Australian Government
Attorney-General's Department

Secretary's Review
of Commonwealth Legal Services

AGD Secretary's Review of Commonwealth Legal Services

Issues Paper Two

February 2016

Contents

1. About the Review

1. The Australian Government has asked the Secretary of the Attorney-General's Department ('*AGD*') to conduct a review of Commonwealth legal services. The terms of reference for the Review are as follows:

> Having regard to the role of the Attorney-General as First Law Officer, the size of Commonwealth legal spend, the diversity of the Commonwealth's legal needs, the Efficiency through Contestability Programme and the need for an efficient and proportionate framework for the sustainable delivery of effective legal services to and by the Commonwealth and its entities, the Review is to examine and report on:
>
> 1. The means for ensuring appropriately coordinated and aligned Commonwealth legal services to identify and manage Commonwealth legal risks, take account of whole of government issues and avoid duplication;
> 2. The efficiency and effectiveness of legal branches of Commonwealth entities, including how in-house legal work is and should be organised and what elements of Commonwealth legal work should be competitively sourced;
> 3. The appropriate mechanisms for the efficient procurement of external legal services by Commonwealth entities, including the Legal Services Multi-Use List;
> 4. The appropriate role and scope of tied legal work;
> 5. Potential improvements to the *Legal Services Directions 2005*;
> 6. Possible savings to be brought forward in the 2016 Mid Year Economic and Fiscal Outlook; and
> 7. Any other relevant matter concerning the delivery, performance or cost of Commonwealth legal work.
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> The Secretary's Review will be completed by 30 June 2016.

2. About the issues paper

2. This is the second and final issues paper to be published as part of the formal public consultation for the Review. It seeks submissions relating to the following terms of reference for the Review:

- the means for ensuring appropriately coordinated and aligned Commonwealth legal services to identify and manage Commonwealth legal risks, take account of whole of government issues and avoid duplication
- the efficiency and effectiveness of legal branches of Commonwealth entities, including how in-house legal work is and should be organised and what elements of Commonwealth legal work should be competitively sourced
- the appropriate role and scope of tied legal work
- potential improvements to the *Legal Services Directions 2005* (the LSDs).

3. The paper follows on from Issues Paper One, which considered 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.

4. The Secretary invites Commonwealth entities, private law firms, and interested organisations and individuals to make submissions in response to this issues paper.

5. Submissions in response to this issues paper should be emailed to LSReview@ag.gov.au. An optional template for submissions is available from the AGD website at https://www.ag.gov.au/LegalSystem/Secretarys-Review/Pages/Issues-papers.aspx. Submissions will be treated confidentially and will not be published.

3. Questions raised in the issues paper

Question 1: What consequences have flowed from the decentralisation of Commonwealth legal services functions?

Question 2: What are your views on the alternative models for Commonwealth legal services identified during consultation (see paragraph 38)? Are there any other alternative models for Commonwealth legal services that should be explored?

Question 3: For Commonwealth entities, is your definition of 'legal' services consistent with the diagram at paragraph 42? Should some 'mixed' or 'other' functions be regarded as 'legal' services? Do you perform additional types of 'mixed' or 'other' functions that are not identified?

Question 4: For Commonwealth entities, does your in-house practice perform 'legal policy' functions and, if so, what are those functions?

Question 5: Do the legal needs of regulatory entities specifically differ from other entities, having regard to their statutory functions? In what way?

Question 6: Are there particular types of matters for which Commonwealth entities regularly or always obtain services from their in-house legal practice? Does the in-house provider add value that might not be available externally? If so, what is that value?

Question 7: What measures should be used to identify the value of in-house legal practices? How do in-house legal practices demonstrate their value to the senior leadership of their entities?

Question 8: How critical is the link between in-house legal practices and their entity's senior management? What possible mechanisms might assist in-house practices to influence critical decision-making within their entity?

Question 9: What is the key supporting 'architecture' that in-house legal practices need to function effectively and efficiently? Do you agree with items identified at paragraph 61?

Question 10: What are the advantages and disadvantages associated with requiring in-house lawyers to (a) time record and/or (b) bill internal clients?

Question 11: For Commonwealth entities, does your in-house practice have systems in place to establish what work should be done in-house and what should be outsourced? For example, does it have a statement of purpose or similar document setting out its role and what work it is structured and supported to do?

Question 12: For Commonwealth entities, how does your in-house practice ensure it is furthering the interests of the Commonwealth as a whole and not just the interests of your specific entity? What mechanisms or guidance might be useful to support a whole of government focus?

Question 13: Would the Commonwealth benefit from providing a better defined career path for government lawyers and, if so, how could this be achieved? Is this something that individual entities should resolve or could something be done to address this on a more centralised basis?

Question 14: Are Commonwealth-wide networks for government lawyers useful in improving the professional ethos and sense of belonging of government lawyers? Are there any ways in which existing networks (the GCWG and AGLN) could be strengthened? Should other initiatives be considered?

Question 15: What core knowledge and skills do government lawyers need? Do you agree with the types of knowledge and skills identified at paragraph 75 and 76?

Question 16: Are there ways in which government lawyers could be better supported to obtain the requisite core knowledge and skills? Should a more centralised program be developed and, if so, how might it be developed and delivered?

Question 17: In what circumstances should government lawyers hold practising certificates?

Question 18: Are the current categories of tied work appropriate? Should they be limited or expanded, for example, to include some whole of government legal issues?

Question 19: Could any steps be taken to help to ensure that tied matters are identified and referred to a tied provider in a timely fashion? How effective are the current arrangements for handling matters that only involve a small proportion of tied work? How could these be improved?

Question 20: Are tied work arrangements where entities have a choice of tied providers consistent with the policy objectives of tied work? If so, are there structures, guidance or a framework that could be developed to ensure a coordinated and consistent approach to tied work?

Question 21: Would it be feasible to tie some categories to government lawyers generally, with a requirement that they be escalated to a specific provider in certain circumstances?

Question 22: Are there barriers to Commonwealth entities reporting significant issues? What could be done to overcome any 'under-reporting' of significant issues?

Question 23: Should any other changes be made to the reporting or handling of significant issues?

Question 24: Is the $25 000 threshold under the LSDs for 'major' monetary claims appropriate? If not, what would an appropriate limit be?

Question 25: Leaving aside the monetary threshold, should any changes be made to the current rules for the handling of monetary claims?

Question 26: Are the current limitations on in-house lawyers of non-corporate Commonwealth entities acting as solicitor on the record or as counsel appropriate? Should any changes be made to the current arrangements?

Question 27: Should any aspects of the LSDs that only apply to non-corporate Commonwealth entities also be applied to corporate Commonwealth entities, to the extent that their enabling legislation permits?

Question 28: Are there other substantive improvements that could be made to the LSDs? Are there aspects of the current LSDs that should be removed or should be expanded upon? Are there additional matters relating to Commonwealth legal work that the LSDs should address?

Question 29: What functions should a central coordination area perform in relation to Commonwealth legal services? Should OLSC take on any additional functions or cease to perform some of its existing functions? For example, should it play a more active role in procurement of legal advice, coordination of training programs or development of collaboration opportunities?

Question 30: What regulatory role should OLSC play in relation to Commonwealth entities' compliance with the LSDs? What consequences, if any, should flow from breaches of the LSDs?

Question 31: Are there barriers that prevent government lawyers from sharing information with each other? What steps could be taken to increase the sharing of information between government lawyers?

Question 32: What mechanisms should be considered to improve sharing of advices about important whole of government issues?

4. Introduction

6. The Review is considering, amongst other things:

- models for the provision of legal services to government
- current in-house arrangements for the provision of Commonwealth legal services, including government legal careers
- the means for ensuring appropriately coordinated and aligned Commonwealth legal services, including the appropriate scope and role of tied work and possible improvements to the LSDs.

7. This paper explores these issues, in turn, below. The paper does not generally examine the role of external legal services providers, which was the subject of Issues Paper One.

8. The Review is being undertaken in the broader context of government reform, including the:

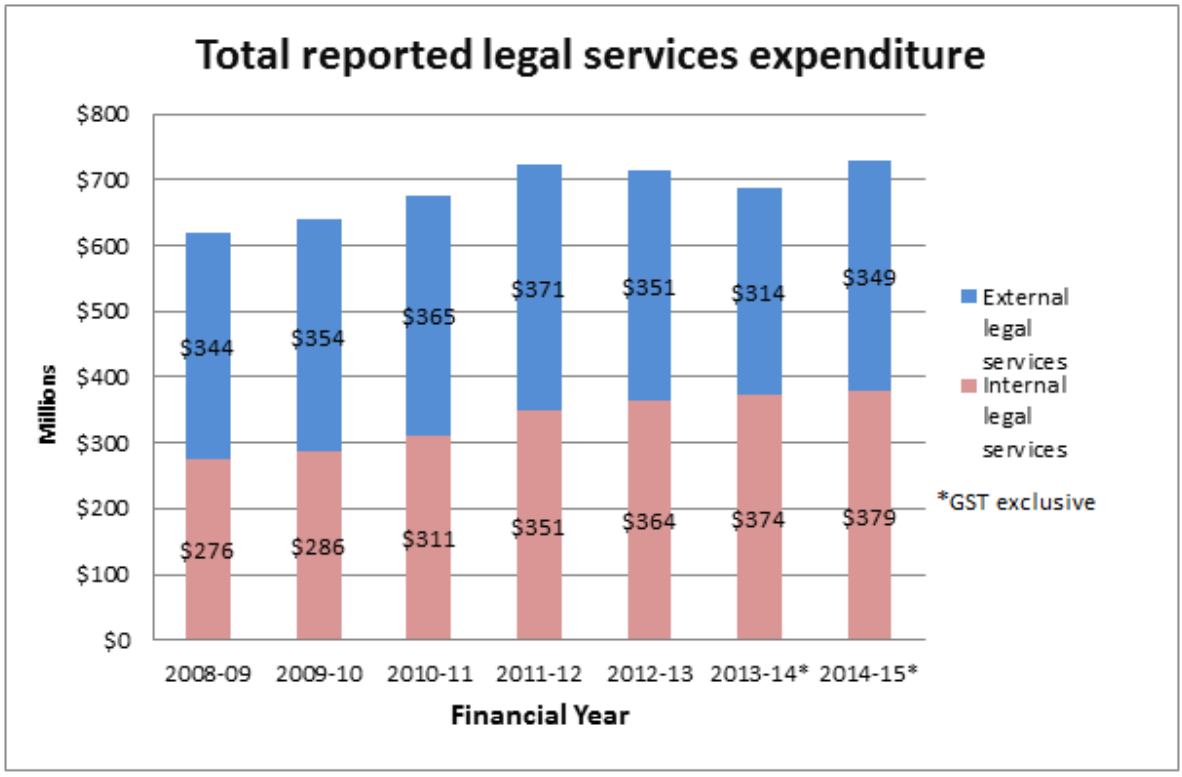
- Efficiency Through Contestability Programme, which is a whole of government strategy that seeks to assess all current government functions to determine whether particular functions would benefit from becoming open to competition and how that competition should occur.
- Smaller government agenda, which 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.

