

The Auditor-General  
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Performance Audit

## **Legal Services Arrangements in the Australian Public Service**

Australian National Audit Office

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of Australia 2005

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Canberra ACT  
20 June 2005

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Legal Services Arrangements in the Australian Public Service*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

Warren J Cochrane  
Acting Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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## Glossary / Abbreviations

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ACCC	Australian Competition and Consumer Commission
Advice	A legal opinion provided on an issue.
AGS	Australian Government Solicitor
Alternative dispute resolution	Any of a range of means to resolve disputes without the need for conventional litigation. This can include mini-trials, negotiation, mediation, informal arbitration or conciliation between the disputing parties.
ANAO	Australian National Audit Office
ANAO survey	A survey of 40 agencies conducted by the ANAO for the purposes of this audit to gather information on legal services.
APS	Australian Public Service
Arbitration	The binding determination of a dispute by one or more independent arbitrators rather than a court.
ATO	Australian Taxation Office
Barrister	A legal practitioner whose main function is to act as an advocate in court.
Billable hour	A measure used by lawyers and other professionals to charge clients based on time spent in hours. Can be broken down into units (for example, units of 6 minutes, making 10 units per hour).
Blended rate	A flat fee arrangement for the purchase of legal services. This fee structure is based on all lawyers from a legal service provider being charged out at the same 'blended rate' regardless of their level.
Breach	The violation of a law or legal obligation. For the purposes of this report, it refers to an act that contravenes the Legal Services Directions.
Commercial law	The law relevant to business or commercial transactions and institutions such as contracts, partnerships and company law.
Counsel	A title used to refer individually or collectively to barristers whose main function is to conduct litigation, give legal advice and draft legal documents.

Court	A body established by law to administer justice by judges or magistrates.
Customs	Australian Customs Service
Deed	Refers to a written document that is signed by the maker or makers and witnessed. A promise in a deed is a contractual document that is binding on the parties even if it is not supported by consideration. Deeds can be used for various purposes, for example, a 'Standing Offer' or a 'Deed of Standing Offer'.
DEWR	Department of Employment and Workplace Relations
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
Directions	Legal Services Directions
DOTARS	Department of Transport and Regional Services
DPP	Office of the Director of Public Prosecutions
External legal services	For the purposes of this report, refers to the procurement of legal services from outside the agencies through the employment of contractors or the purchase of advice from the Australian Government Solicitor or a private firm.
FACS	Department of Family and Community Services
Informed purchaser	For the purposes of this report, refers to the individual or group responsible for coordination and procurement of legal services within an agency that possess sufficient knowledge to make informed decisions about buying legal services.
In-sourcing	The process where external lawyers are placed within an agency premises but are paid as contractors. Can also be referred to as 'co-locating' or 'out-posting'.
Internal legal services	The procurement of legal services from within the agencies through the employment of APS personnel with appropriate professional legal qualifications, or such personnel collectively.
Knowledge management	A system for capturing and managing information or knowledge.
Lawyer	A person professionally qualified to be a lawyer.

Legal professional privilege	The right to have withheld from evidence in court proceedings confidential communications between a person or organisation and their legal adviser, made in the course of obtaining legal advice or with reference to contemplated or actual litigation.
Legal Services Directions	Guidance and binding directions on the procurement and conduct of legal services in the Commonwealth, published by the Attorney-General's Department. Also known as 'the Directions'.
Legislation	The written law enacted by Parliament or the process of making or enacting laws.
Litigation	Taking legal action before a court or a field of law concerned with contentious matters.
Logan Report	Report of the Review of the Attorney-General's Legal Practice
Matter	A lawyer's equivalent of a 'case'. In other words, an issue or question of consequence on which the services of a lawyer is engaged, such as a question for advice on an issue to be determined by a court.
Model Litigant	A component of the Legal Services Directions that outlines exemplary behaviour that is expected of government agencies when involved in litigation or the settlement of disputes.
OLSC	Office of Legal Services Coordination.
Ombudsman	A person appointed by the government and empowered to investigate complaints of private individuals.
Panel	For the purposes of this report, refers to a procurement arrangement selected by a procurement process, from which an ongoing arrangement for legal services is configured. Also refers to the collective groups of selected legal service providers for an agency.
Procurement	The process through which the government purchases goods or services from outside sources.
Purchasing power	The reflective degree of influence or power that a buyer of services may possess, measured by the quantity and quality of products and services it can buy in money terms.

Relationship management	For the purposes of this report, refers to managing the interactions between a contractor / provider, for example to discuss and address issues such as quality of advice, timeliness and individual contractors in the relationship.
Second Counsel	This is both a title and a process, referring both to a supplementary senior lawyer working on a matter; and the process of this lawyer reviewing the work of more junior or other staff.
Significant issue	For the purposes of this report, agencies are required to report significant issues to the Attorney-General's Department under the Legal Services Directions. Significant issues include sizable litigation claims, disputes between two agencies or between the Commonwealth and a State or Territory; matters requiring a high-level of coordination between agencies; matters that may result in a precedent; or matters where the jurisdiction of a Commonwealth or State or Territory Court or Tribunal are in issue.
Solicitor	A legal practitioner who typically provides legal advice or services, drafts legal documents, prepares cases for litigation and represents clients in the lower courts.
Standing Offer	A Standing Offer is an ongoing contract with a provider. Also called a 'Deed of Standing Offer'.

## **Summary and Recommendations**



# Summary

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## Background

1. The Australian Government operates within a complex and extensive legal framework, with 84 agencies and 106 other bodies, administering in total, over 1 000 pieces of legislation. The Government's primary purpose in obtaining legal advice is to protect its interests and meet administrative, legislative and policy objectives.
2. Since 1 September 1999, the operating environment for Government legal services has been predominantly decentralised, with each agency free to choose how its legal needs are met, and what level of resources should be applied to meet these needs.
3. There are a number of legal services models currently operating across Australian Government agencies. The most common model involves an in-house team with access to one or more external providers, although some agencies have fully outsourced their legal services function.
4. The Government's *Legal Services Directions* are legally enforceable and set out requirements for the way in which agencies conduct their legal affairs. They are administered by the Office of Legal Services Coordination (OLSC), within the Attorney-General's Department.

## Audit Objectives and Methodology

5. The objectives of the Australian National Audit Office's (ANAO) performance audit were to:
  - examine the efficiency and effectiveness of agencies' procurement and management of legal services arrangements;
  - determine adherence to Australian Government policy requirements;
  - examine the effectiveness of the OLSC's monitoring of agencies' compliance with Government policy requirements; and
  - examine the OLSC's role in assisting agencies to comply with Government policy.
6. The ANAO surveyed 40 agencies to gather financial data on legal services arrangements, including the type, cost and drivers of their legal services. Audit work was focused on 16 agencies and the OLSC.

## Key Findings

### Patterns of Expenditure (Chapter 2)

7. The survey highlighted that total external legal services expenditure for the 40 agencies has increased by 23 per cent in real terms between 1999–2000 and 2003–04 (refer Table 2.1). Growth in external legal services has been predominantly driven by an increasing volume of legal work performed, with periodic increases in the charge-out rates of providers accounting for a smaller portion of the increase. During this same period, reported internal legal services expenditure has also increased, but the extent of the increase cannot be reliably measured. For a variety of reasons, accurate information prior to 2002–2003 is not available for some key agencies.

8. The Australian Government legal services market consists of a small number of agencies with a high demand for legal services, and many agencies with a relatively low demand that are consequently small consumers in the market. Of the 190 entities that constitute the purchasers in the Government's legal services market, four agencies had total (internal and external) legal expenditure greater than \$40 million in 2003–04, and three had total expenditure in the range \$10–\$40 million. The remaining 33 surveyed agencies recorded individual total expenditure of less than \$10 million on legal services.

