

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. OLSC welcomes feedback on this Guidance Note.

Reporting legal services expenditure

Paragraph 11 of the *Legal Services Directions 2005* sets out the responsibilities of a Chief Executive of an agency regulated by the *Financial Management and Accountability Act 1997* (FMA agency).

In particular, the Chief Executive is 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.

This information is required to be reported in the template approved by OLSC. There is no required form for the information to be published. Most agencies publish via the agency annual report or website¹.

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.

Why has the obligation been imposed?

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). This obligation was initially reflected in the 2005 amendments to the Directions.

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.

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

Who does the obligation apply to?

The obligation to report legal services expenditure applies to all FMA agencies.

Paragraph 12.3A of the Directions extends the legal services expenditure reporting and requirements to agencies regulated by the *Commonwealth Authorities and Companies Act 1997* (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.

Paragraph 13 of the Directions provides that the Attorney-General may decide that an agency is not required to comply with some or all of the Directions, or is required to comply with modified obligations. If an agency considers that there are compelling reasons that it should be exempt from the reporting requirement, or should comply with a modified requirement, it can contact OLSC to discuss.

What does the obligation require agencies to do?

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.

In reporting, agencies must report total legal services expenditure - and the division between internal and external expenditure - and must further break down external legal services expenditure into a number of categories, including:

- Total of professional fees paid
- Total number of Counsel briefed
- Total number of Counsel direct briefed
- Total value of Counsel briefs
- Total of disbursements (excluding Counsel)

Relevant explanations, and the details required in respect of the external legal services expenditure breakdown are set out in the dictionary below.

All expenditure is to be reported **GST inclusive**.

Dictionary

Counsel

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.

Direct briefed

This is when an agency briefs the barrister directly, rather than through a law firm.²

Total number of Counsel briefed³

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 Counsel direct briefed

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

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.

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

Total number of male / female Counsel briefed – 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.

Where Counsel is briefed in an appeal from a first instance judgment, this is to be counted as a second brief.

Total value of male / female Counsel briefed – this is the total value of Counsel briefs (as calculated above) broken down by gender of the Counsel briefed.

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

Total of disbursements (excluding Counsel)

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.

² 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.

³ Note, this advice may vary from advice that OLSC has previously provided to agencies.

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 if possible, and where it would not require a significant diversion of resources from other tasks.

Total of professional fees paid

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

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.

Internal legal services expenditure

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.

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.)

If an agency has legally qualified officers engaged in non-legal roles (for example, they are embedded with operational teams), the agency should ask itself whether the officer is allocated work because of their legal qualifications or skills, or is 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.

OLSC requires agencies to follow the Australian National Audit Office Better Practice Guide of August 2006 in costing internal legal services. In line with the ANAO Guide, the full cost of an internal legal unit must include:

- direct salary costs
- indirect salary costs (superannuation, leave entitlements)
- direct overhead (costs of desks, computer, stationery)
- indirect overhead (apportioned rent, electricity, etc)
- legal unit overhead (specialist software licences, cost of law library), and
- learning and development overhead of officers – including training in legal and non-legal skills.

The ANAO Guide worked example is **attached** to this Guidance Note.

Total costs recovered

This relates to the total 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

received, not simply the quantified order of the court, which may not be enforced for many reasons.

The reason for including this amount in the reporting is to ascertain where the Commonwealth has been able to defray its legal services costs through recovery of costs from another party. Amounts received by way of compensation are not included, because they are not directly related to the costs of the Commonwealth purchasing legal services, rather compensation moneys would represent a different cost or loss to the Commonwealth.

Agencies are not to offset costs recovered in reporting expenditure.

Publication of Legal Services Expenditure Data

It is OLSC’s intention to publish a table of reported agency expenditure on the Attorney-General’s Department’s website. This will include Commonwealth total figures relating to:

- Overall legal services expenditure
- External legal services expenditure
- Internal legal services expenditure
- Professional fees paid to law firms (although not broken down as to amounts paid to individual law firms)
- Number of Counsel briefs
- Number of direct briefs to Counsel
- Value of Counsel briefs
- Disbursements
- Costs recovered pursuant to court order

Frequently asked questions

<p>Does ‘legal services expenditure’ refer only to briefing legal professionals to appear in court matters, or does it extend to obtaining advice?</p>	<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>
<p>Do the reporting requirements apply to fees incurred in respect of overseas legal counsel and solicitors?</p>	<p>Yes.</p>
<p>Does an agency need to report expenditure relating to a transaction where another body has paid for the legal fees?</p>	<p>No.</p>
<p>Do ‘Professional fees’ cover solicitors’</p>	<p>For the purposes of legal services</p>

fees (or cover both solicitors' fees and counsel fees)?	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.
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	
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.
Does the phrase 'Total value of Counsel briefs' cover both categories of counsel, those briefed via firms and directly?	Yes.
Sending in the Report	
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>
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>

<p>What are the consequences of failing to report to OLSC in time?</p>	<p>Breaches will be recorded against agencies that fail to report 60 days after the end of the financial year.</p>
<p>Publishing</p>	
<p>What information is required to be published by the FMA agency?</p>	<p>An FMA agency would satisfy the requirement to publish legal services expenditure by publishing a figure for total external and total internal legal 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>
<p>By what date should the records be published?</p>	<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.