Relevant data

9. The Review has recently conducted a survey of Commonwealth in-house legal practices. Of the total 179 Commonwealth entities and companies, 97 responded to the survey. Initial analysis of the survey responses is drawn on in this paper. More detailed analysis of the results is continuing and will inform the Review's final recommendations.

10. Figure 1 sets out total expenditure information for 2008-09 to 2014-15:[1]

Figure 1 – Total reported legal services expenditure



11. When adjusted for inflation, the total expenditure figures are relatively stable. While internal spending has increased since 2008-09, it has remained steady since 2011-12. There has been some fluctuation and overall a small decline in external legal services expenditure. The figures as adjusted for inflation are set out below.

12. The figures set out below also estimate GST payable in relation to legal services for each financial year,[2] so that the figures are more readily comparable across years. (Prior to 2013-14, legal services expenditure was reported on a GST inclusive basis. From 2013-14 onwards, it has been reported on a GST exclusive basis.) The Review notes that the estimate of GST is indicative only as it cannot be precisely calculated from the information available.[3]

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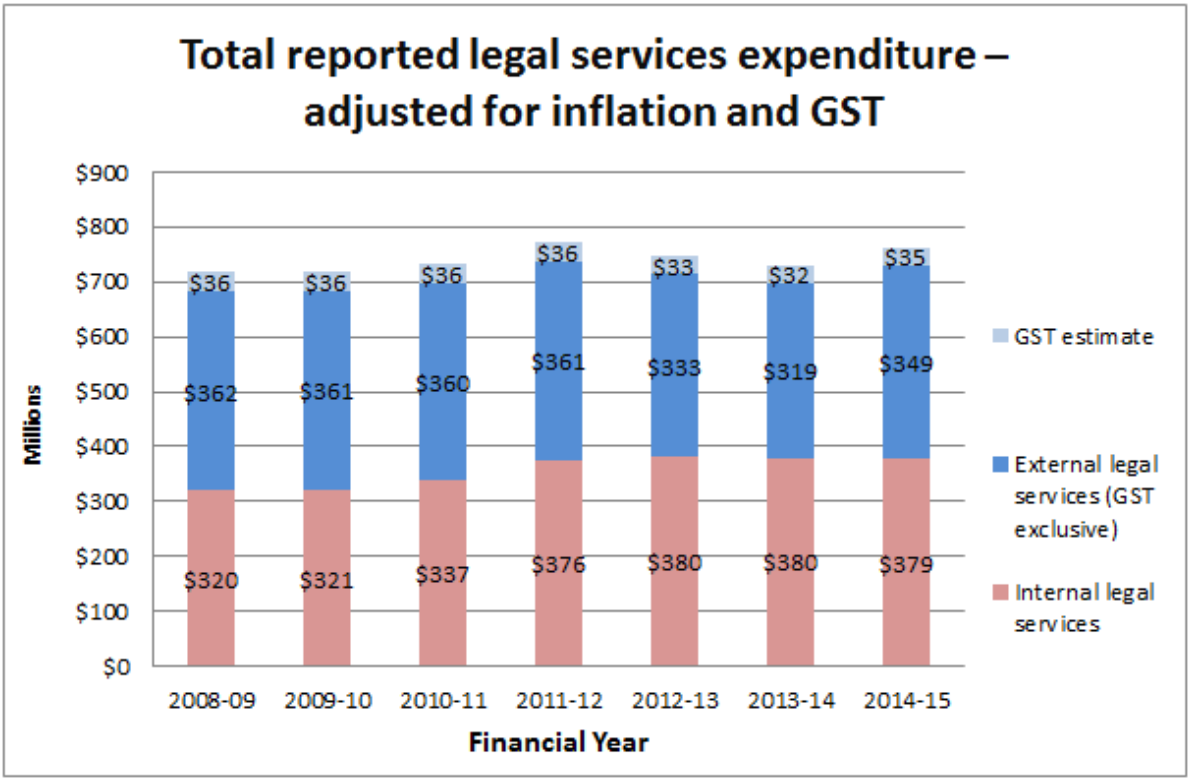
1 Based on data reported to the Office of Legal Services Coordination (OLSC).

2 The GST has been estimated as 10% of external legal services expenditure.

3 More specifically, not all fees for external legal services include a GST component. Further, although GST is not payable for internal salaries, some internal costs (eg overheads) may include a GST component and this is not reflected in the estimate.

Figure 2 – Total reported legal services expenditure adjusted for inflation and GST



5. Models for the provision of legal services to governments

13. The Review is considering whether any modifications should be made to the overall structure of Commonwealth legal services arrangements.

14. As part of this process, the Review has closely examined models for the provision of legal services to government in a range of other jurisdictions (including internationally and in Australian states and territories).

15. It is apparent from this material that there are a variety of models for the provision of legal services to governments. These range from fully (or almost fully) centralised models, 'hybrid' models and decentralised models. Interestingly, Australia is relatively unique because it has moved to a more decentralised model in recent years whereas a number of jurisdictions have moved in the opposite direction, towards a more centralised model. Some examples of the types of models that exist are discussed in further detail below.

16. In general terms, factors that may indicate centralisation in a particular model include whether and to what extent:

- a 'central' provider performs legal services for a large range of government clients (instead of in-house or private sector external providers delivering those services)
- there is a degree of central control over the management of government legal work
- individual government lawyers are connected via a professional or other network
- work is outsourced to the private sector.

Examples of models in other jurisdictions

17. Canada and the United Kingdom (UK) are examples of jurisdictions that have a relatively centralised model for the provision of legal services to government.

18. In Canada, the Department of Justice has primary responsibility for the provision of government legal services and employs almost all government lawyers. The Department of Justice cost recovers from client departments for its legal advice, litigation and legislation services. The only other government providers are the Department of Foreign Affairs, Trade and Development and the Department of Defence's Judge Advocate Office, which provide specialist legal services in relation to international and military law respectively. The Department of Justice outsources very little work to private firms (but does outsource matters relating to foreign law). Procurement of all external legal services is done by the Department of Justice, which has a specialised unit to perform this function.

19. The UK has also moved substantially towards centralisation of the provision of legal services to government. Legal services to the UK government are predominantly provided by the Government Legal Service (GLS), which consists of about 2 000 lawyers.[4] Other government lawyers (outside of the GLS) and private legal practitioners also provide legal services to government. In high level terms:

- The GLS comprises the Government Legal Department (formerly known as the Treasury Solicitor's Department), as well as in-house legal teams in a small number of Departments and other government entities that have not been consolidated into the Government Legal Department.
- The Government Legal Department is the single largest provider of legal services and employs about 1 300 solicitors or barristers.[5] Over the past two years a number of government teams have become part of the Department and, as a result, it has doubled in size. The Department primarily operates on a cost-recovery basis and receives only a small budget allocation. The Department's services include:
  - advisory services to 11 Whitehall departments (the advisory teams are mainly co-located with their departmental clients)[6]
  - most of the government's litigation and employment law services, and
  - commercial services.
- There are also:
  - a number of in-house teams that are not part of the Government Legal Department but are part of the broader GLS, and
  - other government lawyers (eg the Crown Prosecution Service, Parliamentary Counsel and Scottish and Northern Ireland legal teams) who do not form part of the GLS but can participate in GLS networks and groups.
- The GLS regularly uses the services of counsel (generally chosen from panels maintained by the Attorney-General) and also has a framework in place for the procurement of legal services from private firms. Work is generally outsourced to private firms where the necessary expertise does

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4 Government Legal Service, *Guide to the Government Legal Service (GLS) Organisations* (1 April 2015), available at: https://www.gov.uk/guidance/guide-to-the-government-legal-service-gls-organisations.

5 Government Legal Department, *About us*, available at: https://www.gov.uk/government/organisations/government-legal-department/about.

6 Government Legal Service, above n 4.

not exist in the GLS and there is no long-term value in growing it, the GLS does not have the resources to do the work without undue delay, or it is more cost-effective for the work to be done in the private sector. 'Core government work'[7] cannot be outsourced unless approved by the Attorney-General.[8]

20. New Zealand's legal services model is an example of a 'hybrid' model. Even though it has a large number of in-house practices, it also has a central Crown Law Office and an overarching 'Government Legal Network' for government lawyers. More specifically, in New Zealand:

- The Crown Law Office is led by the Solicitor-General. The office provides advice and acts in 'core' legal matters.[9] It also has oversight of public prosecutions.
- 31 out of 33 departments have in-house practices. In-house lawyers can provide 'core' and 'non-core' legal services.[10]
- 'Non-core' work can also be procured from external providers, including barristers.[11]
- There is a Government Legal Network (GLN) for government lawyers. The network is run by a small team in the Crown Law Office. The network has responsibility for talent management initiatives, professional development, and summer clerk and graduate programs. It also administers 'GLN online', which is a virtual platform for GLN members containing a directory of government lawyers, access to the latest opinions and articles, and the network's schedule of seminars, events and professional development opportunities.[12]

21. Finally, Belgium is an example of a country that has a relatively decentralised model for the provision of government legal services. In Belgium:

- There is no central provider of legal services and there is no overarching network of government lawyers.
- Each Ministry contains its own separate legal service which provides specialised advice for that particular Ministry.
- Ministries engage private firms as necessary. There are no rules about what types of work must be done internally. This is a matter for each Ministry to manage.

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7 Core government work is defined as including, but not restricted to, the following: work with national security or other specially sensitive implications; work relating to major policy or constitutional issues; government to government and other international non-commercial work; work affecting the long-term interests of more than one department (eg claims of public interest immunity); and work where Cabinet Office coordination is necessary. See Crown Commercial Service, *Legal Services Framework (RM919:) Client Guidance Document* (25 February 2013) Crown Commercial Service, paragraph 3.2, available at: http://ccs-agreements.cabinetoffice.gov.uk/contracts/rm919.

