How could the LSMUL better support the informed purchaser role?

Question 13: Are there other mechanisms that should be considered to support sharing of information as a means to inform legal services procurement decisions?

Question 14: Should the existing parcelling arrangements be maintained? If so, what improvements could be made?

Question 15: Would a whole-of-government panel be effective for the procurement of Commonwealth legal services? If so, how should panels be appropriately established and administered to ensure efficiency and best provide value for money? What areas of legal work might be best suited to whole-of-government panels?

Question 16: Are there any other models for Commonwealth legal services procurement which the Review should consider to make better use of the Commonwealth's combined purchasing power?

Question 17: How well do the current arrangements for setting counsel fees work? Are there any improvements that should be considered?

3. Context of the Review

5. The critical function of Commonwealth legal services is to support government action and manage Commonwealth legal risk. Informed and comprehensive management of legal risk is an important factor in enabling the Commonwealth and its entities to deliver services and achieve policy and statutory objectives.
6. More broadly, ensuring the Commonwealth administers and complies with its laws in a fair and consistent manner is also critical to upholding the rule of law, particularly where those laws affect individuals' rights and obligations or operate to regulate the behaviour of the Commonwealth or Commonwealth employees.
7. The Commonwealth and its entities must be able to access high quality legal services that meet the diverse needs of the Commonwealth and are delivered efficiently. The Review will consider whether it is desirable to make changes to the delivery of legal services to and by the Commonwealth and its entities.

The government's broader reform agenda

8. The Review is being undertaken in the broader context of the government's:
 - Efficiency through Contestability Programme, which is a whole-of-government reform strategy to improve, via competition, the efficiency and effectiveness of the public sector. The Contestability Programme seeks to assess all current government functions to determine whether particular functions should be open to competition and how that competition should occur. The purpose of the Contestability Programme is to encourage Commonwealth entities to adopt a more commercial mindset and to continually seek ways of improving the performance of existing or proposed government functions. Although the scope of this Review is broader than contestability, it will include consideration of the issues under the Contestability Programme.
 - smaller government agenda, which is directed at achieving sustainable government finances and economic growth, improved government efficiency and improved government service delivery.

- deregulation agenda, which is directed at reducing unnecessary red tape costs on individuals, businesses and community organisations. The Review will proceed on the basis that any regulation of Commonwealth legal services, whether affecting external providers or Commonwealth entities, should not be pursued unless it is clearly proportionate to the risks it seeks to mitigate or the benefits it seeks to provide.

The First Law Officer and the Second Law Officer

9. The Attorney-General was one of the seven original Commonwealth Ministers appointed upon federation on 1 January 1901. The Attorney-General administers a range of legislation and is responsible for 'law and justice', including 'legal services to the Commonwealth'.¹
10. The Attorney-General is also the First Law Officer of the Commonwealth and, in that capacity, has a particular role in managing the Commonwealth's legal risk. The Attorney-General is the chief legal adviser to Government and has overall responsibility for the conduct of legal actions brought by the Government.² In *R v Kidman* (1925) 37 CLR 233, Knox CJ said (at pp 239–240):

... the Attorney-General has full authority to represent the Commonwealth and to act on its behalf in all legal proceedings to which the Commonwealth is a party. By virtue of his office he is the legal adviser of the Crown in right of the Commonwealth and the proper person to conduct or defend legal proceedings on behalf of the Crown in that right.
11. The Attorney-General's function of representing the Commonwealth in legal proceedings is reflected in the *Judiciary Act 1903* (the Judiciary Act), which relevantly states that '[s]uits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him or her in that behalf'.³
12. It flows from the Attorney-General's overall responsibility for the conduct of legal actions involving the Commonwealth that he or she has some oversight of, and the ability to provide input on, such proceedings. To enable this, the Judiciary Act empowers the Attorney-General to issue 'Legal Services Directions' in relation to Commonwealth legal work and enables the Attorney-General to intervene in constitutional matters.⁴
13. The *Legal Services Directions 2005* (LSDs) seek to provide the Attorney-General with visibility of significant legal proceedings involving the Commonwealth and with the ability to ensure that the Commonwealth is taking a consistent and coherent approach to legal issues with whole-of-Commonwealth implications. This helps to ensure that the activities of one Commonwealth entity in a particular matter do not undermine the position taken (or able to be taken) by the Commonwealth or its entities in other matters and, in the case of constitutional law matters,

¹ See, for example, the Administrative Arrangements Order made by the Governor-General on 30 September 2015.