9. The decision on whether to expend resources on legal services is one for each agency. The level of demand for, and nature of, legal services varies considerably across agencies, and for a number of reasons. The nature of the agency's function, the extent of change to legislation it administers, the service delivery model employed (for example, the extent of outsourcing of corporate functions and activities), and the nature and level of litigation can all have a significant impact on the manner and volume of legal services procured. Additionally, some of these factors may vary across agencies due to potentially different organisational cultures, including appetite for risk and strategies to manage and/or mitigate legal and other risks.

10. Surveyed agencies were able to calculate or estimate the breakdown of their total legal expenditure by different categories of work. Of the six areas of legal services requested to be quantified in the survey, (refer Table 2.2), expenditure on litigation accounted for 58 per cent of agencies' categorised legal expenditure, legal advice on specific agency legislation accounted for 24 per cent, and commercial/contract law advice accounted for 9 per cent.

11. Of the 40 agencies surveyed, 16 reported decreased expenditure on external legal services in 2003–04, compared to 1999–2000. Of these agencies, 10 reported an increase in expenditure on internal legal services over that period. This could suggest that, for these agencies, internal resourcing has

increased over time in order to reduce the need to outsource at least some types of legal services. The most common reasons to outsource were to: seek specialist services that are not available in-house; better manage large and complex matters; obtain an independent legal opinion to mitigate the agency's risk on particular matters; and/or cope with peaks in legal advice workloads.

### **Strategic Planning and Review of Agency Legal Services (Chapter 3)**

**12.** Agencies should have well-organised and strongly co-ordinated legal services purchasing processes at the day-to-day level. However, at a higher level, agencies also need to decide on the structure of the purchasing model that best suits their requirements. This should address the context for purchasing legal services having regard to the extent to which services are provided on a cost effective basis and other considerations.

**13.** To put an appropriate model into practice, agencies should have a strong and well-functioning point of co-ordination (the legal services manager, or 'informed purchaser') working between the agency's senior managers, and those who actually deliver legal services. The ANAO found that while some audited agencies had an 'informed purchaser', a number of agencies required improvement in this area. Similarly, there is scope for some audited agencies to improve their internal communication and their systems for monitoring and reviewing legal purchasing decisions.

**14.** Agencies also require information on how well current legal services arrangements are working both in their own organisation and elsewhere, to inform assessments of possible changes. The ANAO also found that while several agencies were able to adjust their legal services as their needs changed, others did not have sufficient systems in place to monitor their workload and expenditure, to enable them to recognise and respond to change.

**15.** Agencies should actively manage risks to their ability to purchase quality legal services as well as managing the legal risks to their own ability to deliver programs and services (their core risks). In the context of the management of legal services, the ANAO found that a large percentage of audited agencies required improvement in these areas of risk management relating to the provision of legal services.

**16.** To ensure arrangements continue to meet agency requirements and represent value for money, agencies should also undertake regular reviews or assessments of their legal services model. The ANAO found that almost all audited agencies have undertaken some kind of review or assessment in the last five years of their legal services. However, these have been in various forms, with varying degrees of rigour. In future, the ANAO considers that

agency assessments could be enhanced by the inclusion of a full-cost comparison of internal and external providers. This would assist agencies to assess the overall cost-effectiveness of particular approaches to legal services in the context of other considerations, such as the quality, timeliness, and reliability of legal advice.

#### **Ongoing Management of Agency Legal Services (Chapter 4)**

**17.** Agencies with internal legal units should ensure that the units combine a strong client service culture with a clear understanding of how the legal services they provide contribute to the work of the agencies as a whole. The ANAO found that most agencies had suitable management practices in place for internal legal services, however obtaining client feedback is an area most agencies could improve to ensure the quality of internal legal services.

**18.** Those agencies that use external legal services require mutually agreed and understood protocols for interaction. The ANAO found most agencies were coordinating requests for external legal services appropriately and actively managing the relationship with providers. However, a large percentage of agencies were not satisfactorily monitoring performance of providers and dealing with deficiencies as those arose.

**19.** Agencies should have appropriate systems in place to effectively distribute work amongst internal and external providers and to assist agencies in gaining the maximum value from legal services. The ANAO found that most agencies had matter management and knowledge management systems in place. However, over half of these agencies require improvement in keeping their knowledge management system up-to-date and useable.

**20.** Agencies are also required to adhere to the *Legal Services Directions*, which provide direction on specific issues and outline agencies responsibilities for managing legal services. The ANAO found that most agency staff were aware of the Directions and how they impact upon their role. However, a large number of agencies did not actively monitor their external providers adherence to the *Legal Services Directions*.

**21.** Overall, the ANAO concluded that agencies have a better chance of achieving value if they have lawyers with a strong focus on client service, are active in setting and monitoring service standards, maintain clearly understood protocols for interaction, and actively manage the provision of legal services as an integral part of their operations.

## The Office of Legal Services Coordination (Chapter 5)

22. The OLSC is a branch within the Attorney-General's Department responsible for administering the *Legal Services Directions* and assisting agencies to manage their legal purchasing decisions.

23. The OLSC investigates possible breaches and provides clarification on aspects of the *Legal Services Directions*. The ANAO found that a number of breaches of the *Legal Services Directions* had occurred overtime. However, in some instances, the OLSC was unaware of these breaches and/or possible breaches. The ANAO considers that the OLSC should review its processes in order to monitor breaches more effectively.

24. The ANAO notes that OLSC currently provides a range of material on its website to assist agencies with their legal purchasing decisions. Some of this material would be of greater assistance to agencies if it included practical insights in addition to the general guidance currently provided. For example, such guidance might include how to manage the risks of legal providers overcharging for services, rather than simply identifying it as a risk.

25. The OLSC has an opportunity to build on its coordination and leadership role from recent initiatives to provide guidance to agencies on cross-agency legal issues. Agencies generally indicated a strong interest in the OLSC playing a greater facilitative role in sharing information and better practice strategies amongst agencies.

26. The ANAO notes that it is sound practice for agencies to actively monitor their legal services expenditure. In this context, the ANAO considers that the OLSC could disseminate guidance to agencies on the measurement and reporting of agency legal services expenditure. This would provide a consistent basis for agencies' reporting of legal services expenditure.

## Overall Audit Conclusions

27. Changes to the Government's legal services policy and operating environment over the last 10 years have placed a greater onus on agencies to understand their legal services needs, and adopt appropriate arrangements.

28. The ANAO concluded that the quality of agency management of legal services has been variable. Some agencies demonstrated a high level of efficiency and effectiveness in the way they procure and manage legal services. Key features of this included a strong, informed, client-focused coordination point for legal services, the ability to adjust arrangements to suit changing needs, an active approach to the management of risks, and appropriate systems to monitor workload, expenditure and knowledge management needs and developments. However, the ANAO also found that a number of agencies

require improvement in these areas. The ANAO has made six recommendations to assist agencies review their current arrangements to achieve greater cost effectiveness from their legal services.

**29.** The ANAO notes that the 40 surveyed agencies reported total legal services expenditure of \$446.0 million in 2003–2004 (refer Table 2.1). The reported external legal services expenditure between 1999–2000 and 2003–04 has increased by 23 per cent. The improved capture and reporting of internal legal services expenditure in recent years is a factor in the increase reported by agencies in that category. Growth has been predominantly driven by an increasing volume of legal work performed. Periodic increases in the charge-out rates of providers accounts for a smaller proportion of the increase. It is noteworthy that from 2001–02, legal services expenditure has been shared almost equally between internal and external providers with a slightly increasing trend towards internal service providers.