8 Ibid paragraph 2.2.5 of Annex 3.

9 Core legal matters are defined as any of the following: legal advice to the Crown, through a minister or government department relating to protection of Crown revenue; enforcement of the criminal law; Constitutional powers or duties of the Crown including the *Treaty of Waitangi 1840*, New Zealand's international obligations and the New Zealand *Bill of Rights Act 1990*; powers or duties conferred on the Law Officers of New Zealand; and the lawfulness of actual or proposed exercise of public power, duty or function; as well as legal representation in any litigation where the Crown is a party either through a Minister or government department; representation in any other forum where the substance of the dispute is as described above; and representation in inquests or coronial inquiries relating to deaths in Crown custody. See Cabinet Office Circular 'Cabinet Directions for the Conduct of Crown Legal Business 2012' (21 December 2012) CO (12) 8, paragraph 9, available at: http://www.dpmc.govt.nz/cabinet/circulars/co12/8.

10 Information provided by the New Zealand Crown Law Office.

11 Ibid.

12 See also Government Legal Network (2014), available at: http://gln.govt.nz/.

22. The legal services markets in Canada, the UK, New Zealand and Belgium demonstrate the spectrum of models that exist in other jurisdictions. However, the general trend in other jurisdictions has been to move towards a centralised model, with a mid-range to large central provider and limited reliance on the private sector.

The current Australian model

23. Although Australia's model for the provision of government legal services is not fully decentralised, it has become increasingly decentralised since the late 1990s. Some legal services are still performed by central providers (discussed below). However, there has been a significant growth of Commonwealth in-house practices since the reforms implemented following the 1997 Logan review. 72% of entities responding to the Review's survey had in-house legal practices, including 24.7% with practices of over 20 lawyers.[13] Growth in some in-house practices has been the result of conscious, strategic decisions by entity heads, while others may have evolved more organically. As discussed later in this paper, the growth may also reflect some in-house practices taking on functions that may not be strictly 'legal' in nature.

24. The Commonwealth legal services market includes a number of 'central' providers which perform legal services for a large range of government clients. Some legal services work is 'tied' to those central providers while a subset of providers also perform work on a competitive basis. 'Central' Commonwealth providers are currently the Solicitor-General, Australian Government Solicitor (AGS), the Office of Parliamentary Counsel (OPC), the Office of International Law (OIL), and the Department of Foreign Affairs and Trade (DFAT). Not all of these providers charge for the provision of legal services.[14]

25. Central providers currently do far less work than was the case historically, prior to the establishment of AGS as a separate government business enterprise (GBE) in 1999. In particular, the 1997 Logan review calculated the Commonwealth legal market to be in the order of $198 million for the 1995-96 financial year[15] and, of that amount:

- the Attorney-General's Legal Practice in AGD[16] had approximately 47% of total market share
- in-house lawyers had approximately 33% of market share
- private law firms had approximately 10% of market share
- private counsel had approximately 10% of market share.[17]

26. That is, in the 1995-96 financial year, a central Commonwealth provider (the Attorney-General's Legal Practice) had approximately 47% of total market share. Approximately 53% of legal services were provided on a decentralised basis by a combination of in-house lawyers, private law firms and

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13 The Review is anecdotally aware of a trend toward larger in-house practices in the private sector and is seeking further data on this trend and meeting with private sector in-house providers to explore the extent and reasons for any shift in the private sector.

14 The Solicitor-General and the DPP do not charge for the provision of services. OIL and DFAT sometimes charge fees for public international law work or obtain funding from line agencies for international litigation work. However, they do not charge for the majority of their work. In addition, OPC charges fees for certain publishing functions and non-tied drafting work.

15 Basil Logan, David Wicks QC and Stephen Skehill, Attorney-General's Department, *Report of the Review of the Attorney-General's Legal Practice* (March 1997) [4.27] (Logan review). The total figure does not include the Solicitor-General or legislative drafting work undertaken by OPC.

16 The Attorney-General's Legal Practice was a unit within AGD. Most of the legal service elements of the Attorney-General's Legal Practice became part of AGS when it was established as a separate GBE in 1999.

17 Logan review, above n 15, [4.26]-[4.27].

private counsel.[18] The figures in the Logan review were extrapolated from survey data as there was no regular legal expenditure reporting at the time.

27. By contrast, based on data reported to the Office of Legal Services Coordination (OLSC), in 2014-15:

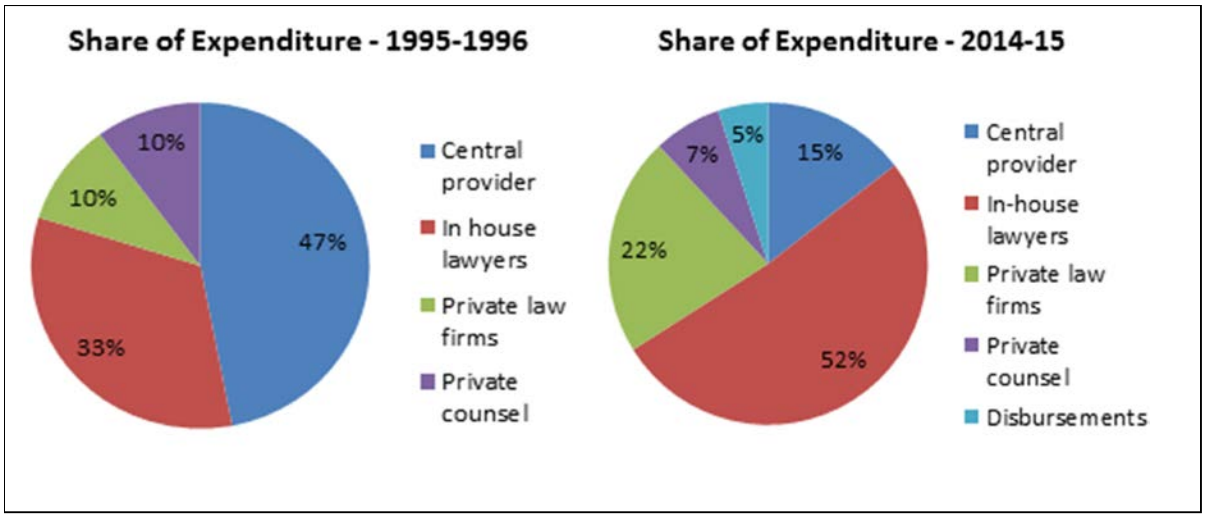
- professional fees[19] paid to AGS comprised approximately 14% of market share
- estimated professional fees and budget funding of other central government legal services providers[20] comprised less than 1% of market share[21]
- expenditure on in-house legal services was approximately 52% of market share
- professional fees paid to private law firms comprised approximately 22% of market share
- fees paid to counsel comprised approximately 7% of market share.

Disbursements accounted for the remaining 5% of total expenditure.[22]

28. Consistently with this, approximately 15% of total Commonwealth legal services expenditure comprised fees paid to central providers.[23] The vast majority (approximately 81%) of total expenditure comprised in-house practices and fees paid to decentralised providers (private law firms and counsel). Research indicates that Australia relies more heavily on the private sector than other comparable jurisdictions.

29. The proportion of market share held by central providers in 1997 compared to 2014-15 is demonstrated by Figure 3 below.

Figure 3 – Commonwealth legal services market in 1997 compared to 2014-15



18 Logan review, above n 15, [4.26-4.27].

19 Professional fees paid to providers do not include disbursements.

20 Tied drafting work performed by OPC is not included for consistency with the Logan review figures and because it is not reported to OLSC.

21 Market share is an estimate calculated from reported fees paid by Commonwealth entities to tied providers and estimated costs for services provided free of charge by tied providers.

22 There are no comparable figures on disbursements in the Logan review. Discrepancies in the sum of these percentages are due to rounding.

23 This only includes services provided by central providers. It does not, for example, include shared services models whereby an entity purchases services from another entity within its portfolio (survey results indicate these arrangements are rare).

30. It is also relevant to note that although AGS received approximately 14% of total reported expenditure in 2014-15, it operates on a commercial basis in competition with in-house practices and the private sector (other than for 'tied work', which is discussed in detail later in this paper). As such, its role is not directly comparable with central providers in some of the jurisdictions with more centralised models.

Consequences of a decentralised model

31. The recommendations contained in the 1997 Logan review were intended to increase the degree of competition in the Commonwealth legal services market. Particular benefits have flown from increased competition. For example, a number of stakeholders commented that, following its establishment as a separate GBE in 1999, AGS's client services improved substantially, including by being more responsive and providing advice in a timely manner. Further, it has resulted in in-house practices developing specialist expertise and performing an important role as trusted advisor to their entities.

32. Having said that, it is not clear the authors of the Logan review intended that the legal services market should become fragmented to the extent that it has, or that there should be such a significant growth in in-house practices. In particular, given their view that '[i]n-house legal service providers should not enjoy net competitive advantages over their private sector and other public sector competitors simply by virtue of public sector ownership',[24] it is not clear that they would have anticipated the increased reliance on in-house legal practices.

33. Overall, the approach that the Commonwealth took in response to the Logan review does not appear to have resulted in any cost savings for the Commonwealth. Based on the information contained in that report, overall expenditure appears to have grown at more than double the rate of inflation between 1997 and 2015. Although there may be some contextual reasons for this growth in expenditure (eg the greater volume of legislation and the greater accountability placed on agency heads),[25] the move to a more decentralised model has clearly coincided with increasing legal services costs for the Commonwealth.

34. Further, decentralisation has been criticised as weakening the ability of the First Law Officer (the Attorney-General) and the Second Law Officer (the Solicitor-General) of the Commonwealth to effectively monitor the provision of legal services across government.[26] As discussed in further detail later in this paper, coordination and collaboration of Commonwealth legal services supports the Attorney-General and the Solicitor-General to fulfil their respective roles. It has been suggested in the course of consultation that decentralisation may have:

- reduced the emphasis that government lawyers place on the potential whole of government implications arising from legal issues
- reduced the number of government lawyers with key corporate Commonwealth legal knowledge in areas of law involving important whole of government issues
- resulted in duplication (eg where multiple Commonwealth entities provide or procure the same or similar legal advice)

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24 Logan review, above n 15, [12.40].

25 Additional reasons are suggested in Anthony S Blunn AO and Sibylle Krieger, Attorney-General's Department, *Report of the Review of Commonwealth Legal Services Procurement* (2009) 6 ('*Blunn and Krieger review*').

26 Gabrielle Appleby, 'The Challenges of Providing Legal Services to Government' in Gabrielle Appleby, Patrick Keyzer, and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014), 155; see also Blunn and Krieger review, above n 25, 10.

- increased the risk of the Commonwealth taking inconsistent positions on legal issues, which can expose the Commonwealth and its entities to legal, financial and reputational risks
- reduced the extent to which government lawyers share information because in-house practices may operate in silos and may not regularly interact with each other
- reduced the 'economies of scale' that exist when a central provider has a critical mass of work in particular areas and is able to perform that work in an efficient manner.