² B C Wright and P E Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012), p 64.

³ Judiciary Act s 61. For completeness, but not directly relevant to the Review, indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General or such other person as the Governor-General appoints in that behalf (s 69(1) of the Judiciary Act).

⁴ Judiciary Act ss 55ZF, 78A.

do not undermine the Commonwealth's future ability to enact legislation and implement policies.⁵ For example, the LSDs require:

- constitutional, Cabinet, national security, public international law and most drafting work undertaken by non-corporate Commonwealth entities to be performed by particular 'tied' providers⁶
- reporting of significant legal issues to the Office of Legal Services Coordination (OLSC) in AGD⁷
- compliance with instructions by the Attorney-General about the handling of claims or the conduct of litigation.⁸

14. The Attorney-General is also supported by the Second Law Officer, the Secretary of AGD and the Australian Government Solicitor.⁹
15. The Solicitor-General is the Second Law Officer of the Commonwealth (see s 5 of the *Law Officers Act 1964*). The Solicitor-General acts as counsel in matters involving the Commonwealth and provides opinions on questions of law to the Attorney-General.
16. Since 1964, when the offices of the Solicitor-General and the permanent head of AGD were separated, the Attorney-General is assisted by both the Solicitor-General in his role advising Government and acting as its counsel, and by the Secretary of AGD administering the Department.¹⁰
17. The scope and effectiveness of mechanisms in support of the Attorney-General's role as First Law Officer will be considered in a subsequent issues paper.

Responsibilities of heads of Commonwealth entities

18. The heads (or accountable authorities) of Commonwealth entities play a critical role in managing the Commonwealth's legal risk. Accountable authorities are responsible for managing their entities in a way that promotes the proper use and management of public resources, the financial sustainability of their entities, and the achievement of the purposes of their entities.¹¹ Further, under s 16 of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act), accountable authorities must establish and maintain an appropriate system of risk oversight and management for their entities. This includes arrangements to manage legal risk.¹²

⁵ Section 55ZH of the Judiciary Act provides that legal professional privilege is not taken to have been waived in respect of communications disclosed as required under the LSDs or for the purpose of providing information to the Attorney-General or a person authorised for that purpose.

⁶ Constitutional law, national security and Cabinet work are tied to AGS and AGD. Public international law work is tied to AGS, AGD and the Department of Foreign Affairs and Trade. Drafting work is tied to the Office of Parliamentary Counsel: see LSDs, s 2, Appendix A.

⁷ LSDs, s 3.

⁸ LSDs, s 4. A future issues paper will invite submissions on the scope, content and administration of the LSDs.

⁹ Since 1 July 2015, the Australian Government Solicitor is a position established by s 55J of the Judiciary Act that is occupied by a person in the Attorney-General's Department.

¹⁰ Second Reading Speech to the Law Officers Bill 1964: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, p 2220.