**30.** The ANAO concluded that the OLSC has played a broad role in the coordination of the Government’s legal services. However, there is scope for the OLSC to increase its role in monitoring breaches of the Legal Services Directions, and facilitating information sharing across agencies. In addition, the ANAO recommends that the OLSC provide guidance to agencies on the recording and reporting of legal services expenditure. The ANAO has made three recommendations to assist the OLSC enhance its coordination of the Government’s legal services.

**31.** The ANAO has also summarised some key features of better practice in the management of legal services. This is included at Appendix 2. The ANAO intends to produce a Better Practice Guide on Legal Services Arrangements, to provide more detailed and practical guidance to agencies.

## **Agency Responses**

**32.** All 16 audited agencies responded positively to the report, agreeing to Recommendations 1-6, except that the Department of Defence agreed with qualification to Recommendation 6. Detailed responses from the 16 audited agencies (listed in Appendix 1) are included at Appendix 3. A further 24 agencies (listed in Appendix 1) were surveyed during the audit but were not required to respond to the recommendations in the report. General responses were received from 13 of the 24 surveyed agencies. The Attorney-General’s Department agrees with the Recommendations 7–9, which were directed towards it.

## Recommendations

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*Set out below are the ANAO recommendations. Recommendations 1–6 are directed to the 16 agencies reviewed as part of the audit. These are likely to have relevance to many Australian Government agencies. Recommendations 7–9 are directed to the Attorney-General’s Department. Details of agency responses are included at Appendix 3.*

**Recommendation No.1  
Para 3.10** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they have an identified team / person to act as a coordination point within the agency for obtaining legal services. The coordination point should be capable of actively managing the provision of legal services, and understand the:

- business needs of the agency, and
- relative strengths and weaknesses of legal service providers in the market.

**Recommendation No.2  
Para 3.27** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they have appropriate systems in place to capture, record and report their legal services expenditure, and monitor workloads and trends in legal services. This should provide a sound basis for agencies to assess and match their legal service needs with cost effective service delivery.

**Recommendation No.3  
Para 3.34** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they regularly assess the legal risks to their core activities, and the risk that their legal service approach will not meet agency business needs.

**Recommendation No.4  
Para 4.19** The ANAO *recommends* that agencies review their existing procedures to ensure they have appropriate frameworks in place to monitor the performance of external providers (where applicable) and to identify and deal with any issues as they arise.

**Recommendation No.5**  
**Para 4.26**

The ANAO *recommends* that agencies review their existing procedures and policies to ensure that their agency staff are fully educated on when and how to seek legal services.

**Recommendation No.6**  
**Para 4.38**

The ANAO *recommends* that agencies review their existing procedures in order to ensure that they maintain effective knowledge management systems. Such systems should:

- have the ability to capture legal knowledge and advices already purchased (including standard form contract and template documents wherever possible); and
- be kept as up to date and as useable as possible (including having keyword search capability or cross-referencing mechanisms).

**Recommendation No.7**  
**Para 5.16**

The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, review its current approach to identifying and reporting breaches of the Legal Services Directions, with a view to providing greater assurance that reporting arrangements are capturing all breaches of the Directions.

**Recommendation No.8**  
**Para 5.38**

The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, consider implementing measures to better facilitate information sharing and exchange on legal issues across the Commonwealth.

**Recommendation No.9**  
**Para 5.45**

The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, assist the ANAO in the development and dissemination of better practice methodologies, and provide appropriate guidelines and reporting mechanisms for agencies to capture, record and report legal expenditure.

# **Audit Findings and Conclusions**



# 1. Background

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*This Chapter provides an overview of the Australian Government's legal services needs and arrangements over time, including the policy framework under which legal services operate. This chapter also outlines the audit objective, methodology and structure of this report.*

## The Australian Government's legal services needs

**1.1** The Australian Government operates within a complex and extensive legal framework, with 84 agencies under the *Financial Management and Accountability Act 1997* and 106 bodies under the *Commonwealth Authorities and Companies Act 1997*,<sup>1</sup> administering in total, over 1 000 pieces of legislation.<sup>2</sup>

**1.2** Legislation and the law generally is a necessary feature of the administration and accountability of government, underpinning the Government's broad range of functions, from social welfare, education and defence, to regulation and enforcement. In addition, a significant body of law governs the operating environment for day-to-day management of Australian Government agencies, including human resources and employment issues, and financial management and accountability issues.

**1.3** The Government's primary purpose in obtaining legal services is to protect its interests as well as to meet its administrative, legislative, and policy objectives. Legal advice provides assurance that the way the Government has acted, or should act, is legally appropriate, within the scope of its powers, and that the Government's legal risks are being adequately managed. In this context, legal services can also include scoping the legal implications of possible new policy proposals.

**1.4** Agencies may require legal services across a number of areas of law. These include litigation, legal advice on specific agency-administered legislation and whole of government legislation, as well as areas of corporate, commercial and contract law. The scope and quantity of legal services required by individual agencies varies considerably.

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<sup>1</sup> The number of agencies is based on information on the Department of Finance and Administration's website, <[http://www.finance.gov.au/finframework/fma\\_agencies.html](http://www.finance.gov.au/finframework/fma_agencies.html)> [29 March 2005].

<sup>2</sup> Commonwealth of Australia Administrative Arrangements Order, Schedule, Parts 1–18, <<http://www.pmc.gov.au/parliamentary/docs/aaor.htm>> [10 December 2004].

## The provision of legal services over time

**1.5** Prior to 1992, the Attorney-General's Department, including the Australian Government Solicitor (AGS) and a number of other legal services divisions, provided most legal services to all Australian Government agencies without charge. These were through its Legal Practice and funded by the Department's annual appropriations. These legal services were in addition to any services provided by individual agencies' in-house legal units. In 1992, formal reform of the Australian Government's legal services environment began. The Attorney-General's Department still offered legal services, but on a user-pays basis. In 1995, the deregulation of the Australian Government's legal services market continued, with further reforms allowing agencies to obtain services from private providers. In 1997 a major review of these legal services was undertaken "to consider the needs of the Commonwealth for legal services, and how these might best be met."<sup>3</sup>

**1.6** The subsequent *Report on the Review of the Attorney General's Legal Practice*<sup>4</sup> (the Logan Report) recommended that the Government's legal policy functions remain in the Attorney-General's Department, but that the Legal Practice be re-established as a Government Business Enterprise to be consolidated and operate under the AGS.<sup>5</sup> The AGS was to be separate and distinct from the Attorney-General's Department.

**1.7** The Office of Legal Services Co-ordination (OLSC) was established within the Attorney-General's Department to develop and administer the Government's legal services policy. The reform process culminated on 1 September 1999 with the enactment of the *Judiciary Amendment Act 1999*. The AGS now competes alongside private law firms on equal footing for most Australian Government work, though it is the only provider other than the Attorney-General's Department and the Department of Foreign Affairs and Trade allowed to perform all 'tied' work (i.e. constitutional, Cabinet, national security and public international law). Subject to tied work restrictions, agencies are now able to obtain legal services from in-house lawyers (subject to certain other restrictions), the AGS, private lawyers, or counsel across the entire range of their operations.

**1.8** Opening the Government's legal services market to competition from the private sector was aimed at introducing the following benefits:

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<sup>3</sup> B. Logan et al, Report of the Review of the Attorney-General's Legal Practice - The Logan Report, Australian Government Printing Services, Canberra, 1997, p. 3.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*, p. 10.