35. Further:

- Because in-house practices in Commonwealth entities have evolved independently of each other and of any central control over their structure and functions, the 'architecture' supporting in-house practices (ie their systems, policies and processes) may vary significantly and may not have the benefit of broader experience. The importance of the supporting architecture of in-house practices is discussed in further detail later in this paper.
- Decentralisation may have also affected government legal careers. For example, as discussed in further detail later in this paper, there is no consistent approach across Commonwealth entities to the training and development of government lawyers.

36. On the other hand, as noted above, decentralisation has resulted in some clear improvements (eg AGS client service). Proponents of a decentralised model also argue that:

- it is appropriate for individual accountable authorities of Commonwealth entities to determine how to manage their entities' risks and financial resources
- in-house practices have particular specialist expertise and a close knowledge of their entity and its business that it can be difficult for external providers to obtain (see the discussion below about the value and influence of in-house lawyers)
- the current arrangements are, for the most part, seen as generally effective in managing legal risk – ie the system is not 'broken'.

Question 1: What consequences have flowed from the decentralisation of Commonwealth legal services functions?

Possible alternative approaches

37. As noted above, the Review is an opportunity to consider whether modifications should be made to the overall structure of the Commonwealth legal services market to foster best practice into the future. Stakeholders have raised a number of potential alternative models during consultation. For example:

- A model whereby in-house government lawyers remain employees of their respective entities but are also part of an overarching professional service of government lawyers (including AGS lawyers). The professional network would have a key role in supporting and linking government lawyers - eg by facilitating the sharing of information between government lawyers and coordinating their professional development. This might be combined with an expectation that General Counsels in Departments of State would take a leadership and coordination role for legal services across their portfolio unless inappropriate in the specific circumstances.

- A shared services model, whereby Commonwealth entities with large in-house practices provide services to other entities within their portfolio. This may be a way of ensuring that the legal needs of entities with small in-house practices are met more efficiently and sustainably.[27]
- A model whereby all or most government lawyers work for a central provider (even though they may be physically co-located with their client agency).
- A model whereby all General Counsels in Commonwealth entities (or in a subset of critical entities such as portfolio departments) are employed by a central provider such as AGS. Under this model, General Counsels could either be seconded to an entity by the central provider, or the people filling the General Counsel position in Commonwealth entities would become employees of the central provider.
- A model whereby AGS is treated as an internal rather than external service provider for government, noting that it is no longer a GBE. Under this model, for example, its fees would be set on a cost recovery rather than 'for profit' basis and its lawyers would be seen as part of broader government legal networks.

38. The Review seeks submissions on whether any of these options should be considered or if there are any other alternative models that should be explored.

39. Of course, many of the issues raised about the Commonwealth's current legal services model may be able to be addressed in ways that do not fundamentally alter the nature of the current model. This paper discusses (and seeks submissions) on other ways that these issues might be addressed in further detail below.

Question 2: What are your views on the alternative models for Commonwealth legal services identified during consultation (see paragraph 38)? Are there any other alternative models for Commonwealth legal services that should be explored?

6. In-house Commonwealth legal services

Functions of in-house practices

40. In-house legal practices undertake a broad range of functions to manage the Commonwealth's legal risk and support the delivery of services and the implementation of government policy. The diversity of the responsibilities of Commonwealth entities is reflected by the varied functions of government lawyers.

41. Some of the functions performed by in-house practices clearly involve the provision of 'legal' services. However, some other functions may not necessarily need to be performed by people with legal qualifications. In particular:

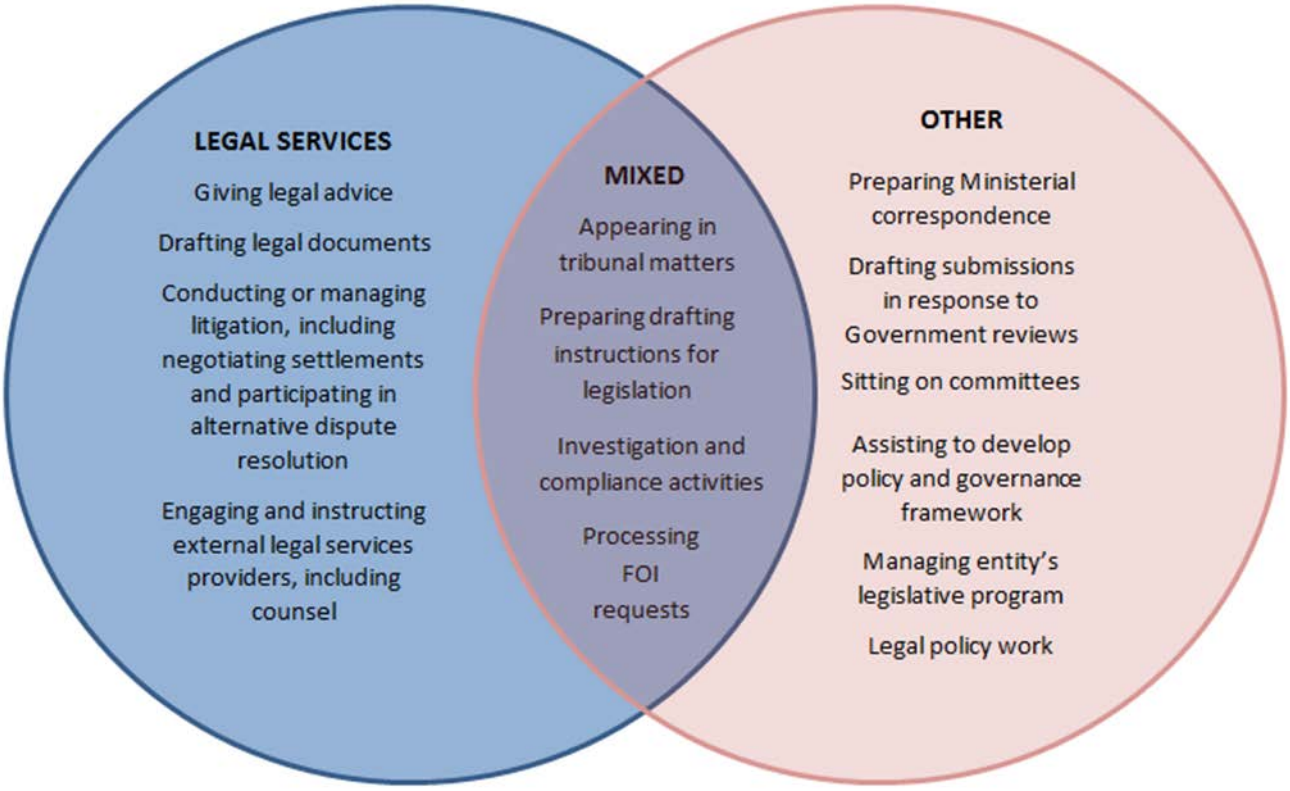
- To the extent that some entities require certain functions which are not exclusively legal (eg appearing in tribunal matters) to be performed by people with legal qualifications, those functions may be properly characterised as 'legal' services.

[27] The survey results indicate that a small number of entities have a partial shared services model for the provision of legal services. For example, one entity reported providing ad hoc legal services to entities in its portfolio where the entities had a shared interest in the outcome of a matter. Another entity said it had a legislative obligation to provide assistance or legal advice to another entity on reasonable request.

- Some other types of functions, including some performed by in-house practices (eg developing policy documents and sitting on committees), are unlikely to ever involve the provision of 'legal' services regardless of whether the people who perform them have legal qualifications.

42. The diagram below attempts to demonstrate the general spectrum of legal services and other functions that might be performed by in-house practices.[28] It does not capture all types of functions performed by in-house practices. Those functions that do not necessarily need to be performed by people with legal qualifications but may be regarded as 'legal' services are described as 'mixed' functions in Figure 4.[29]

Figure 4 – Functions performed by in-house legal practices



43. During consultation, stakeholders emphasised that regulatory entities may have unique functions and legal needs. The core business of such entities is to investigate whether Commonwealth laws have been complied with and, in the event of non-compliance, potentially take administrative or legal action. The role of legal services in those entities is generally different from that of legal services in other Commonwealth entities (for example, entities that predominantly perform policy or service delivery functions).

44. Further, during consultation a number of in-house practices indicated that they perform 'legal policy' functions (it was also acknowledged that external service providers are sometimes engaged to assist with legal policy functions). However, it is not clear that there is a common understanding of what

[28] Figure 4 notes that conducting or managing litigation is a function performed by in-house practices. Under the LSDs, a non-corporate Commonwealth entity may only use an in-house lawyer to conduct litigation as solicitor on the record or as counsel if they have received prior approval from the Attorney-General.

[29] To the extent that in-house practices perform 'other' functions (ie that are not 'legal' or 'mixed' functions), expenditure for this purpose should not be included in their legal services expenditure reporting to OLSC. However, it is not clear whether entities take a consistent approach in this regard.

'legal policy' functions are. Examples may include developing policy proposals to amend legislation and providing policy advice to government on the impact of legal developments.

45. It was also noted that there can be a tendency for non-lawyers in Commonwealth entities to seek legal 'signoff' for a range of activities that may not strictly need legal input. Some stakeholders have suggested that this may reflect an approach to risk management that has had the effect of disempowering public servants from making decisions. This particularly arises when officers are allowed or required to have matters that previously would have been for decision by an experienced policy or operational officer to be 'signed off by legal'. For example, if entities have appropriate grant agreement templates, their legal areas should not have to provide legal signoff for routine grant agreements that do not depart from the template. In other words, the existence of in-house practices can have the effect that particular routine activities or decisions are 'over-legalised' or encourage business areas to attempt to shift risk to their in-house legal practice.

46. It is possible that some of the growth in reported internal legal services expenditure in recent years relates to an expansion of the functions being performed by in-house practices.

47. The types of functions described above are broadly consistent with the findings of a survey of corporate and government lawyers conducted by the Law Society of New South Wales in 2012. The majority of survey respondents who were government lawyers worked for the State Government, although 1 in 10 respondents worked for a Commonwealth agency. Respondents to the Law Society survey who were government lawyers most commonly identified legal advice (71%), litigation (43%), legal policy and/or drafting (42%), managing legal services and/or a legal team (28%) and prosecution or enforcement (27%) as a main component of their role.[30]

48. In their 2009 review, Blunn and Krieger took the phrase 'legal services' to mean 'professional services used by agencies to determine their legal position on issues, to manage legal processes, to advise on managing legal risk or achieving results lawfully, or to document contractual or other legal obligations'. They did not understand it to mean 'resources used on the development or implementation of policy proposals, including legal policy, or drafting, except to the extent that professional legal services as outlined above are utilised in those processes'.[31]

Question 3: For Commonwealth entities, is your definition of 'legal' services consistent with the diagram at paragraph 42? Should some 'mixed' or 'other' functions be regarded as 'legal' services? Do you perform additional types of 'mixed' or 'other' functions that are not identified?