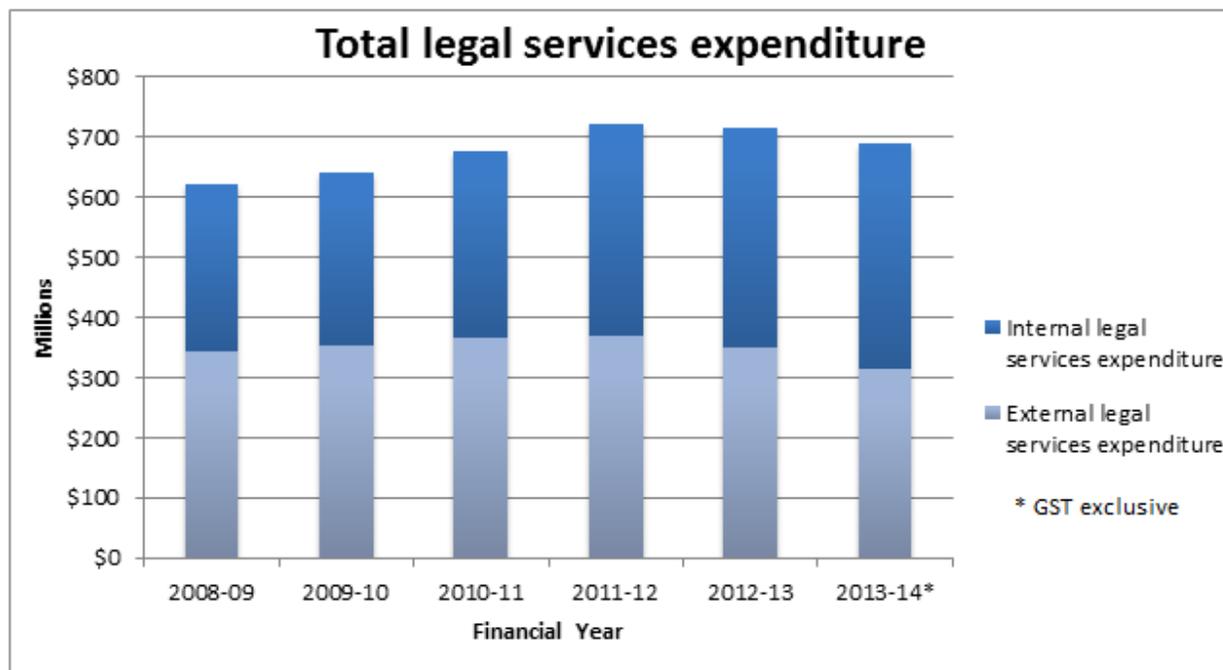
¹¹ *Public Governance, Performance and Accountability Act 2013* s 15.

¹² For example, systems directed at ensuring that entities act lawfully, and that entities can maintain claims for legal professional privilege where appropriate.

19. Commonwealth entities perform a diverse range of functions and their requirements for legal services vary significantly. For example, the core business of entities that perform regulatory functions is to investigate whether Commonwealth laws have been complied with and, in the event of non-compliance, potentially take legal action. The needs of such an entity to provide or obtain legal services are different from the needs of other Commonwealth entities (for example, entities that predominantly perform policy or service delivery functions).
20. Commonwealth entities currently obtain legal services from:
- in-house legal services providers
 - private sector providers (including private law firms and counsel)
 - other Commonwealth office holders and entities that provide legal services (the Solicitor-General, AGS,¹³ the Director of Public Prosecutions, the Office of Parliamentary Counsel, the Office of International Law in AGD, and the Department of Foreign Affairs and Trade).
21. The interaction between accountable authorities' entity-specific responsibilities and the higher level and whole-of-government responsibilities of the First Law Officer will be considered in future issues papers addressing in-house arrangements and collaboration.

Trends in Commonwealth legal services expenditure

22. Commonwealth entities are required to report to OLSG in AGD about their legal services expenditure on an annual basis.
23. The following table demonstrates trends in legal services expenditure since annual reporting was introduced for all Commonwealth entities.



24. External legal services include professional fees paid to private firms, AGS and counsel.

¹³ For practical purposes, many issues that arise for AGS are similar to those that arise for private sector providers. This is because AGS provides contestable legal services.

25. Reported expenditure in 2013-14 is not directly comparable with prior years' expenditure because it was previously reported on a GST inclusive (rather than GST exclusive) basis.¹⁴ However, it is apparent that since 2008-09:
- in-house legal costs have increased
 - the amount of professional fees paid to external legal services providers has decreased.