- giving agencies greater freedom of choice when purchasing their legal services;
- stimulating competition amongst private and public providers to contain or reduce their costs and increase their quality of services;
- enhancing the ability of agencies to ensure that they receive value for money in the purchase of their legal services; and
- giving private firms the opportunity to contribute their expertise to the delivery of government legal services.<sup>6</sup>

## The current environment

**1.9** As a result of these reforms, since 1 September 1999 the operating environment for the Government's legal services has been predominantly decentralised. Each agency is free to choose how its legal needs are met, and what level of resources should be applied to meet its legal service needs. In this context, each agency must weigh up its expenditure on legal services against all of its other resourcing priorities.

## The Legal Services Directions

**1.10** The Attorney-General issues *Legal Services Directions* (the Directions) under the *Judiciary Amendment Act 1999*. The Directions are intended to ensure that the quality of the Government's legal work is maintained and the public interest protected. The Directions are also designed to enable the Attorney-General to manage and reduce risks inherent in the provision of legal services to the Australian Government, and to ensure that these services are of a high standard and consistent with the public interest.<sup>7</sup>

**1.11** The Directions prescribe the Government's legal services policy and outline requirements on specific issues, ranging from the definition of 'tied' work, to the Government's approach to litigation and agency responsibilities when managing legal services. Attached to the Directions are the Government's model litigant policy and guidance on various issues, including on engaging counsel on behalf of the Australian Government. The Directions are covered in more detail in Chapter 5 - *The Office of Legal Services Coordination*. A failure by agencies or providers to follow the Directions constitutes a breach of the Directions.

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<sup>6</sup> Office of Legal Services Coordination, *Reforms to the Legal Services Market*, Attorney-General's Department, Canberra, 2003, pp.1-5.

<sup>7</sup> Office of Legal Services Coordination, *Purchasing Legal Services*, Attorney-General's Department, Canberra, 2000, p. 4.

## **The Office of Legal Services Coordination**

**1.12** OLSC is a Branch of the Legal Services and Native Title Division of the Attorney-General's Department. OLSC's responsibilities in relation to the Australian Government's legal services include: the administration of the Directions, including monitoring their operation; promoting an awareness of their requirements; and advising the Attorney-General on the need for any directions in relation to specific matters. OLSC also advises the Attorney-General on significant Australian Government litigation and determines which agency should be responsible for litigation where this is unclear. OLSC's roles and functions are covered in more detail in Chapter 5 - *The Office of Legal Services Coordination*. In the context of its role in the administration of the Directions, the OLSC is responsible for investigating and monitoring breaches of the Directions.

## **Different models currently operating across the APS**

**1.13** Opening the Government's legal market to fee charging and to competition from the private sector has resulted in the development of a number of different agency approaches to the procurement and management of legal services, the most common of which are briefly described below.

### **In-house legal unit supplemented by an external panel**

**1.14** The most common model in operation consists of an in-house legal team, with access to private legal firms (more often through a panel arrangement, although sometimes through a register of interested firms). While the details of internal arrangements vary across agencies, those using this model generally funnel legal services requests through a limited number of staff (often through a Chief Lawyer/General Counsel), in order to determine the key legal issues to address, and whether in-house capacity and expertise or an external provider is best placed to provide advice. Approximately 41 per cent of APS agencies service their legal needs using this approach.<sup>8</sup> Agencies which are the largest users of legal services tend to operate with this model.

### **Exclusive use of outsourced legal services**

**1.15** The second most common model adopted by agencies is to have their legal service needs met exclusively through the use of external providers. A number of these have outsourced their 'in-house' legal function to a single external provider, with most also maintaining a panel of external providers. Under this model, the agency generally employs a manager to represent and

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<sup>8</sup> ANAO, based on analysis of data collected by the Attorney-General's Department for the *Tongue Report*.

protect the agency's legal services interests. Reasons given for this approach include legal services not being perceived to be part of the agency's core business, and a belief that a private provider can deliver more cost effective legal services (given the agency's identified needs).<sup>9</sup> Approximately 38 per cent of agencies rely on totally outsourced legal services arrangements,<sup>10</sup> although only one of these agencies is among the ten largest users of legal services.<sup>11</sup>

## Other models

**1.16** Some agencies' approaches are variants of these models. One agency has adopted what it describes as a 'Public Private Partnership' model. This model involves an in-house legal team of Australian Public Service (APS) employees, who are managed by a private law firm. Under this arrangement, a law firm is contracted as the primary provider, to provide a level of service for a fixed price, with a panel of other firms able to obtain legal work from the agency through the primary-provider. This agency is one of the 20 largest users of legal services. Another agency has a less formal 'partnership' arrangement in place, in that it has contracted the services of an AGS employee to perform the role of General Counsel to the agency, and to manage the in-house legal unit.

**1.17** There are other examples, where in-house legal teams are supplemented with external legal resources, either seconded to the in-house team, or out-posted to line areas of the agency. These arrangements can be for specific tasks, or as part of strategies to develop in-house expertise in particular areas of law within the agencies concerned.

## Audit Objectives and Scope

**1.18** The objective of the ANAO's performance audit was to:

- examine the efficiency and effectiveness of agencies' procurement and management of legal services arrangements;
- determine adherence to Australian Government policy requirements;
- examine the effectiveness of the OLSC's monitoring of agencies' compliance with Government policy requirements; and
- examine the OLSC's role in assisting agencies to comply with Government policy.

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<sup>9</sup> ANAO, based on agency responses to the survey used as part of this audit.

<sup>10</sup> ANAO, based on analysis of data collected by the Attorney-General's Department for the *Tongue Report*.

<sup>11</sup> ANAO, based on agency responses to the survey used as part of this audit.

## Audit Methodology

**1.19** The audit methodology was based on a review of files, records, systems and interviews with staff in legal and other areas of 16 agencies and the OLSC. The ANAO surveyed a further 24 agencies on the type, cost and drivers of their legal services. The list of audited and surveyed agencies is at Appendix 1.

**1.20** The ANAO also consulted with and invited submissions from, a number of stakeholders and interested parties, including law firms, professional associations and law societies.

**1.21** A strong focus of the audit was to examine the processes and systems agencies use to provide senior management and decision-makers with assurance that agency legal services arrangements are providing value for money. In this context, the audit examined agencies' systems for recognising and assessing the impact of legal workload changes, approaches to capturing and utilising legal knowledge previously purchased and of monitoring legal services resources and expenditure. The audit did not review individual decisions by agencies to use, or procure, legal services.

**1.22** Agencies were surveyed on a range of issues, including legal expenditure over the last five years, the key drivers of legal services, and the basis for determining which matters should be handled in-house and/or externally.

**1.23** The audit methodology did not seek to replicate the work of the *Report of a Review of the Impact of the Judiciary Amendment Act 1999 on the Capacity of Government Departments and Agencies to obtain Legal Services and on the Office of Legal Services Coordination* (the Tongue Report),<sup>12</sup> which sought to collect expenditure data from 170 Australian Government agencies. The work of the Tongue Report informed the audit methodology, particularly in the selection of agencies for participation as auditees and survey recipients. Agency selection was based predominantly on those with the highest reported level of legal services expenditure (as identified through the Tongue Report's survey).<sup>13</sup> The audit methodology also sought to ensure that a range of legal services procurement models was included as part of the agencies audited and/or surveyed.

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<sup>12</sup> S. Tongue, *Report of a Review of the Impact of the Judiciary Amendment Act 1999 on the Capacity of Government Departments and Agencies to Obtain Legal Services and on the Office of Legal Service Coordination*, Attorney-Generals Department, Canberra, 2003.

<sup>13</sup> The 40 agencies selected for the audit survey, reported combined expenditure of over 90 per cent of the *Tongue Report's* estimate of total Australian Government agency legal services expenditure (\$243.0 million in 2001–02).

