

GUIDANCE NOTE NO 8

The Office of Legal Services Coordination (OLSC) provides Guidance Notes in order to assist Australian Government departments and agencies, and legal services providers (as applicable), to comply with the Legal Services Directions 2005, procure legal services, and deal with legal issues in an efficient and effective manner.

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Reporting legal services expenditure

1. Commonwealth agencies must report their legal services expenditure to OLSC within 60 days of the end of financial year. This information must be reported in the template approved by OLSC. A copy of the template required for reporting is attached to this Guidance Note, and is available on the OLSC website at www.ag.gov.au/olsc.
2. Agencies must also ensure that the expenditure figures are published by 30 October each year. There is no required form for the information to be published. Most agencies publish via the agency annual report or website¹.

Why has the obligation been imposed?

3. The obligation for agencies to report and publish legal services expenditure is to enhance the transparency of legal services expenditure and to ensure reporting of expenditure is in line with the findings of the Australian National Audit Office in its Report No 52 of 2004/05, *Legal Services Arrangements in the Australian Public Service* (the ANAO Report).
4. The requirement for agencies to report their legal services expenditure to OLSC, in a template approved by OLSC, ensures consistency of reporting across Commonwealth agencies. Further, the extension of the requirement to CAC agencies in 2008 provides better information about the purchase of legal services across the whole of government.

Who does the obligation apply to?

5. All agencies regulated by the *Financial Management and Accountability Act 1997* (FMA agencies), and most agencies regulated by the *Commonwealth Authorities and Companies Act 1997* (CAC agencies) are required to report on legal services expenditure.
6. The Chief Executives of FMA agencies are responsible for ensuring that the agency reports its legal services expenditure to OLSC within 60 days of the end of financial year and that the expenditure figures are published by 30 October each year (paragraph 11 of the *Legal Services Directions 2005*).
7. Paragraph 12.3A of the Directions extends the legal services expenditure reporting and requirements to CAC agencies. The publishing requirement does not apply to CAC agencies. The reporting and publishing obligations do not apply to CAC agencies which are Government Business Enterprises, *Corporations Act 2001* companies controlled by the Commonwealth, or agencies which are otherwise exempt from complying with the Directions.

What does the obligation require agencies to do?

8. As noted above, agencies are to report legal services expenditure within 60 days after the end of each financial year in a template approved by OLSC.
9. The report must include the following information:
 - a) total legal services expenditure

¹ From 2010, OLSC will also publicise certain legal services expenditure information as noted on p5

- b) division between internal and external expenditure, and
 - c) further break down external legal services expenditure into a number of categories, including:
 - i. total number of Counsel briefed
 - ii. total number of Counsel direct briefed
 - iii. total value of Counsel briefs
 - iv. total of disbursements (excluding Counsel), and
 - v. total of professional fees paid.
10. Relevant explanations, and the details required in respect of the external legal services expenditure breakdown are set out in the following pages.
11. All expenditure is to be reported **GST inclusive**.

Legal Services Expenditure Report

[Name of Agency]

All figures should be inclusive of GST

Totals

Total Costs Recovered¹	\$0.00
¹ Do not subtract this figure from the legal services expenditure total	
Total External Legal Services Expenditure	\$0.00
Total Internal Legal Services Expenditure	\$0.00
Total (External + Internal) Expenditure	\$0.00

Summary of External Legal Services Expenditure

• Total value of briefs to Counsel (A)	\$0.00
• Total value of disbursements (excluding counsel) (B)	\$0.00
• Total value of professional fees paid (C)	\$0.00
Total External Legal Services Expenditure (A + B + C)	\$0.00

Counsel

• Number of briefs to male counsel	0
• Number of briefs to female counsel	0
Total number of briefs to counsel	0
• Number of direct briefs to male counsel	0
• Number of direct briefs to female counsel	0
Total number of direct briefs to counsel	0
• Total value of briefs to male counsel (including direct briefs) ²	\$0.00
• Total value of briefs to female counsel (including direct briefs) ²	\$0.00
Total value of briefs to Counsel (A)³	\$0.00

Disbursements

Total value of disbursements (excluding counsel) (B)	\$0.00
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Professional Fees