Value and legal services

26. The Review will closely consider when Commonwealth legal services represent 'value for money'. It is clear that using solely cost-based methods to select providers (for example, providers with the lowest hourly rate) does not necessarily equate to value for money, including for in-house providers. A central message of a 2011 report prepared by Lateral Economics was that legal services are pre-eminently 'experience goods', where the true and full value of the goods is only realised once it is purchased and experienced.¹⁵ Cost is not a sufficient indicator of the value or quality of legal services. For example, there is value in the Commonwealth taking a consistent position on significant matters or matters affecting the Commonwealth as a whole.
27. Fully exploring the value of Commonwealth legal services requires a complex assessment of the benefits, costs and risks of different approaches.¹⁶ There may be circumstances in which there is particular value in the Commonwealth and its entities procuring services from external providers (including AGS) and, equally, particular value in services being performed internally.

Previous reviews

28. The Review will build on substantial work previously undertaken about the provision of legal services to and by the Commonwealth. These are briefly outlined in **Attachment A**.

Question 1: Do you have any observations about the contextual factors for the Review identified in Part 3 of this paper?

Question 2: Are there any other critical contextual factors that should be considered as underpinning the Review?

4. External legal services

29. This part of the issues paper concerns the role of 'external' legal services providers. External providers in this context are providers other than 'in-house' legal services providers and include AGS, private law firms and

¹⁴ On the information currently available, it is not possible to identify the GST exclusive cost of legal services expenditure for the years prior to 2013-14, nor is it possible to identify the GST inclusive cost of legal services expenditure for 2013-14. This is the case for a number of reasons. For example, although most fees for external legal services will include a GST component, this will not always be the case because the provision of some external legal services is GST-free. Further, although the cost of the salaries of in-house lawyers should not include a GST component, other costs (for example overheads) relating to in-house practices may attract GST. Consistently with this, on the information currently available, it is not possible to accurately increase the 2013-14 figures to account for GST.

¹⁵ Nicholas Gruen, Lateral Economics, *Learning from experience: Purchasing legal services. A Lateral Economics study commissioned by the Attorney-General's Department* (9 February 2011), p v.

¹⁶ See question 3 on page 10.

counsel.¹⁷ This paper does not generally examine the role of in-house legal services providers, which will be considered in a subsequent paper. However, there is necessarily some interaction between the role of in-house and external providers.

30. AGS is regarded as an external legal services provider because it provides services to a range of clients (predominantly Commonwealth entities)¹⁸ and, for the vast majority of its work, does so in competition with the private sector. The only work AGS performs that the private sector cannot generally perform is work that is 'tied work' under the LSDs. In the current year, tied work makes up about 10-12% of its total work. The role and scope of tied work will be considered in detail in a subsequent paper.
31. In 2013-14, Commonwealth entities' reported expenditure on external legal services (other than disbursements) comprised approximately 40% of their total reported legal services expenditure. Of this expenditure, approximately:
 - 33% was paid as professional fees to external providers (including AGS but not counsel)
 - 7% was paid to counsel.
32. Approximately 41% of the professional fees paid to external providers other than counsel were paid to AGS.
33. In broad terms, the majority of Commonwealth legal work can be described as contestable, given there is no requirement or expectation that it be performed by agencies themselves or by AGS. This is consistent with the substantial role of the private sector in the Commonwealth legal market. However, the proportion of work undertaken by external providers has decreased since 2008-09.
34. The Review is interested in exploring the reasons for these trends in legal services expenditure and whether they are consistent with the position that Commonwealth legal work is contestable. This includes whether appropriate competition between in-house and external providers is in place to ensure the efficient provision of legal services to and by the Commonwealth and its entities. The Review will also consider the 'value for money' that the Commonwealth receives for those services.
35. Stakeholders have identified a range of sources of value from engaging external legal services, including:
 - providing specialist expertise in a particular area of law
 - having the capability to take on a large or urgent matter at short notice
 - bringing an external perspective, or a 'fresh pair of eyes', to improve assurance, or
 - being unlikely to have a conflict of interest in acting for a client (for example, if the external provider only acts for the Commonwealth in particular types of matters).
36. Preliminary consultation suggests that Commonwealth entities do not have a uniform approach to determining whether services should be performed internally or by an external provider. In some entities, the decision must be made by a central legal area. In other entities, business line areas can decide to procure external services and engage external providers directly.
37. Sustainability of external legal services may also be an issue. For example, it may be difficult for external providers to sustain a Commonwealth practice where the availability or volume of work is variable. Preliminary consultation