Question 4: For Commonwealth entities, does your in-house practice perform 'legal policy' functions and, if so, what are those functions?

Question 5: Do the legal needs of regulatory entities specifically differ from other entities, having regard to their statutory functions? In what way?

Value and influence of in-house practices

49. As discussed in Issues Paper One, 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

[30] Law Society of New South Wales, *Inside in-house legal teams – Report on a survey of corporate and government lawyers* (2013), 9. These percentages add up to more than 100% because some lawyers identified more than one type of work as a main component of their role.

[31] *Blunn and Krieger review*, above n 25, 15.

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.[32]

Special value of in-house counsel

50. It is commonly suggested that there is a particular value associated with in-house practices. Consultation to date indicates that in-house lawyers play an important role as trusted advisors and often have particular subject matter expertise on legislation and policies administered by their entity. In-house lawyers are also expected to have a thorough understanding of the processes and functional structure of their entity. Their position within an entity makes them accessible to business areas, including at short notice. It also enables them to be proactive in their approach to providing legal advice and influencing decision-making within their entity, and to provide timely and practical advice and training across the organisation. These factors can assist to reduce the risk of legal issues escalating.

Question 6: Are there particular types of matters for which Commonwealth entities regularly or always obtain services from their in-house legal practice? Does the in-house provider add value that might not be available externally? If so, what is that value?

Measuring value

51. Further, consultation indicates that there is a widely held view that internal legal services are cheaper than external legal services. A number of in-house practices have taken steps to analyse their own costs compared to those of external providers. Estimates of in-house costs from these exercises have ranged between one-fifth to two-thirds of the cost of external services. However, the Review currently has limited information about the basis for comparison, including:

- types of overhead costs taken into account in making these calculations - relevant overheads include specialist legal information resources, IT systems and professional development
- the extent to which the basis for calculations is consistent between agencies as to what should be included, and
- the extent to which the work undertaken by in-house practices (which some have suggested tends to be more routine or repeatable work) is directly comparable to that undertaken externally (which often includes complex advice or heavily contested litigation.

52. For in-house practices to operate on a truly contestable basis, Commonwealth entities need to have conscious, deliberate processes by which they measure the value of internal legal services compared to the value of services that they obtain externally. To this point, the Review has been unable to identify clear or comparable data to quantify the monetary and non-monetary value of in-house practices and legal services (both internal and external).

53. Currently, the only Commonwealth-wide measurement of the work done by in-house practices is the dollar cost of internal legal services, which is reported in the Commonwealth's annual legal services expenditure reports.[33]

54. These simple quantitative measures are insufficient to identify the value of in-house teams. Similarly, numerous studies and surveys on the effectiveness of both government and private in-

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

[33] Attorney-General's Department, *Commonwealth legal services expenditure* (21 February 2014), available at: https://www.ag.gov.au/Publications/Pages/CommonwealthLegalServicesExpenditure.aspx.

house teams have concluded that more sophisticated measures are required to meaningfully measure and demonstrate value.[34] For example, the following types of measures may assist to demonstrate the value of in-house teams:

- legal costs as a percentage of annual budget/turnover/budget per matter
- legal costs per lawyer/full-time equivalent employee/matter
- ratio of budgeted matters handled within budget
- time recording
- internal costs per lawyer (ie all of the costs - eg salary, overhead and administrative costs - associated with employing an additional lawyer)
- customer satisfaction/staff engagement/culture surveys
- staff performance management systems
- output planning and reporting
- regular end of transaction assessments (eg client surveys) with a focus on gathering qualitative data.

55. The Review seeks submissions about what measures entities use to identify and quantify the monetary and non-monetary value of their in-house practices, and whether those might be relevant to other Commonwealth entities. The Review will also seek to work with a small group of interested agencies to do a detailed examination of different methods for identifying value.

Question 7: What measures should be used to identify the value of in-house legal practices? How do in-house legal practices demonstrate their value to the senior leadership of their entities?

Influence

56. The value of an in-house practice, as well as its ability to demonstrate that value, may also be reflected in the degree of influence that the legal practice has in its entity. Blunn and Krieger concluded that in-house lawyers should be closely integrated into the strategic decision-making body of the organisation.[35] Similarly, many stakeholders have suggested that highly effective in-house practices are well-respected by their entity's senior management, have close working relationships with business areas in their entity and are able to influence decision-making within their entity. However, in some instances there may be differences between the way in-house practices view themselves and their place in the organisation and how they are viewed by senior management.[36]

57. The Review survey results indicate that in the majority of Commonwealth entities the most senior lawyer reports directly to (and has regular contact with) either the head or deputy head of the entity. In the majority of entities, the most senior lawyer is also a member of the executive board

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[34] See Bruce Goldberg, and James C Partridge, *Association of Corporate Counsel value challenge: It's more than Price* (2012), available at: http://m.acc.com/legalresources/resource.cfm?show=1319463;
Nabarro, *From in-house lawyer to business counsel* (2010), available at: http://www.nabarro.com/downloads/From-in-house-lawyer-to-business-counsel.pdf;
Australian Corporate Lawyers Association and Corporate Lawyers Association of New Zealand, *Legal Department Benchmarking Report* (2008), 12.

[35] Blunn and Krieger review, above n 25, 48.

[36] Nabarro, above n 34, 6.

and/or participates in a number of senior committees that influence decision-making within the entity.

Question 8: How critical is the link between in-house legal practices and their entity's senior management? What possible mechanisms might assist in-house practices to influence critical decision-making within their entity?

Architecture of in-house practices

58. The architecture supporting an in-house practice (eg its systems, policies and processes) influences its ability to operate effectively and efficiently. The Review will seek to identify elements of legal practice architecture that may be indicative of good practice and relevant to most Commonwealth entities, while noting their diverse needs.

59. Blunn and Krieger emphasised that it was important for in-house practices to have:

- a well-defined mission or purpose within the organisation which gives the practice a focus
- clarity around what is to be done in-house and what is to be outsourced, including by having systems for decision-making about what is to be done in-house supported by rigorous analysis of the internal skill base and the areas where in-house lawyers can best add value
- strong informed purchaser skills to ensure that the organisation can scope and price services which it purchases in the commercial market and does not become captive to external service providers.[37]

60. The Review seeks to identify what processes and systems in-house practices have in place to establish what work is to be done in-house and what is to be outsourced. In the survey, 58% of respondents said they had written internal policies on procuring external legal services. The reasons for seeking external legal advice varied considerably, but the most common reason for seeking external legal advice was a lack of expertise to respond to a matter in house. A significant proportion of respondents also identified risk mitigation as a consideration for outsourcing legal services. In consultation, a subset of in-house practices advised they have a mission statement or some other clear statement of their role and what work they will perform. Several other in-house practices indicated their role is best described as doing as much of their entity's legal work as possible within resources (other than litigation).

61. Additionally, some stakeholders identified one or more of the following supporting architecture as being important for maintaining an efficient legal practice:

- case and matter management and record keeping systems
- a database containing previous advice (both internal and external) to assist to retain corporate knowledge and prevent duplication of advice
- measures of individual and team performance (eg time recording, time/cost benchmarks and internal client surveys)
- policies setting out professional standards for government lawyers, such as requirements for dealing with clients (eg acknowledging requests for advice within a particular time period), dealing with potential conflicts of interest and complying with the LSDs
- appropriate training and professional development for lawyers (which is discussed in further detail later in this paper)

[37] Blunn and Krieger review, above n 25, 47-48.

- quality assurance mechanisms such as second counselling
- a clear mission statement setting out the role and purpose of the legal practice.

62. Some entities consulted indicated that they require their lawyers to time record as part of measuring the in-house team's workload and performance. However, it is uncommon for Commonwealth in-house practices to bill their internal clients. Only one survey respondent has full cost recovery billing arrangements in place. In the vast majority of cases, in-house practices are allocated funding from their entity's budget. Some in-house practices that are allocated budget funding also receive funding from business areas in particular circumstances (eg because they bill for particular matters or require business areas to make funding contributions for major projects).

63. Consultation to date has indicated that there is not a consistent approach to the supervision of junior lawyers or the second counselling of advice across Commonwealth entities. For example, some entities require legal advice or significant correspondence to be cleared by an SES employee. Other entities allow second counselling to be performed at the EL1 or EL2 level.

Question 9: What is the key supporting 'architecture' that in-house legal practices need to function effectively and efficiently? Do you agree with items identified at paragraph 61?

Question 10: What are the advantages and disadvantages associated with requiring in-house lawyers to (a) time record and/or (b) bill internal clients?

Question 11: For Commonwealth entities, does your in-house practice have systems in place to establish what work should be done in-house and what should be outsourced? For example, does it have a statement of purpose or similar document setting out its role and what work it is structured and supported to do?

Government legal careers

64. Role clarity and a clear purpose are recognised as being fundamentally important to maximise the value and effectiveness of in-house legal practices.[38]

65. In Review focus groups with Commonwealth in-house lawyers, most indicated that they identify most strongly as legal professionals but also identify as public servants. However, the 2009 Blunn and Krieger review found that the lack of a clear role and purpose for in-house lawyers in some agencies had hampered the development of a 'professional ethos' or, in other words, 'a recognition on the part of in-house lawyers that, in addition to being employees of an agency and owing the agency loyalty, they are also professionals…with…obligations to be objective and independent, and to recognise obligations to uphold the rule of law and the interests of the Commonwealth as a whole'.[39] Some commentators have gone further and suggested that government lawyers feel pressure to act in the interests of their entities and not in the interests of the government as a whole.[40]

66. During the government lawyer focus groups, participants were asked whether they identified their client as the relevant business area of their entity, their entity head, their Minister and/or the Commonwealth. Approximately 40% of the participants chose all of the available options. Selections

38 See eg Nabarro, above n 34 and Blunn and Krieger review, above n25, 48.

39 Blunn and Krieger review, above n 25, 44.

40 Appleby, above n 26, 161.

made by the other participants, from most to least common, were the relevant business area, their entity head, the Commonwealth and, finally, their Minister.