List each law firm and the amount paid in professional fees in the financial year	\$0.00
Total value of professional fees paid (C)	\$0.00

² Includes the value of direct briefs

³ Includes all expenditure on Counsel

Definitions and Guidance to the reporting template

Legal services expenditure

Total costs recovered

1. This relates to the total legal costs recovered by the Commonwealth in litigation or alternative dispute resolution, such as funds received by the Commonwealth through enforcement of a costs order made by the court, or an amount representative of the Commonwealth's costs received by way of settlement. It only includes actual funds recovered. It does not mean a quantified order of the court which has not been enforced.
2. This amount is included in the report to ascertain where the Commonwealth has defrayed its legal services costs through recovery of costs from another party.
3. The figure for total costs recovered is not to be subtracted from the legal services expenditure total.

External legal services expenditure

Summary of external legal services expenditure

4. OLSC requires agencies to provide a figure for the total value of briefs to counsel, the total value of disbursements (excluding counsel), and total value of professional fees paid. OLSC requires that all these figures be included in the total for external legal services expenditure.
5. In some situations, such as a fixed fee arrangement which covers professional fees and counsel fees, agencies may find it difficult to disaggregate these expenses for the purposes of reporting. In those cases, OLSC will accept an agencies' best estimate of the breakdown between professional fees and counsel.

Counsel

Definition of counsel

6. Barristers from the private bar or legal practitioners (in a jurisdiction like the ACT where the profession is fused) briefed as barristers to advise or appear in tribunal or court proceedings. When counting Counsel, the Solicitor-General is not included.

Total number of briefs to counsel

7. This is the total number of briefs to male and female Counsel, broken down by gender of the Counsel briefed, which can be read together with the value of briefs to give an impression of the kind / nature of work Counsel is engaged to perform.
8. Where Counsel is briefed in an appeal from a first instance judgment, this is to be counted as a second brief.

Total number of briefs to counsel

9. This is the total number of briefs to Counsel. For example, if an agency briefs one Counsel six times, the response is six - not one.

Total number of briefs to counsel

10. This is when an agency briefs a barrister directly, rather than through a law firm.⁴

Total number of direct briefs to counsel

11. This is the total number of direct briefs to Counsel. For example, if one Counsel is direct briefed six times, the response is six - not one.

Total value of Counsel briefs

12. This is the total value of all Counsel briefs paid by the agency. For example, if the same Counsel is briefed six times at a fixed rate of \$1,000 per brief, the answer is \$6,000 - not \$1,000.

13. This includes the value of all Counsel briefs, whether through a legal services provider or direct briefed.

Total value of male / female counsel briefed

14. This is the total value of briefs to Counsel (as calculated above) broken down by gender of the Counsel briefed.

15. The total value of the briefs to male and female Counsel should equal the total value of Counsel briefs.

Disbursements (excluding counsel)

Total of disbursements (excluding counsel)

16. Disbursements are costs incurred for goods and services, which are not for Counsel and not professional fees. For example, disbursements could include filing fees, expert witnesses, and administrative fees such as binding and photocopying, travel and accommodation fees where payable.

17. OLSC appreciates there may be difficulties in determining the exact amount of disbursements, depending on how legal services providers invoice and how financial systems capture this information. We ask that details of disbursements be provided where possible, and where it would not require a significant diversion of resources from other tasks.

Professional fees

Total of professional fees paid

18. Professional fees are the fees charged by external legal services providers for their professional services; that is, the work done by the solicitors.

19. This includes the professional fees incurred by engaging external legal services providers overseas, if the agency making payment is a FMA or non-exempt CAC agency.

20. Professional fees should also include fees paid to the Office of Parliamentary Counsel (OPC) and the Office of Legislative Drafting and Publishing (OLDP) for drafting services, and any legal work billed by the Office of International Law (OIL).

⁴ Note the restriction on in-house lawyers acting as solicitor on the record (paragraph 5 of the Directions), so this should ordinarily only relate to a brief to advise.

21. OLSC notes that some drafting services are provided on a budget-funded basis, and are not charged to agencies. However, where drafting services are costed and billed to agencies this cost should be recorded as a professional fee, with the provider being noted as OLDP.