¹⁷ Other tied work providers – ie the Office of International Law in AGD, the Department of Foreign Affairs and Trade and the Office of Parliamentary Counsel – are not treated as external legal services providers for present purposes. The role that they perform in relation to tied work will be discussed in a later issues paper.

¹⁸ Judiciary Act s 55N.

suggests that some Commonwealth entities have gained substantial benefit from developing longer-term partnerships with external providers in the interests of investing in, retaining and leveraging key Commonwealth legal knowledge.

38. Some stakeholders suggest external legal services providers who do not undertake what they see as a critical mass of Commonwealth work in particular areas may not seek (or be able) to maintain a practice in those areas or adequately develop junior staff. The issue of development and sustainability may be particularly significant for AGS given that it can only provide services to the persons and bodies specified in s 55N of the Judiciary Act.
39. If external providers are not able to maintain a practice in particular areas of law, or adequately develop staff expertise, this may impair the Commonwealth's ability to manage legal risk. For example, it may mean that the Commonwealth and its entities are not able to access relevant and timely expert services, and this may impact on the Commonwealth's ability to retain key Commonwealth legal knowledge.

Question 3: How do Commonwealth entities assess whether particular legal services they obtain represent value for money? In addition to cost, what factors are relevant in making this assessment? Are the considerations the same for AGS compared to other external providers?

Question 4: Are there particular types of matters on which Commonwealth entities regularly or always obtain services from an external provider (including AGS)? Does the external provider add value that might not otherwise be available? If so, what is that value?

Question 5: For Commonwealth entities, what policies are in place and what factors are taken into account in deciding whether to engage an external provider?

Question 6: Are there factors (aside from any factors relating to the LSMUL and existing procurement processes) that negatively impact on the ability of external providers to compete in the Commonwealth legal services market?

Question 7: For Commonwealth entities, have you developed long-term partnerships with external providers? If so, what benefits and challenges have emerged in relation to those partnerships?

Question 8: Are there factors that make it difficult for external providers to sustain a Commonwealth practice in particular areas of law or in relation to particular types of services? How might those difficulties be overcome?

Question 9: Is the sustainability of external legal services, including services provided by AGS, an important consideration in ensuring the Commonwealth's ongoing capacity to manage legal risk?

5. Procurement of external legal services

40. Purchasing services from external legal services providers creates a 'purchasing event' which requires Commonwealth entities to comply with the PGPA framework. For all non-corporate Commonwealth entities and some corporate Commonwealth entities, this includes a requirement to comply with the *Commonwealth Procurement Rules – July 2014* (CPRs) which are made under the PGPA Act.¹⁹ Achieving value for money is the core rule of the CPRs.²⁰
41. Procuring legal services includes identifying a provider, undergoing a risk assessment, evaluating alternative solutions, awarding a contract, the delivery of and payment for services and the ongoing management of the

¹⁹ The CPRs apply to all non-corporate Commonwealth entities and particular corporate Commonwealth entities prescribed in s 30 of the *Public Governance, Performance and Accountability Rule 2014*.

²⁰ CPRs, para 3.2.

contract.²¹ This part will invite consideration of the current and possible new approaches to procurement of external legal services.