67. A number of in-house legal practices have taken conscious steps following Blunn and Krieger to better support the objectivity and independence of their lawyers. However, these steps have primarily had an entity-specific focus, rather than a whole of government focus. If government lawyers had a clear purpose and strong awareness of their whole of government role and obligations, this may assist to manage Commonwealth legal risk and support the Attorney-General to fulfil his or her role as First Law Officer.

68. Steps have been taken in recent years to strengthen the 'professional ethos' of government lawyers. For example, the:

- General Counsel Working Group ('*GCWG*'), which is a representative group of 14 senior legal services practice leaders from across the Commonwealth, was established in 2010 to consider strategic issues facing the Commonwealth legal services market
- Australian Government Legal Network ('*AGLN*') was established in 2013 to support the professional development of government lawyers, including by creating a support network for government lawyers and improving the attractiveness of government legal practice. It was established in response to Blunn and Krieger's recommendation that there should be a Commonwealth-wide network that provided a platform for information and experience sharing, and also gave government lawyers a sense of belonging to a professional network extending across the Commonwealth as a whole.[41] AGS lawyers are not currently members of the AGLN, which limits its whole-of-government reach.

69. Some stakeholders regard the establishment of the GCWG and AGLN as positive steps, but not yet fully effective, in creating a coherent professional identity for government lawyers. However, it is not clear that the original objectives of the AGLN, as described in the 2009 Blunn and Krieger report, have been fully realised. There may be ways that existing networks could be better structured to strengthen the professional ethos and sense of belonging of government lawyers. There may also be other vehicles by which this could be done – eg by Commonwealth-wide mentoring programs.[42]

Professional development

70. During consultation, many stakeholders said that there is not currently a well-defined career path for government lawyers. It was also suggested in focus groups with government lawyers that it can be difficult for lawyers to move between Commonwealth entities in order to broaden their expertise and build a fulfilling legal career. There is no consistent approach to professional development or practising certificates across Commonwealth entities.

71. Currently, it is up to each Commonwealth entity to identify and fulfil their lawyers' training and development needs. Some entities have developed their own specific training programs. Of the survey respondents with in-house legal units, 44% said they had a structured development program for in-house lawyers. Some of those programs appear to be quite sophisticated. For example, one entity has partnered with tertiary education providers to provide training, and its employees obtain tertiary qualifications on successful completion of the training. A number of entities tailor and run their own internal training programs and also encourage their lawyers to attend external training.

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41 Blunn and Krieger review, above n 25, 49-50.

42 In 2014 and 2015, the AGLN has run a mentoring program for network members, which has reached about 70 participants including mentors and mentees.

72. External training most commonly involves law firms offering free professional development opportunities as a value add for entities purchasing legal services through the LSMUL or parcels. Many government lawyers have indicated that their entities have little or no capacity to provide formal professional development other than those external offerings, which also serve as client relationship development events for firms. While generally perceived as worthwhile, the reliance on availability of those seminars may leave a skills gap where critical core skills are not offered and are not capable of being provided by individual entities.

73. During consultation, a number of government lawyers indicated that they would welcome a more coordinated approach to training and professionalisation across Commonwealth entities. If it was possible to reduce the duplication of effort (ie the effort involved in creating and delivering training and development programs) across Commonwealth entities, a more coordinated approach could result in efficiencies and savings.

74. The AGLN is currently considering options for shared legal training for government lawyers. It circulated a survey to the heads of approximately 40 Commonwealth in-house legal practices, the results of which supported the introduction of an inter-agency shared legal training program. Following the survey, the AGLN endorsed the development and delivery of a continuing legal education program for government lawyers that:

- is organised around a basic competency framework that reflects central areas of law for government lawyers
- leverages existing seminar-based training by using tools to share activities across agencies.

75. The AGLN's survey results also supported a conclusion that the areas in which government lawyers need to be competent are generally consistent across agencies, with some additional areas of specialisation. The AGLN identified a range of areas of law as potential 'core competencies' for government lawyers.[43] These include:

- professional duties of government lawyers
- the framework for government legal work[44]
- constitutional law
- the Commonwealth financial framework, grants, procurements and Commonwealth contracts
- administrative law and good decision-making
- information and disclosure law
- the Australian public service
- developing and working with legislation
- advice writing for government clients
- governance and risk management in the Commonwealth public sector.

76. Core skills identified by AGS as part of its training program for junior lawyers include many of the same competencies as identified by AGLN as well as some others such as alternative dispute resolution essentials, federal jurisdiction, privilege, immunities and confidentiality, and conflicts of

43 These 'core competencies' are similar to the subject matters covered in AGS's course entitled 'essentials for the government lawyer'.

44 This includes the role of the Attorney-General as First Law Officer, LSDs, Legal Profession Acts, government lawyers as informed purchasers and client management and the trusted advisor.

interest. AGS also runs a National Practice Orientation for new lawyers which covers, among other topics, advice writing, plain language and the AGS National Practice Standards.

Practising certificates

77. A large number of Commonwealth bodies require at least some of their lawyers to hold practising certificates. Of the survey respondents, 80% of entities with in-house lawyers required some or all of their legal staff to hold practising certificates. A small number of entities only require lawyers who are Senior Executive Service employees to hold practising certificates, while 53% of respondents with in-house lawyers required all staff to hold them.

78. Whether government lawyers hold practising certificates can be a relevant factor in determining whether their communications attract legal professional privilege (LPP). For communications from a government lawyer to attract LPP, the lawyer must (amongst other things) be able to act with independence or, in other words, be professionally detached from the subject matter of the advice. If lawyers hold practising certificates this may assist to establish that they operate with the requisite degree of independence for their communications to attract privilege. However, it is not a precondition to a claim for LPP that an in-house government lawyer must hold a practising certificate.[45]

79. The survey results indicate that LPP is a key reason why a large proportion of entities require some or all of their staff to hold practising certificates. Other responses included that holding practising certificates:

- ensures that government lawyers are required to complete ongoing professional development and maintain professional standards
- assists to distinguish between those legally qualified employees who provide legal services and those who do not
- builds credibility with clients and creates a sense of collegiality with the broader legal profession
- enables the supervision of employees undertaking practical legal experience for admission as a legal practitioner.

80. During consultation, stakeholders noted that the professional development activities lawyers are required to undertake to maintain practising certificates are not generally geared towards government lawyers. Further, it was noted that it would be costly for Commonwealth entities to fund all government lawyers to have practising certificates.

Question 12: For Commonwealth entities, how does your in-house practice ensure it is furthering the interests of the Commonwealth as a whole and not just the interests of your specific entity? What mechanisms or guidance might be useful to support a whole of government focus?

Question 13: Would the Commonwealth benefit from providing a better defined career path for government lawyers and, if so, how could this be achieved? Is this something that individual entities should resolve or could something be done to address this on a more centralised basis?

[45] *Commonwealth v Vance* (2005) 158 ACTR 47, [30]. Some Australian states require their state government lawyers to hold practising certificates – see the *Legal Profession Uniform Law Application Act 2014* (NSW) and the *Legal Profession Uniform Law Application Act 2014* (Vic). Further, AGS lawyers and Attorney-General's lawyers are entitled to practise (in that capacity) as barristers and/or solicitors in any court and in any state or territory, and have all the rights and privileges of so practising, whether or not they hold a practising certificate (see sections 55Q and 55E of the *Judiciary Act 1903*).

Question 14: Are Commonwealth-wide networks for government lawyers useful in improving the professional ethos and sense of belonging of government lawyers? Are there any ways in which existing networks (the GCWG and AGLN) could be strengthened? Should other initiatives be considered?

Question 15: What core knowledge and skills do government lawyers need? Do you agree with the types of knowledge and skills identified at paragraph 75 and 76?

Question 16: Are there ways in which government lawyers could be better supported to obtain the requisite core knowledge and skills? Should a more centralised program be developed and, if so, how might it be developed and delivered?

Question 17: In what circumstances should government lawyers hold practising certificates?

7. Coordination and collaboration on Commonwealth legal services

Why is coordination and collaboration important?

81. As the First Law Officer of the Commonwealth, the Attorney-General has oversight of legal issues affecting the Commonwealth (with support from the Solicitor-General, the Secretary of AGD and the Australian Government Solicitor).[46]

82. Issues Paper One briefly discussed the roles of the Attorney-General and Solicitor-General as the First and Second Law Officers. In high level terms, the Attorney-General is the chief legal adviser to government, has overall responsibility for the conduct of legal actions involving the Commonwealth and is responsible for legal services to the Commonwealth. The Solicitor-General supports the Attorney-General by acting as counsel in matters involving the Commonwealth and providing opinions of law to the Attorney-General.[47] The Attorney-General is also supported by the Secretary of AGD in relation to the administration of the Department and the Australian Government Solicitor in relation to the provision of legal services to government.

83. Oversight and coordination of legal issues affecting the Commonwealth is important for a number of reasons. Key reasons include:

- Coordination and collaboration supports the Attorney-General and the Solicitor-General to fulfil their respective roles as First Law Officer and Second Law Officer of the Commonwealth.
- There are a total of 179 Commonwealth entities and companies, which perform a diverse range of functions. In the absence of appropriate coordination and collaboration mechanisms, these bodies could be:
  - taking divergent or inconsistent approaches about legal issues, which could expose the Commonwealth and its bodies to legal, financial and reputational risks and, in the case of constitutional law matters, undermine the Commonwealth's future ability to enact legislation and implement policies

[46] Since 1 July 2015, the Australian Government Solicitor is a position established by section 55J of the *Judiciary Act 1903* that is occupied by a person in the Attorney-General's Department.

[47] See generally the *Law Officers Act 1964*.

  - duplicating effort and cost in providing or procuring legal services on similar issues.

- Even where entities have statutory independence, their enabling legislation and powers may be similar to those of some other entities. Therefore, inconsistent exercise or interpretation of powers by agencies can lead to significant risk for the Commonwealth as a whole.
- Ensuring that the Commonwealth and Commonwealth bodies administer and comply with its laws in a fair and consistent manner is critical to upholding the rule of law, particularly where those laws affect individuals' rights and obligations.
- A collaborative approach can encourage the sharing of best practice and allow government lawyers to learn from the experience of other government lawyers.