**1.24** While there is no definitive list of categories for describing legal services, for the purposes of this audit, the following categories were used to capture details of agencies' legal services workloads:

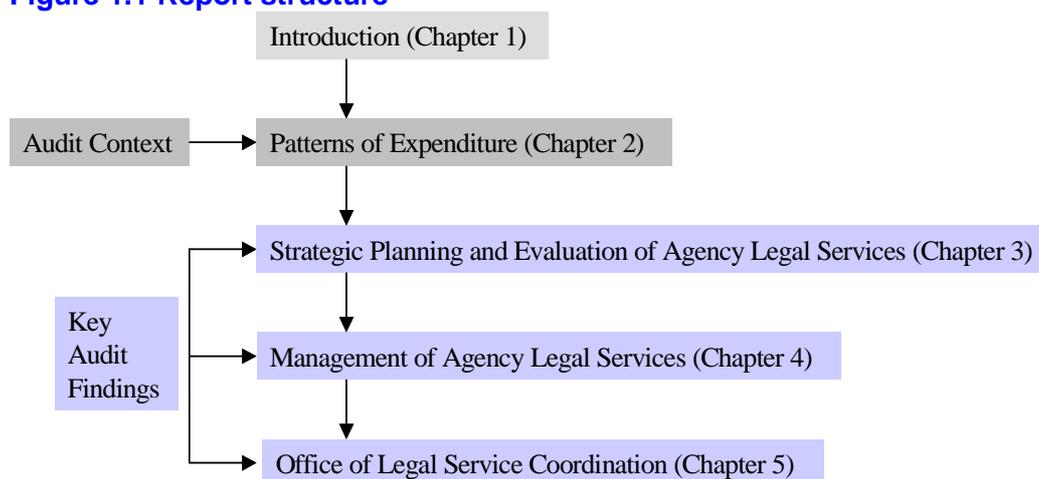
- litigation;
- legal advice on specific agency-administered legislation and related work;
- legal advice to support Australian Government agency management functions;
- commercial or contract law/legal agreements;
- other legal services; and
- management/corporate tasks undertaken by legal unit staff.

**1.25** The audit recognised that different agencies may well have differing legal service needs, requiring a range of approaches. In this context, the audit tested whether each agency has based its legal service model on the identified needs of the agency, and whether agencies had sufficient systems and processes in place to provide assurance that the operation of their selected model was cost-effective.

**1.26** The audit was conducted in accordance with ANAO auditing standards. The audit commenced in March 2004 and the bulk of fieldwork was conducted between March and October 2004. The total audit cost was \$520 000.

## Report Structure

**Figure 1.1** Report structure



Source: Developed by the ANAO

## 2. Patterns of Expenditure

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*This chapter describes the legal services expenditure of the 16 audited and 24 surveyed agencies, providing analysis of the key drivers of expenditure, along with changes and the reasons for change over time. The chapter provides a context in which to consider the audit's findings outlined in subsequent chapters, relating to the planning and management of agency legal services and the coordination of the Australian Government's legal services arrangements.*

### Legal expenses over time

**2.1** To date, the Australian Government's legal services expenditure has not been systematically recorded and reported. In 1997, the Logan Report estimated that the Commonwealth legal market (both internally and externally provided services) was 'in the order of \$198 million per annum'<sup>14</sup>, although this figure was not exact, having been extrapolated from available data. In 2002, the Attorney-General's Department conducted a survey of 170 Australian Government agencies, and calculated their legal expenditure (both internal and external) for 2001–02 at \$243 million.<sup>15</sup> This survey was part of the Tongue Report, which analysed the survey findings, and acknowledged that 'the survey results have some limitations'<sup>16</sup> noting that:

'not all agencies attempted to complete the survey; some agencies were only able to estimate costs; the basis used for calculating internal costs varied among agencies; and there was an inconsistent approach among agencies to the inclusion of GST expenses after 2000.'<sup>17</sup>

**2.2** It was also difficult for the purposes of this audit to ascertain the true historical value of the Government's legal services market for comparative purposes. However, despite the approximate nature of both earlier figures, and difficulties presented by incomplete data, expenditure by agencies on legal services is substantial and is growing in real terms.

**2.3** The ANAO notes that one agency has revised its reported internal legal services expenditure by an increase of \$14.4 million from the amount included in its original Tongue Report survey response,<sup>18</sup> which suggests that some agencies may have difficulty in recording and collating legal services

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<sup>14</sup> B. Logan et al, op cit., p. 38.

<sup>15</sup> S. Tongue, op cit, p. 10.

<sup>16</sup> Ibid., p. 3.

<sup>17</sup> Ibid.

<sup>18</sup> Australian Parliament, Hansard Question on Notice No. 3025, 16 November 2004.

expenditure data, and indicates that this expenditure was under-reported in the Tongue Report. In addition, comparisons of legal services expenditure over time are further complicated by agencies not necessarily adopting a common definition of what constitutes 'legal expenses', and what factors to include in calculating internal legal costs.

**2.4** Comparing the dollars estimated to have been spent on legal services in 1997 with the estimated expenditure in 2001–02 suggests a 22.7 per cent increase (\$198 million to \$243 million) over a five-year period. However, such a comparison does not take into account changes in the 'purchasing power' of money over that time. In order to more effectively compare legal services spending over time, the amounts identified in the Logan and Tongue Reports were adjusted by the ANAO for changes in the Consumer Price Index (CPI).<sup>19</sup> This allows 'real' changes in the estimates of legal services purchasing to be more clearly identified (rather than potentially mistaking the effects of inflation for a real change in consumption behaviour). On this basis, the Logan Report figure of \$198 million and the Tongue Report figure of \$243 million (excluding the subsequent \$14.4 million revision) would be \$230.8 million and \$257.7 million respectively, in 2003–04 prices. This yields a real increase in estimated spending from 1997 to 2001–02 of \$26.9 million (\$230.8 million to \$257.7 million), or 11.7 per cent, over the five-year period from the previous studies undertaken.

### **Total expenditure in surveyed agencies**

**2.5** For the purposes of this audit, the amounts (excluding GST) of legal expenses reported by surveyed agencies, have been used for analyses involving agency legal expenses over time. This provides a clearer view of changes in workload and underlying expenditure. In addition, the figures submitted by agencies were similarly adjusted to account for CPI increases. Figures reported for legal services expenditure are consequently represented at the equivalents of 2003–04 prices.

**2.6** Table 2.1 summarises the Government's legal services spending, based on data collected from surveyed agencies. Detailed agency data is at Appendix 1.

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<sup>19</sup> Australian Bureau of Statistics *6401.0 Consumer Price Index Australia*, Table 1A. All Groups, Index Numbers (Financial Year), Weighted Average of Eight Capital Cities, released 27 October 2004.

**Table 2.1 Total legal services expenditure across 40 selected agencies – 1999–2000 to 2003–2004 (in June 2004 prices)**

Year	Internal legal services costs (\$m) <sup>A</sup>	External legal services costs (\$m)	Total across the 40 surveyed agencies (\$m)
1999–2000	132.8	175.0	307.8
2000–2001	138.5	163.6	302.1
2001–2002	178.0	184.9	362.9
2002–2003	203.7	205.3	409.0
2003–2004	229.8	216.2	446.0

<sup>A</sup> Not all surveyed agencies were able to provide robust estimates of their internal legal expenditure prior to 2002–2003. As a result, the figures reported above for the earlier years are likely to understate actual internal legal costs.

Source: Developed by the ANAO on the basis of agency survey responses.