Legal Services Multi-Use List

Operation and objectives of the LSMUL

42. The LSMUL was implemented following the Blunn and Krieger and Lateral Economics reviews.²² It is a whole-of-government multi-use list that Commonwealth entities are required to use when procuring external domestic legal services, except in the case of tied work or where exemptions have been granted. Providers who have been pre-qualified to provide legal services across four broad categories of legal work can be added to the LSMUL at any time.
43. Prior to the introduction of the LSMUL in 2012, each agency was largely responsible for its own legal services procurement, including identifying providers and negotiating fees.
44. The LSMUL was designed to benefit both entities and service providers by reducing their respective administrative burdens and creating more streamlined purchasing arrangements. The LSMUL was intended to:
 - reduce barriers to entry into the market for Commonwealth legal work
 - gather and disseminate information on the performance of service providers in the provision of legal services to agencies
 - support agencies in their ongoing function as informed purchasers of legal services.²³

In early consultation, the Review has heard mixed views on whether the LSMUL has achieved these objectives. In terms of market participation, the proportion of professional fees earned by the top 10 providers remains unchanged since the introduction of the LSMUL, at 89%.²⁴

Issues relating to the LSMUL framework

45. Preliminary discussions with stakeholders have raised a variety of issues relating to both usability of the LSMUL and the LSMUL framework itself. While views vary, issues raised include:²⁵
 - Reporting and regulation responsibilities on entities and providers are disproportionate.
 - Procurement under the LSMUL may become 'transactional', reducing investment in developing relationships with providers.
 - The LSMUL IT system has limited search and compare capability and is not accessible by providers. It does not have the capacity to generate automatic reports for agencies.
 - Agencies do not use the LSMUL consistently, and sometimes overlay additional unnecessary requirements.

²¹ CPRs, para 2.7.

²² Anthony S Blunn AO and Sibylle Krieger, *Report of the Review of Commonwealth Legal Services Procurement* (6 November 2009); Gruen, above n 15.

²³ Attorney-General's Department, *Legal Services Multi-Use List Guidance Material* (May 2012) (LSMUL Guidance Material).

²⁴ Attorney-General's Department, *Commonwealth Legal Expenditure Report 2013-14*, pp 12-13.

²⁵ These views have been identified through preliminary discussions with stakeholders and the Australian National Audit Office (ANAO), *Establishment and Use of Multi-Use Lists Across Agencies* (Report No 54 2013-14).

- The number of providers on the LSMUL (approximately 120) makes it unwieldy to navigate, leading to entities continuing to rely on pre-existing relationships.
- Not all of the requirements for inclusion on the LSMUL are necessary. In particular, the requirement to maintain at least \$10m worth of professional indemnity insurance may be a barrier to inclusion for smaller firms, sole practitioners and critical providers of niche technical skills.
- The exclusion of proportionate liability in the LSMUL Deed places private external legal services providers at a competitive disadvantage. As commercial insurers will not provide cover in respect of the liability assumed when contracting out of proportionate liability, a portion of the potential liability of an external legal services provider is uninsured.

Question 10: What aspects of the LSMUL should be maintained or built on? What improvements to the framework or capability of the LSMUL should be considered?

Informed purchaser capability

46. The role of the informed purchaser is a key factor in the effective and efficient procurement of legal services and the management of service providers and costs.²⁶ As legal services are an ‘experience good’, increased importance is placed on the skills, knowledge and experience of the informed purchaser. Purchasers of legal services must be able to define the needs of the entity, scope the services to be purchased and have a well-informed view of what those services are worth.²⁷ The Lateral Economics report also identified a need for entities to become more informed about each other’s purchasing by sharing lessons learnt to enable better selection of suppliers.²⁸
47. Blunn and Krieger recommended that AGD take a leadership role in providing advice and guidance to assist entities in developing a better understanding of the legal services market.²⁹ AGD, through OLSC, assists with the management of legal services procurement by assessing Applications for Inclusion to the LSMUL, coordinating annual reporting, maintaining the LSMUL IT system, and providing guidance on the LSMUL framework. However, OLSC itself is not a regular purchaser of legal services and does not hold substantial information relevant to making informed purchasing decisions.