Internal legal services expenditure

22. This is the total amount of expenditure within an agency on legal work undertaken by in-house lawyers. This can be undertaken either by a dedicated legal unit (for example, the Legal Services Branch in your agency), or by individual lawyers working within business lines.
23. If there is a dedicated legal unit within an agency, OLSC expects that the entire costs of that unit will be included in the agency's internal legal services expenditure. (See below for information about fully costing internal legal services.)
24. If an agency has legally qualified officers engaged in non-legal roles (for example, they are embedded with operational teams), the agency should determine whether the officer is allocated work because of their legal qualifications or skills, or the work allocated regardless of legal qualifications or skills. If work is allocated due to legal qualifications and skills, or partially so, the cost of that officer (or a pro rata amount) is to be included in the total internal legal services expenditure for the agency.
25. OLSC requires agencies to follow the methodology set out in the Australian National Audit Office Better Practice Guide *Legal Services Arrangements in Australian Government Agencies* of August 2006 in costing internal legal services (p25). In line with the ANAO Guide, the full cost of an internal legal unit must include:
- a) direct salary costs;
 - b) indirect salary costs (superannuation, leave entitlements);
 - c) direct overhead (costs of desks, computer, stationery);
 - d) indirect overhead (apportioned rent, electricity, etc);
 - e) legal unit overhead (specialist software licences, cost of law library), and
 - f) learning and development overhead of officers – including training in legal and non-legal skills.

Direct salary costs

26. Direct salary costs of administrative support staff, paralegals, junior and senior lawyers, principal lawyers and the General Counsel should be captured within the legal unit cost centre. Direct salary costs should be calculated by reference to department/agency workplace agreements.

Indirect salary costs

27. Indirect salary costs should also be captured within the legal unit cost centre. Calculation of indirect salary costs should include:
- a) superannuation (based on the proportions of staff belonging to different funds)

- b) leave entitlements, and
- c) other salary related contributions (noting that these costs may be more extensive in some departments/agencies than others).

Direct overhead and indirect overhead

28. Direct overhead costs should be captured within the legal unit cost centre. Where necessary, departments/agencies should use the Department of Finance and Deregulation(DoFD) Overheads Model to assist this calculation. This category should include costs such as:
- a) organisational services costs such as office consumables, travel and accommodation costs, postage, courier services, publishing and printing, management overheads, and taxi and car hire charges;
 - b) average cost per employee of provision of corporate IT ;
 - c) professional development, and
 - d) average cost per employee workers' compensation premiums (using the actual premium paid by the department/agency).
29. Records of indirect overheads may not be easily accessible within an agencies financial system. However, agencies should interrogate their systems, with reference to cost centres and other means of recording / categorising expenditure, and use the DOFD Overheads Model to calculate the cost of indirect overheads as accurately as possible. Indirect overheads include:
- a) property operating expenses including apportioned rent/lease costs, related utility service charges, repairs and maintenance, and building security services, and
 - b) desktop information and communication technology services (operation and maintenance) costs, including desktop computer rental/lease costs (as opposed to purchase costs), standard bulk software user licence costs, standard help desk services, routine maintenance costs, and telecommunications costs.
 - c) Legal unit overhead
30. Legal unit overhead costs should be captured within the legal unit cost centre. It is expected that this category will include costs such as:
- a) Staff training and development specific to the legal unit;
 - b) Developing/maintaining a law library, and any specialist software licences
 - c) Software/database systems for knowledge and matter management purposes.

Publication of Legal Services Expenditure Data

31. It is OLSC's intention to publish a annual report of Commonwealth legal services expenditure on the Attorney-General's Department's website. This report is intended to include the following categories:

- a) Overall legal services
- b) External legal services
- c) Internal legal services
- d) Professional fees paid to law firms
- e) Number of Counsel briefs
- f) Number of direct briefs to Counsel
- g) Value of Counsel briefs
- h) Disbursements
- i) Costs recovered pursuant to court order