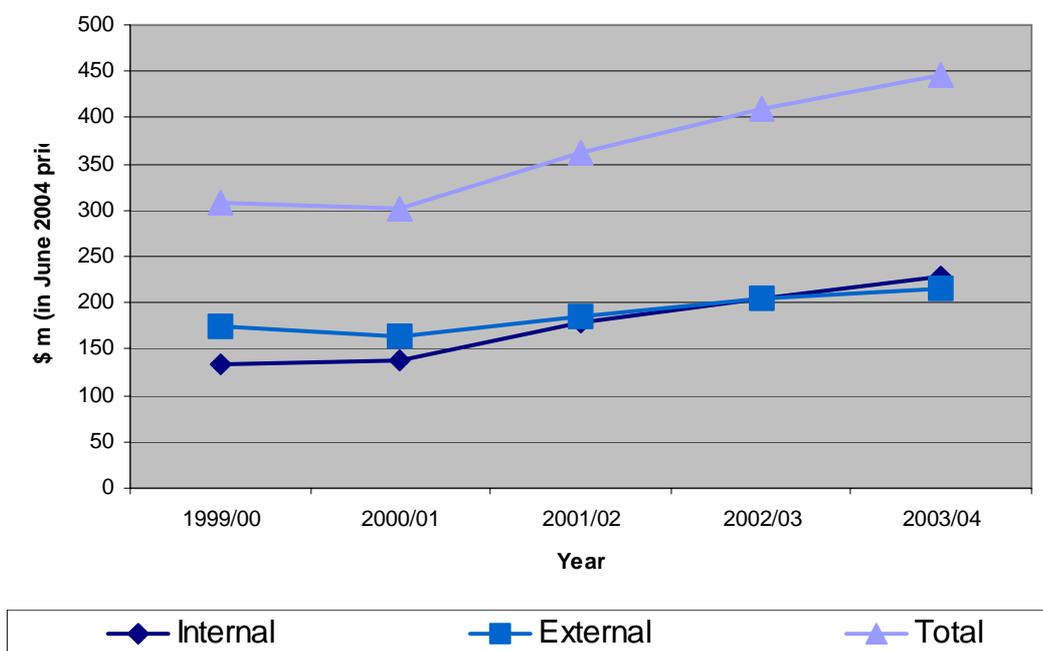
**2.7** It is important to note that the ANAO survey data differs significantly from the expenditure estimates of the Tongue Report. The reason for this is that the ANAO survey sought to capture all expenditure on legal services by 40 selected Australian Government agencies. As a result, the data in Table 2.1 includes the costs of legal work performed by staff in agencies whose core business involves enforcement activities, such as the Office of the Director of Public Prosecutions (DPP) and the Australian Securities and Investments Commission (ASIC). These two agencies' internal legal expenditure was not included in the Tongue Report figures. The ANAO has included these legal services, as the staff employed by these agencies exercise their legal professional judgement on legal issues as a part of their daily function. In addition, the Tongue Report's reported total of \$243 million for 2001–02 included the spending of many smaller agencies, but did not include an amount of \$14.4 million described in paragraph 2.3 above as being inadvertently excluded from one agency's Tongue Report survey response. Therefore, the figures from this audit report do not match the Tongue Report, and could not be expected to do so. As a result, direct comparisons with the expenditure estimates from the Tongue Report would not be valid, and no conclusions should be drawn in regard to the differences.

**2.8** Overall, based on CPI adjusted amounts, total external legal services spending, as reported by agencies in the survey, has increased by approximately 23 per cent from 1999–2000 to 2003–04. Internal spending appears to have increased at a faster rate than external spending. However, it is important to note that the increase in internal spending over this period is likely to be significantly overstated, as a number of agencies, including two of

the largest users of legal services, were unable to provide complete estimates of their internal legal expenses, especially in relation to the first 2-3 years of the survey analysis.

**2.9** This data has been presented graphically in Figure 2.1 to better demonstrate the year-on-year changes in real terms.

**Figure 2.1 Commonwealth expenditure on legal services – 1999–2000 to 2003–04 (in June 2003–04 prices)**



Note: As explained in paragraph 2.8, two of the largest users of legal services were unable to provide complete estimates of the internal legal services expenditure prior to 2002–2003.

Source: ANAO based on survey data.

**2.10** On the basis of this survey and Figure 2.1, external legal spending is trending upwards over time. It is also apparent that the balance of the total reported legal expenditure, categorised between internally and externally provided services, has reversed over the period. In 1999–2000 and 2000–01, expenditure on external legal services was significantly higher than that on internal services. From 2001–02, legal services expenditure has been shared almost equally between internal and external providers.

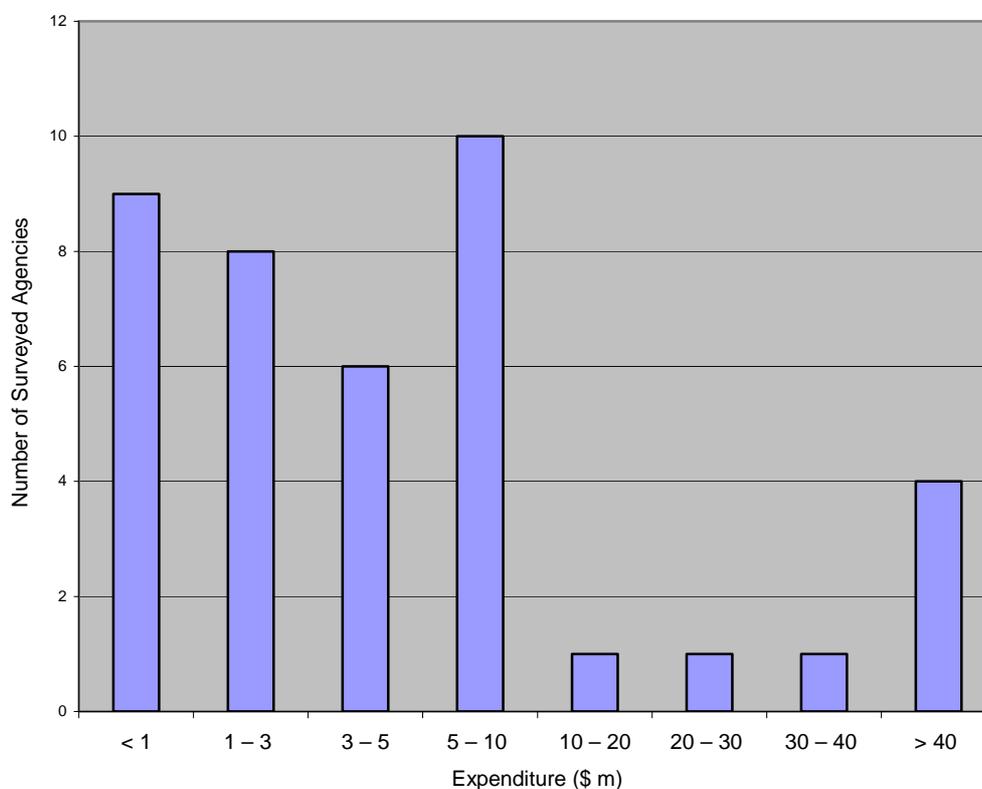
**2.11** The ANAO considers that it is important to understand the key drivers of agency demand for legal services, in order to understand the level of, and changes in, legal services expenditure. A focus on expenditure alone provides no insight into whether or not the Commonwealth is obtaining greater cost effectiveness over time.

**2.12** The decision on whether to expend resources on legal services is one for each agency. The level of demand for, and nature of, legal services varies considerably across agencies, and for a number of reasons. The nature of the agency's function, the extent of change to legislation it administers, the service delivery model employed (for example, the extent of outsourcing of corporate functions and activities), and the nature and level of litigation can all have a significant impact on the manner and volume of legal services procured. Additionally, some of these factors may vary across agencies due to potentially different organisational cultures, including appetite for risk and strategies to manage and/or mitigate legal and other risks. These are considered in more detail later in this chapter.