Existing mechanisms to share information

48. A central element of the capacity to act as informed purchasers is the sharing of information. Sharing information across the Commonwealth should enhance an entity’s ability to scope the legal services being purchased and access value for money when making purchasing decisions. Current mechanisms are:
- The LSMUL IT system – as identified above, this system contains information about service providers but its functionality is otherwise limited. Blunn and Krieger recommended an IT system similar to the Legal Panel Gateway (LPG) System used to administer the Victorian Government’s Legal Services Panel but that was not considered appropriate as the Victorian system operates as a gateway to all legal procurement, and due to resource issues. However, it was always expected

²⁶ This was recommendation 6 of Blunn and Krieger, above n 22, p 12.

²⁷ Ibid pp 42–43.

²⁸ Gruen, above n 15, p xiii.

²⁹ Blunn and Krieger, above n 22, pp 12, 43.

that the LSMUL would evolve over time and this Review provides an opportunity to continue that process.

- The LSMUL Guidance Material requires agencies to evaluate service providers at the conclusion of each matter, or every six months for ongoing matters, to provide assistance to future purchasers. There is a widely-held view that the evaluation system is ineffective as the information gathered is not helpful and is not considered by entities in subsequent engagement decisions. AGD is considering options to reform the current evaluation requirement to ensure it is not administratively burdensome.

Possible mechanisms to better inform entity purchasing

49. Whilst there are some agencies that clearly have a strong informed purchaser capability, the issues outlined above indicate that there is scope to improve processes in support of an informed purchaser capability. Options canvassed by stakeholders to better inform entity purchasing include periodic surveys (ie annual or biannual), a standing item on the General Counsel Working Group agenda, and utilising an informal network of informed purchasers or communities of practice.

Question 11: For Commonwealth entities, how does your entity develop and maintain its informed purchaser capability?

Question 12: Has the LSMUL made any difference to Commonwealth entities' capacity to act as an informed purchaser of legal services? How could the LSMUL better support the informed purchaser role?

Question 13: Are there other mechanisms that should be considered to support sharing of information as a means to inform legal services procurement decisions?

Parcels, panels and coordinated procurement

The LSMUL does not provide for whole-of-government panels, but includes the ability for entities to 'parcel' certain aspects of their legal work. The LSMUL Guidance Material describes parcelling as follows:

Parcels may range from a specific task or matter, to broader categories of work required over a period of time... Parcelling arrangements would be suitable for those Agencies with high volume routine matters, with a more or less guaranteed level of work or expenditure. Parcelling arrangements may also apply to complex or high volume litigation matters.³⁰

50. Many entities, particularly those with a high volume of matters, have established parcels to streamline the subsequent procurement process. The LSMUL Guidance Material also specifically envisages that parcels could apply to multiple agencies that would 'cluster' together to cooperatively approach the market. Similarly, some agencies 'piggyback' on parcels created by other agencies. The Review will be seeking data about the extent, nature and value of existing clustering and piggy-backing arrangements.
51. Issues raised by stakeholders about parcelling include:
- Lack of transparency – unlike in an open tender for a panel, LSMUL providers are not necessarily provided with an opportunity to be considered for every parcel. Equally, entities may not be aware of existing or proposed parcels that they may be able to participate in. This may lead to duplicate arrangements.

³⁰ LSMUL Guidance Material, paras 11.2–11.3.

- The optimum number of providers on a panel, having regard to the need to negotiate competitive rates, manage conflicts of interest and maintain sustainability of workload.
- The success of piggy-backing arrangements often relies on the goodwill of the lead entity and providers do not necessarily have visibility of which, if any, entities are considering piggy-backing off the arrangement.

52. Recognising the benefits of legal services panels, the Blunn and Krieger and Lateral Economics reviews highlighted the option of whole-of-government panels as the primary source of procurement, supported by a multi-use list for purchases off-panel. It has been suggested that this hybrid approach could support the ability to develop and maintain client relationships, allow for faster and cheaper engagement and maintain the ability to engage other providers 'off panel' as required.

Question 14: Should the existing parcelling arrangements be maintained? If so, what improvements could be made?