Current coordination and collaboration mechanisms

84. The *Legal Services Directions 2005* are the main mechanism currently in place to enable the Attorney-General to maintain oversight of actions involving the Commonwealth and fulfil his role as First Law Officer. Most relevantly to the coordination of Commonwealth legal services, the LSDs:

- stipulate that particular areas of work are 'tied' to particular providers (paragraph 2 and Appendix A) and those providers are called 'tied providers'
- impose reporting requirements on non-corporate Commonwealth entities for significant issues (paragraph 3)
- specify things that non-corporate Commonwealth entities must do in the conduct of litigation (eg comply with instructions from the Attorney-General, comply with model litigant obligations, and act in accordance with legal principle and practice) (paragraph 4)
- require that Commonwealth entities handle monetary claims by and against the Commonwealth or a Commonwealth entity in accordance with particular rules (paragraph4.4 and Appendix C)
- specify the circumstances in which a non-corporate Commonwealth entity may use an in-house lawyer to appear as solicitor on the record or counsel in court litigation (paragraph 5)
- set out procedures for the sharing of advice (including constitutional advice) within government (paragraphs 10 and 10A).

85. The LSDs are administered by the OLSC in AGD.

Is there scope to improve upon existing coordination and collaboration mechanisms?

86. The Review is considering whether there are ways that existing mechanisms in support of the First and Second Law Officers of the Commonwealth could be improved. The overall model for Commonwealth legal services, which is explored in detail earlier in this paper, will of course affect what mechanisms are needed. However, improving existing mechanisms in support of the First and Second Law Officers could also potentially involve changes to:

- the text and interpretation of the LSDs
- the role of OLSC
- facilitate a greater degree of collaboration and sharing of information between government lawyers.

87. Potential improvements that might be made in these areas are discussed in further detail below. The Review also invites submissions on any other matters that might assist to improve coordination and collaboration on Commonwealth legal services.

Potential changes to the Legal Services Directions 2005

88. During consultation, stakeholders raised a number of issues relating to the LSDs. The most common issues that were raised related to tied work, significant issues reporting, the handling of monetary claims and the capacity of in-house lawyers to appear as solicitor on the record.[48] The paper discusses each of these issues, in turn, below.

Tied work

89. As discussed above, Australia has moved to an increasingly decentralised model for the provision of legal services to the Commonwealth in recent years. However, the LSDs continue to require certain categories of Commonwealth legal work to be performed by particular tied providers.

90. Tied work is an exception to the general rule that entities are free to manage their own legal services and to decide when to seek these services externally. The Explanatory Statement to the LSDs explains that the rules about the conduct of tied work:

- are intended to 'ensure that the Commonwealth minimises the risk that portfolio-specific approaches to questions of public international law or constitutional law (for instance) will impair the Commonwealth advancing and maintaining a consistent and clear position on such matters'
- recognise that certain kinds of work 'have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision'.

91. Having an identified tied provider (or providers) also assists to ensure that people providing legal services in areas of critical importance to government have:

- relevant expertise
- key corporate knowledge about legal positions previously taken by the Commonwealth
- a whole of government perspective.

92. The current categories of 'tied work' are constitutional, Cabinet,[49] national security, public international law and most drafting work (to the extent that these types of work are undertaken for a non-corporate Commonwealth entity).[50] Tied work can generally only be performed by tied government providers which (depending on the type of work) are AGS, AGD, DFAT and/or OPC. However, the Attorney-General has power to give (conditional or non-conditional) approval for a legal services provider other than a tied provider to undertake tied work.[51]

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48 The legal services procurement arrangements established under the LSDs were considered in Issues Paper One.

49 Cabinet work includes legal advice to be considered by Cabinet or relied on in preparing material for consideration by Cabinet, as well as legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament.

50 The tied work rules do not apply to corporate Commonwealth entities.

51 Paragraph 3B of Appendix A to the LSDs. The Attorney-General has delegated this power to people occupying particular positions within AGD (including a number of positions within OLSC).

93. Tied work may also reduce the extent to which there is duplication of work between Commonwealth entities and/or legal services providers. Tied providers should be able to draw on previous experience and opinions rather than starting from scratch each time they receive a request for advice.

94. While tied work represents some of the most critical Commonwealth legal work, it remains a relatively small proportion of legal work undertaken. For example, tied work generally constitutes around 10-15% of AGS's work in any given year.

95. The approach of requiring core government legal work to be performed by a central provider is common in other Australian jurisdictions. For example, in New South Wales 'core legal work' is required to be referred to the Crown Solicitor's Office.[52] In Victoria, the Victorian Government Solicitor's Office performs a range of exclusive services.[53] In Queensland, 'tied work' must be performed by Crown Law (a self-funded business unit in the Department of Justice and Attorney-General). Categories of tied work in Queensland are relatively extensive and include matters involving judicial officers, matters involving indemnities for public officers, native title claims, legal advice and representation in relation to child welfare and a broad range of litigation.[54]

96. Core government legal work is also performed centrally in many overseas jurisdictions, either because the relevant jurisdiction has a centralised model for the provision of legal services to government or 'ties' some work to a particular provider.

97. During the course of consultation, stakeholders generally agreed that there are areas of critical or core government legal work that should be tied to particular central providers. Some stakeholders thought that the current tied work categories should be expanded. For example, some stakeholders suggested that the scope of tied work should be expanded to include legal services for whole of government legal issues, such as:

- matters relating to machinery of government changes
- the development of whole of government agreements
- advice on agreements between the Commonwealth, States and/or Territories
- parliamentary matters
- public interest immunities
- matters involving disputes between Commonwealth entities
- matters relating to the conduct of the Commonwealth and its officers
- matters involving the interpretation of laws imposing substantial obligations on Commonwealth entities and/or Commonwealth officials, such as the *Freedom of Information Act 1982*, the *Public Governance, Performance and Accountability Act 2013*, the *Public Service Act 1999*, the

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52 NSW Department of Justice, *Core Legal Work* (13 January 2015) available at: http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/core-legal-work.aspx.

53 Department of Justice and Regulation (VIC), *Victorian Government Solicitor's Office Exclusive Services* (21 March 2015), available at: http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/regulation+of+legal+services/victorian+government+solicitors+office+exclusive+services.

54 Department of Justice and Attorney-General (QLD), *Tied Work Guidelines* (19 December 2014), Legal Services Coordination Unit, available at: http://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/tied-work-guidelines.

Public Interest Disclosure Act 2013, the *Privacy Act 1988,* the *Ombudsman Act 1976* and the *Work Health and Safety Act 2011.*

98. It was also suggested that the extent to which work relating to the development of legislation and legislative instruments (ie Cabinet work) is tied should be clarified.

99. It has been suggested that it may be possible to tie particular areas of whole of government work to government lawyers generally - ie not just to one or more specific central providers. If this approach was pursued there would need to be mechanisms in place to ensure all in-house practices had the capacity to undertake that work and identify if an issue of whole-of-government significance arose. Further, government lawyers could be required to escalate complex issues to a single central provider in particular circumstances.

100. In considering these proposals, it is necessary to weigh up the benefits of tying particular core government legal work to particular providers against the benefits of contestability and competition more generally.

101. On the current arrangements for tied work, the lateness with which tied matters are sometimes identified by agencies (including those that only do so after the issue is raised by OLSC) suggests that:

- some entities either lack the requisite skills or are reluctant to identify at an early stage whether matters involve tied issues
- there is some ambiguity about the scope of the various categories of tied work (eg it has been suggested that it is not always clear when a matter involves a national security issue).

The result is that not all tied matters are identified and referred to a tied provider in a timely fashion. This can mean it is difficult for the tied provider to become familiar with the matter and perform the work within relevant timeframes. Costs may also be wasted by agencies as previous tied work done by the agency may need to be redone by the tied provider.

102. Some stakeholders also suggested that there is a need for greater flexibility in the handling of matters that only involve a small proportion of tied work. They suggested that it is not always appropriate for an entire matter to simply be handed over to a tied provider when a tied issue arises, particularly if a private firm has already invested a significant amount of time working on the matter.

103. Stakeholders also suggested that issues can arise where there is more than one provider that can perform particular types of tied work. For example, there are three alternative providers for public international law work and these entities do not have a consistent approach to charging clients (AGS is the only provider that always charges for public international law work). In this context, it may not be immediately apparent to entities which provider they should seek international law services from, and nor is it clear that advice given by the alternative providers will always be consistent. An entity may decide to obtain services from a provider based on its policy on fees, instead of making an assessment of which provider is best suited to provide the relevant services.

Question 18: Are the current categories of tied work appropriate? Should they be limited or expanded, for example, to include some whole of government legal issues?

Question 19: Could any steps be taken to help to ensure that tied matters are identified and referred to a tied provider in a timely fashion? How effective are the current arrangements for handling matters that only involve a small proportion of tied work? How could these be improved?

Question 20: Are tied work arrangements where entities have a choice of tied providers consistent with the policy objectives of tied work? If so, are there structures, guidance or a framework that could be developed to ensure a coordinated and consistent approach to tied work?

Question 21: Would it be feasible to tie some categories to government lawyers generally, with a requirement that they be escalated to a specific provider in certain circumstances?

Significant issues reporting

104. Paragraph 3.1 of the LSDs requires non-corporate Commonwealth entities to report (as soon as possible) to the Attorney-General or OLSC on 'significant issues' that arise in the provision of legal services, especially in handling claims and conducting litigation. 'Significant issues' include matters where:

- the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues
- a dispute or disagreement exists between the Commonwealth and a Commonwealth agency or between different Commonwealth agencies (other than matters arising under legislation which contemplates that the Commonwealth or Commonwealth agencies may be on different sides in a case)
- a significant level of coordination between different Commonwealth agencies is required
- a significant precedent for the Commonwealth or other Commonwealth agencies could be established, either on a point of law or because of its potential significance for the Commonwealth or other Commonwealth agencies, or
- a dispute exists with an agency of a State or Territory government.

105. Some significant issues are escalated to a Significant Litigation Issues Committee (SLIC, of which the Solicitor-General is a member) for consideration. Despite this mechanism, it was suggested during consultation that there can be a tendency for entities to 'under-report' significant issues or wait until an issue is the subject of substantive litigation before reporting. This can affect the ability of the Attorney-General and Solicitor-General to fulfil their respective roles as First and Second Law Officer of the Commonwealth and, in particular, manage the Commonwealth's legal risk.

106. Specific reforms to significant issues reporting suggested by some stakeholders include:

- clarifying the criteria for identifying significant issues, for example removing the reference to political sensitivity as it is not really for entities to assess
- extending significant issues reporting obligations, in whole or in part, to corporate Commonwealth entities
- removing the requirement for OLSC to approve settlement of significant issues
- expanding information sharing by the SLIC and OLSC about current significant issues.

Question 22: Are there barriers to Commonwealth entities reporting significant issues? What could be done to overcome any 'under-reporting' of significant issues?

Question 23: Should any other changes be made to the reporting or handling of significant issues?