**2.13** In this context, the ANAO notes that of the 40 agencies surveyed, 16 reported decreased expenditure on external legal services in 2003–04, compared to 1999–2000. Of these agencies, 10 reported an increase in expenditure on internal legal services over that period. This could suggest that internal resourcing has increased over time, in order to reduce the need to outsource at least some types of legal services. Alternatively, it may in part be attributable to improved capture and reporting of internal legal services expenditure in recent years.

### **Legal services expenditure in surveyed agencies**

**2.14** As can be seen from Figure 2.2, in 2003–04, seven of the 40 surveyed agencies' legal services expenditure was greater than \$10 million, 10 agencies spent \$5-10 million and the remaining 23 agencies spent less than \$5 million. The Australian Government legal services market can thus be characterised as having a small number of agencies with a high demand for legal services and many agencies with a relatively low demand and consequent small share of the market.

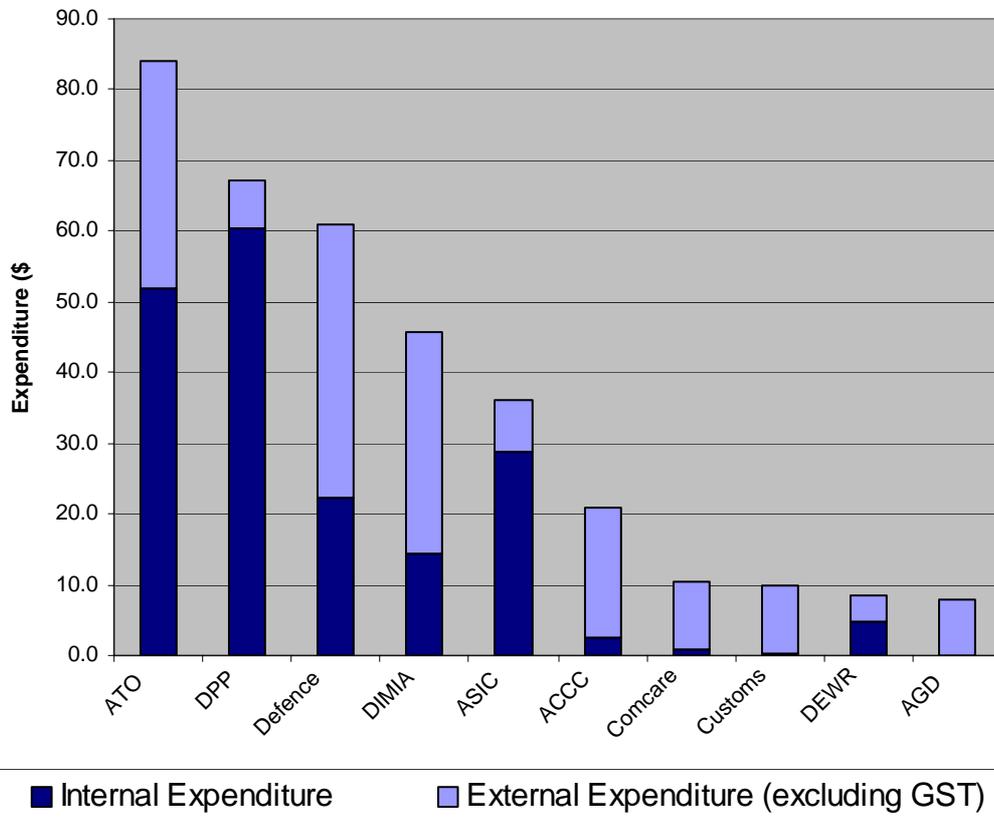
**Figure 2.2 Distribution of expenditure across agencies – 2003–04**

Source: ANAO from audit survey data.

**2.15** The four agencies with expenditure on legal services greater than \$40 million in 2003–04 were: the Australian Taxation Office (ATO) (\$86.2 million); DPP (\$67.1 million); Defence (\$61.0 million); and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) (\$45.9 million).<sup>20</sup> Together, these four agencies account for 58 per cent of the total Australian Government legal services expenditure, as recorded by surveyed agencies. The 10 agencies with the highest legal services expenditure are summarised in Figure 2.3 below.

<sup>20</sup> ANAO, based on agency responses to the survey used as part of this audit.

**Figure 2.3 Top ten agencies legal services expenditure – 2003–2004**



Source: ANAO from audit survey data.

**2.16** Given the contributions the top four agencies make to the Government’s total legal expenditure, the key drivers of these agencies’ legal spending over time are analysed below in greater detail.

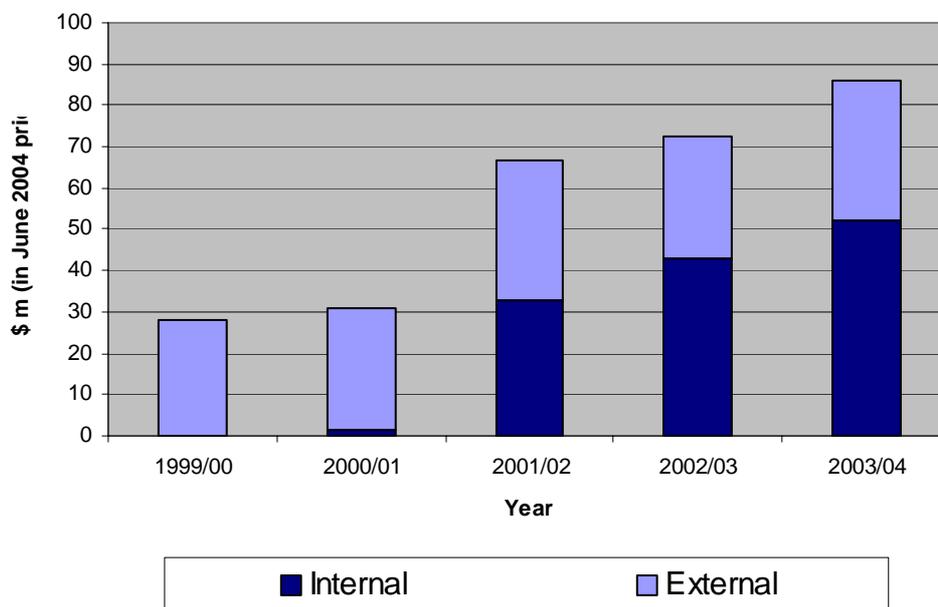
#### ATO

**2.17** The role of the Australian Taxation Office (ATO) is to manage tax, excise and superannuation systems that fund services for Australians, giving effect to social and economic policy.<sup>21</sup> For 2004–05, the ATO’s departmental appropriation is \$2.4 billion, and the Government expects it to collect \$216.8 billion in taxation revenue.<sup>22</sup> The ATO’s legal expenditure over the last five years is outlined in Figure 2.4 below.

<sup>21</sup> Australian Taxation Office, *Annual Report 2003-04*, 2004, part 1.1.

<sup>22</sup> Portfolio Additional Estimates – Treasury – Part C: Agency Budget Statements – Australian Taxation Office <[http://www.budget.gov.au/2004-05/paes/html/18\\_part\\_c\\_ATO.htm](http://www.budget.gov.au/2004-05/paes/html/18_part_c_ATO.htm)> [11 February 2005].

**Figure 2.4 ATO legal expenses 1999–2000 to 2003–04**



Note: The ATO advised that it was unable to provide complete data on its internal legal spending for 1999–2000 and 2000–01 as the expenditure was included in operational spending and could not be specifically identified.