Question 15: Would a whole-of-government panel be effective for the procurement of Commonwealth legal services? If so, how should panels be appropriately established and administered to ensure efficiency and best provide value for money? What areas of legal work might be best suited to whole-of-government panels?

Question 16: Are there any other models for Commonwealth legal services procurement which the Review should consider to make better use of the Commonwealth's combined purchasing power?

Counsel fees

53. As a major purchaser of legal services, the Commonwealth is able to negotiate a substantial discount on the usual commercial fees charged by counsel.
54. Commonwealth entities and legal services providers must not, without the approval of the Attorney-General or his delegate, brief counsel at daily rates higher than \$3500 per day for senior counsel and \$2300 per day for junior counsel.³¹ OLSC sets initial rates for counsel, and entities are then able to undertake negotiations and agree rates with counsel directly, up to the thresholds. All negotiated rates must also meet the requirements in the PGPA framework to achieve value for money.
55. OLSC maintains a counsel fee database and also shares a database with AGS.
56. For the most part, Commonwealth entities have indicated that the counsel fee policy operates effectively. However, some have suggested that administration could be simplified, or that OLSC or AGS could undertake a more active assessment of the relative skills and experience of counsel.

Question 17: How well do the current arrangements for setting counsel fees work? Are there any improvements that should be considered?

³¹ In accordance with paragraphs 5 and 6 of Appendix D of the LSDs.

6. References

- Attorney-General's Department, *Commonwealth Legal Expenditure Report 2013-14*. Available at: <http://www.ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/Legal%20ServicesExpenditureReport2013-14.pdf>
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Previous reviews of Commonwealth legal services issues

The two most significant previous reviews of Commonwealth legal services are the 1997 Logan review³² and the 2009 Blunn and Krieger review³³.

The Logan review considered the needs of the Commonwealth for legal services, including the role of the former Attorney-General's Legal Practice. Reforms arising from the Logan review included:

- establishment of AGS as a separate statutory authority
- empowering the Attorney-General to issue LSDs regarding Commonwealth legal work
- formation of OLSC within AGD.

The Blunn and Krieger review examined practices for the procurement of legal services by the Commonwealth and how the Commonwealth could make best use of its in-house legal services. Following the Blunn and Krieger review, AGD implemented the General Counsel Working Group, the Significant Issues Coordinating Committee (now the Significant Legal Issues Committee), the Australian Government Lawyers Network and the LSMUL.

Other reviews that have been undertaken relating to the provision of legal services to and by the Commonwealth include the:

- 2003 review by Sue Tongue into the impact of the *Judiciary Amendment Act 1999*³⁴
- 2005 Australian National Audit Office (ANAO) review into legal services arrangements in the Australian Public Service³⁵
- 2009 Allen Consulting Group organisational audit of the Attorney-General's Department³⁶
- 2011 Lateral Economics review into coordination of arrangements for the purchasing of legal services by Commonwealth agencies³⁷
- 2014 ANAO review into the establishment and use of multi-use lists across agencies.³⁸

In addition, in 2014 the National Commission of Audit recommended that AGS's Office of General Counsel should be consolidated into AGD.³⁹ The Government subsequently decided that the whole of AGS should be consolidated into AGD to strengthen the capacity of the Department to provide legal and legal policy advice to the Commonwealth. AGS was consolidated into AGD on 1 July 2015.

³² Basil Logan, David Wicks QC and Stephen Skehill, *Report on the Review of the Attorney-General's Legal Practice* (March 1997).

³³ Blunn and Krieger, above n 22.

³⁴ Sue Tongue, *Report of a review of the impact of the Judiciary Amendment Act 1999 on the capacity of Government departments and agencies to obtain legal services and on the Office of Legal Services Coordination* (June 2003).

³⁵ Auditor-General, Australian National Audit Office, *Legal Services Arrangements in the Australian Public Service* (Report No 52 2004–05).

³⁶ Roger Beale AO, Allen Consulting Group, *Organisational Audit of the Attorney-General's Department: Final Report* (January 2009).

³⁷ Gruen, above n 15.

³⁸ ANAO, above n 25.

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