Handling monetary claims

107. As noted above, non-corporate Commonwealth entities are required to handle monetary claims by and against the Commonwealth or a Commonwealth entity in accordance with particular rules contained in Appendix C of the LSDs. More specifically:

- All claims are to be settled in accordance with legal principle and practice. That is, there must be at least a meaningful prospect of liability being established.
- Any claim exceeding $25 000 is to be treated as a 'major claim' and can only be settled if written advice is obtained from an external legal adviser that the settlement is in accordance with legal principle and practice, and the relevant accountable authority (or delegate) agrees with the settlement.[55]
- If a non-corporate Commonwealth entity considers that a claim raises exceptional circumstances which justify a departure from the normal settlement mechanisms, it must refer the matter to OLSC. The Attorney-General may permit a departure from the normal policy, but may impose different or additional conditions on the entity doing so.

108. In their 2009 report, Blunn and Krieger thought the threshold of $25 000 was unrealistically low.[56]

Question 24: Is the $25 000 threshold under the LSDs for 'major' monetary claims appropriate? If not, what would an appropriate limit be?

Question 25: Leaving aside the monetary threshold, should any changes be made to the current rules for the handling of monetary claims?

Solicitor on the record

109. Under paragraph 5 of the LSDs, a non-corporate Commonwealth entity may only use an in-house lawyer to conduct court litigation as solicitor on the record or as counsel with the approval of the Attorney-General. In deciding whether to grant approval in a particular case, the Attorney-General will have regard to whether the entity:

- is able to demonstrate a capacity to conduct the litigation properly and efficiently
- is able to conduct litigation at a lower cost than using external solicitors
- has a statutory charter which gives it an operation independent of government.

110. Currently, a small number of non-corporate Commonwealth entities have approval to appear as solicitor on the record, mostly for a limited period of time.

111. Stakeholders commented that it can sometimes be a difficult fit to be both the 'client' and 'solicitor' when participating in proceedings before a court. Engaging an external lawyer facilitates objectivity and independence.

112. In-house practices which are not regularly involved in litigation may not have sufficient specialist expertise and current awareness of court rules, procedure and applicable case law that are required to run litigation effectively. Further, such practices may not have appropriate information technology infrastructure to manage litigation matters.

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[55] If the matter is identified as a significant issue, a non-corporate Commonwealth entity must obtain agreement from the Attorney-General or his delegate before settling the matter (paragraph 3.2 of the LSDs).

[56] Blunn and Krieger review, above n 25, 40.

113. In their 2009 report, Blunn and Krieger concluded that the current limitations on in-house lawyers of non-corporate Commonwealth entities was very important because, amongst other things:

> Ensuring the proper management of litigation by the Commonwealth is central to the role of the Attorney-General as First Law Officer, and litigation is a highly specialised and technical area of the law. It is also the area in which whole-of-government issues are most likely to arise due to the fact that once the Commonwealth has publicly taken a position on a legal issue in litigation it may be restricted from taking a different position on a subsequent occasion. It is at the least embarrassing if the Commonwealth or its agencies take contradictory positions on important legal issues in different pieces of litigation, especially if this occurs because those with the conduct of each piece of litigation are simply unaware of the other.[57]

Question 26: Are the current limitations on in-house lawyers of non-corporate Commonwealth entities acting as solicitor on the record or as counsel appropriate? Should any changes be made to the current arrangements?

Other issues

114. A query was raised with the Review about whether the LSDs should continue to generally apply differently to corporate Commonwealth entities than they do to non-corporate Commonwealth entities. For example, it was queried whether all corporate Commonwealth entities should, to the extent that their enabling legislation permits, be:

- required to report on significant issues under paragraph 3.1 of the LSDS
- required to share advice on legislation administered by another entity (see paragraph 10 of the LSDs)
- subject to the tied work rules

in the same way that all non-corporate Commonwealth entities (and some corporate Commonwealth entities[58]) are, while retaining capacity for one-off or ongoing exemptions.

115. The Review also invites submissions on any other substantive issues that arise about the LSDs.

Question 27: Should any aspects of the LSDs that only apply to non-corporate Commonwealth entities also be applied to corporate Commonwealth entities, to the extent that their enabling legislation permits?

Question 28: Are there other substantive improvements that could be made to the LSDs? Are there aspects of the current LSDs that should be removed or should be expanded upon? Are there additional matters relating to Commonwealth legal work that the LSDs should address?

The role of the Office of Legal Services Coordination

116. OLSC is a branch within AGD. It was created in response to a recommendation of the 1997 Logan review that an office should be established within AGD to support the Attorney-General in relation to his responsibilities for legal services to the Commonwealth.[59]

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57 Blunn and Krieger review, above n 25, 41.

58 Specifically, those entities that were 'agencies' within the meaning of the *Financial Management and Accountability Act 1997* on 30 June 2014.

59 Logan review, above n 15, [10.29].

117. OLSC's responsibilities for monitoring and coordinating the delivery of legal services to the Commonwealth include:

- administering the LSDs, which involves:
  - considering requests from entities for an approval to allow a non-tied external legal service provider to perform tied work (paragraph 3B of Appendix A)
  - overseeing significant legal issues for the Commonwealth, including collating fortnightly and quarterly significant issues reports and considering entity requests to settle significant issues (paragraph 3)
  - providing guidance about the allocation of responsibility for litigation between non-corporate Commonwealth entities, and the handling of litigation where more than one non-corporate Commonwealth entity may be involved (paragraph 4.8)
  - advising the Attorney-General on whether in-house lawyers should be granted approval to conduct court litigation as solicitor on the record or as counsel (paragraph 5)
  - administering the Commonwealth Counsel Engagement policy, including approving initial Commonwealth rates for junior and senior counsel or increases over the threshold (paragraph 4E of Appendix D)
  - handling of requests for assistance to Commonwealth employees in relation to legal proceedings (Appendix E)
  - administering the Legal Services Multi Use List, including considering applications for inclusion, exemptions and special reporting arrangements (Appendix F)
  - providing policy guidance to entities and their legal service providers on the operation of the LSDs
  - monitoring and supporting entity and legal service provider compliance with the LSDs, including on potential breaches of the model litigant obligation
  - conducting training and awareness seminars
- administering aspects of the *Judiciary Act 1903*
- providing support as required for the Attorney-General as First Law Officer and the Solicitor-General as Second Law Officer - this includes considering correspondence, providing briefing material, supporting the appointment of Commonwealth's Queen's Counsel and a range of administrative support
- providing secretariat support to the GCWG, AGLN Board and SLIC
- coordinating and publishing the annual Commonwealth Legal Services Expenditure Report
- providing information about the Commonwealth's legal services system.

118. Like all areas, OLSC undertakes its wide-ranging responsibilities within relatively limited resources. Its compliance approach focuses on encouraging and supporting entities to comply with the LSDs. It does not take a strict regulatory approach to enforcement of the LSDs and impose sanctions for breaches of the LSDs.[60]

[60] Attorney-General's Department, *Guidance Note 3, Compliance with the Legal Services Directions 2005,* available at: https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Compliance-with-the-Legal-Services-Directions-2005.pdf.

119. During the course of consultation a query was raised about whether OLSC's current approach to compliance is the best approach, or whether OLSC should have a greater regulatory role. Another alternative to the current approach would be for entities to generally self-assess their compliance with the LSDs, but for OLSC to have the capacity to conduct audits to monitor compliance and impose sanctions where necessary.

120. Quite apart from the LSDs, it was suggested in consultation that OLSC (or potentially a different central coordination area) could play a greater role in other areas, such as for the training and development of government lawyers and coordinating the procurement of legal advice (eg by playing an active role in assisting Commonwealth entities to choose between external providers).

121. It was also suggested that there could be a reciprocal secondment program whereby government lawyers are seconded to OLSC to strengthen its technical skills and its relationships with Commonwealth entities.

Question 29: What functions should a central coordination area perform in relation to Commonwealth legal services? Should OLSC take on any additional functions or cease to perform some of its existing functions? For example, should it play a more active role in procurement of legal advice, coordination of training programs or development of collaboration opportunities?

Question 30: What regulatory role should OLSC play in relation to Commonwealth entities' compliance with the LSDs? What consequences, if any, should flow from breaches of the LSDs?

Greater sharing of information between government lawyers

122. The Commonwealth's relatively decentralised model for the provision of legal services does not, of itself, foster the sharing of information between government lawyers. As discussed above, there are currently two 'networks' of government lawyers – the GCWG and the AGLN. The GCWG, in particular, provides some senior government lawyers with a forum to discuss and share information about important legal issues affecting their entities. However, some stakeholders have suggested that the GCWG has not been particularly effective as an information sharing forum because only a small number of General Counsels (from the 14 Commonwealth entities with the highest legal expenditure) are members of the GCWG. Further, those General Counsels have generally been reluctant to share information about matters affecting their entity. The AGLN was not designed as a forum for government lawyers to share matter-specific information.

123. Another issue relating to the sharing of information between government lawyers concerns legal advice. A consequence of the Commonwealth's relatively decentralised model for the provision of legal services is that Commonwealth entities obtain their own advice about a legal issue and usually have no particular imperative to share that advice with other Commonwealth entities (except, eg where the advice is about legislation administered by another entity). As noted above, this can result in a degree of duplication and Commonwealth entities taking inconsistent positions on legal issues. It is also known to result in a degree of duplication, where advice on effectively the same issue is sought and paid for separately by several Commonwealth entities.

124. Government lawyers have generally expressed support for greater sharing of legal advices. However, many stakeholders have also expressed a need for caution due to risks to legal professional privilege, the degree of sensitivity of particular matters, and the need to use previous advice carefully noting it may not necessarily reflect current law and jurisprudence. A range of suggestions have been made by stakeholders to increase the sharing of advice, including:

- a central coordination point having responsibility for procuring advice about important whole of government issues, to be shared with relevant Commonwealth entities (at a cost to those entities)
- in addition, or alternatively, a central coordination area maintaining a database for government lawyers that captured key overarching advices about important whole of government issues affecting a range of (or all) Commonwealth entities
- the AGS opinions database being made available to other government lawyers (whether all or a more limited group)
- clearer rules or guidance in support of sharing of advice, to give entities greater confidence that the material will be appropriately handled by others and that LPP will not be compromised
- establishment of communities of practice around core areas of law to facilitate sharing and support a consistent approach across the Commonwealth – stakeholders identified recent examples around enterprise bargaining and freedom of information as good examples of this approach.

Question 31: Are there barriers that prevent government lawyers from sharing information with each other? What steps could be taken to increase the sharing of information between government lawyers?

Question 32: What mechanisms should be considered to improve sharing of advices about important whole of government issues?

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