Frequently asked questions

General questions		
1.	Does ‘legal services expenditure’ refer only to briefing legal professionals to appear in court matters, or does it extend to obtaining advice?	<p>Legal services expenditure includes both appearance by legal professionals in litigation, the provision of legal advice, and costs attributed to in-house lawyers.</p> <p>Refer also to the explanation relating to the reporting of internal legal services expenditure.</p>
2.	Do the reporting requirements apply to fees incurred in respect of overseas legal counsel and solicitors?	Yes.
3.	Does an agency need to report expenditure relating to a transaction where another body has paid for the legal fees?	No.
4.	Do ‘Professional fees’ cover solicitors' fees (or cover both solicitors' fees and counsel fees)?	For the purposes of legal services expenditure reporting under the Directions, professional fees refer only to solicitors' fees. Counsel fees should be reported in the relevant line depending on male, female, direct, indirect etc.
5.	What is included in ‘Total Costs Recovered’?	In ‘Total Costs Recovered’ we only require reporting of actual funds recovered by way of a court order or ADR process that is representative of the Commonwealth’s incurred costs. This is distinct from the recovery of third party payments, such as compensation payments, which are not required to be reported.
Reporting Figures – Counsel		
6.	When counting Counsel, is the Solicitor-General included?	No. The Solicitor-General is budget funded, so including the briefs to the Solicitor-General in

		this analysis would skew the expenditure totals.
7.	Does the phrase 'Total value of Counsel briefs' cover both categories of counsel, those briefed via firms and directly?	Yes.
Submitting the Report		
8.	In what form should the reports be sent?	<p>The reports should be completed in the template form available on the web site, and the template must be completed in full and without amendment.</p> <p>Reports may be emailed to OLSC at olsc@ag.gov.au, or sent via hardcopy to:</p> <p>Assistant Secretary Office of Legal Services Coordination Attorney-General's Department 3-5 National Circuit BARTON ACT 2600</p>
9.	By what date should the report be sent in?	<p>60 days after the end of the financial year.</p> <p>This is usually by 29 August, but if 29 August falls on a weekend, the report is due the next business day.</p>
10.	What are the consequences of failing to report to OLSC in time?	Breaches will be recorded against agencies that fail to report 60 days after the end of the financial year.
Publishing		
11.	What information is required to be published by the FMA agency?	An FMA agency would satisfy the requirement to publish legal services expenditure by publishing a figure for total external and total internal legal

		<p>services expenditure. The Directions do not require agencies to publish details of the expenditure breakdown between particular legal services providers.</p> <p>In addition, an agency will satisfy the obligation to publish by including the information in its annual report, or by inclusion in a readily accessible place on its website.</p>
12.	By what date should the records be published?	<p>Under paragraph 11.1(ba) of the Directions, an agency is required to publish records of its legal services expenditure for the previous financial year by 30 October each year. For example, 2009-10 expenditure must be published by 30 October 2010.</p>

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ANAO Case study – costing legal services

ANAO noted in Audit Report No.52 2004-2005 that an audited agency costed its internal legal services and developed charge-out rates for its internal lawyers using a model that included salary, a loading for salary-related expenses and variable, or direct, overheads and fixed, or indirect, overheads.

The salary rates reflected the relevant salary points (from the agency's workplace agreement), and levels of staff. This enabled the agency to calculate the full cost, as well as apply an hourly rate, based on a specified level of 'billable' hours per year. The agency included a figure of 1210 billable hours for junior and senior lawyers and 1100 hours for principal lawyers and general counsel for this purpose.

These annual hours reflected the agency's expectation of 5.5 billable hours per day for junior and senior lawyers and 5 hours per day for principal lawyers and general counsel, over 220 working days per year. The result of this approach was that an internal legal resource could be fully costed, as well as the 'marginal cost' per hour/day for work that could be given to external providers. The hourly rate was calculated by dividing the full cost by the number of productive hours.

The salary-related loading was based on 25 per cent of salary for each staff member, to make provision for superannuation and long service leave, etc.

The variable overhead included the provision of IT, professional development and workers' compensation insurance (the agency's average contribution per employee to Comcare).

The fixed overhead included the total estimated cost of the provision and maintenance of the legal unit's law library, administrative support staff, apportioned costs of accommodation and rent, furniture and fittings, communications (phone and facsimile), office expenses (stationery, photocopiers, consumables, etc), travel, and a provision for annual recruitment costs for the legal unit.

The ANAO considered that this costing model represented a comprehensive and appropriate approach to assessment of that agency's internal legal costs.