Source: ANAO based on survey data

**2.18** The ATO administers legislation on taxation, (most notably the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997*), and some superannuation legislation. Providing policy interpretation and regulation of this legislation are significant features of the ATO's core function and responsibilities.

**2.19** The ATO devotes resources to the policy interpretation and clarification of its legislation, and publishes Interpretative Decisions and Taxation Rulings as a consequence. These resources are not attributed to the ATO's internal legal expenditure. The ATO's internal legal expenditure reflects the regulatory side of its operations, along with its corporate/commercial law activities.

**2.20** While the ATO was unable to provide data on the volume of litigation in previous years, in 2003–04 the Commissioner of Taxation was involved in a total of 4,850 litigation cases, of which 1,674 were direct recovery actions.

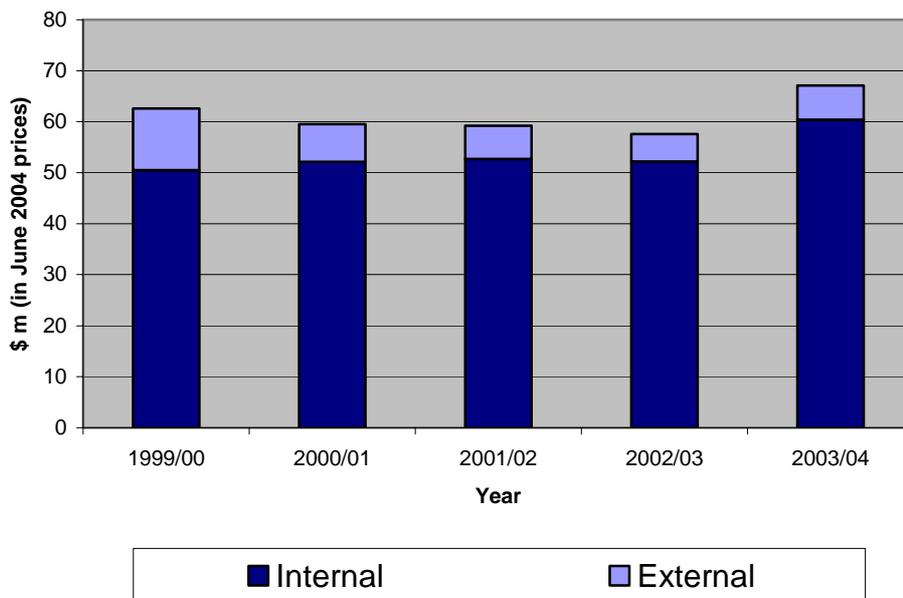
**2.21** Against this background, the ATO estimates that 35 per cent of its total legal spending is on litigation, and a further 35 per cent of its internal legal spending and 60 per cent of its external legal spending relate to its administered legislation.

## DPP

**2.22** The primary role of the DPP is to prosecute offences against Commonwealth law, including *Corporations Act 2001*, and to recover the proceeds of Commonwealth crime. The DPP is not an investigative agency. It prosecutes cases investigated and referred to it by other agencies.<sup>23</sup>

**2.23** The DPP indicated that its workload has increased within the last five years due to corporate collapses such as HIH Insurance, and cases relating to Pan Pharmaceuticals, people smuggling and counter-terrorism. The ANAO notes that the Australian Government has provided additional resources from 2003–04 for: the HIH Prosecutions Task Force; Proceeds of Crime legislation; identity fraud (to improve and increase the number of investigations); and the Interim Taskforce for the Building and Construction Industry.<sup>24</sup> These resources explain the increased expenditure on internal legal services in 2003–04, shown in Figure 2.5 below.

**Figure 2.5 DPP Legal Expenditure 1999–2000 to 2003–04**



Source: ANAO based on survey data

## Defence

**2.24** Defence manages annual resourcing in excess of \$18 billion, and has legal service requirements ranging from specialist military law, to corporate

<sup>23</sup> Attorney-General's Department, *2004-05 Portfolio Budget Statements*, 2004, p. 393

<sup>24</sup> *ibid.*, p. 398.

and commercial law. Advice on commercial and contract law includes the structure and administration of many service and procurement contracts, covering catering and maintenance contracts, to long term procurement contracts for major military equipment.

**2.25** Defence operates an internal legal unit, with operational procedures also allowing for line area staff to directly procure external legal services from a panel of providers. Until recently, the management of the legal panel was the responsibility of the Defence Materiel Organisation, on the basis of the relatively high volume of potentially complex commercial/contract legal work arising from defence procurement activities.

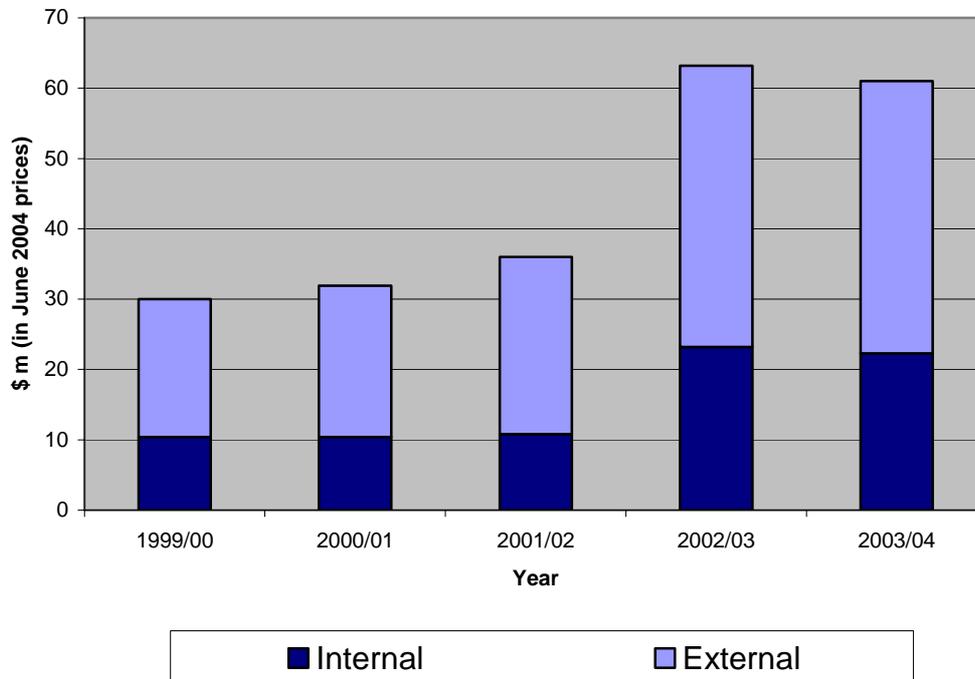
**2.26** Defence identified three factors as key drivers for increases in legal spending over the last five years: the impact of technological change (which has led to internal client expectations of more instantaneous legal services); the impact of overseas events (and the associated greater operational profile of Australian Defence Forces overseas); and the Defence White Paper and subsequent Defence Capability Plan, which have increased the amount of large and complex projects to be delivered. In 2003–04, this included two Government-approved projects estimated to cost \$450–600 million, three to cost \$250–350 million and five to cost \$100–250 million.<sup>25</sup>

**2.27** The ANAO notes that Defence has recently changed the structures and arrangements that underpin its legal services arrangements. These changes are designed to provide the in-house legal services unit with more centralised control over decisions to obtain legal services, and to determine the most cost-effective method in doing so.

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<sup>25</sup> Department of Defence, *Annual Report 2003–04*, 2004, p. 24.

**Figure 2.6 Defence Legal Expenditure 1999–2000 to 2003–04**



Note: Defence was unable to provide complete internal legal services data prior to 2002–03. As a result, the reported estimated figures in previous years may understate actual expenditure.

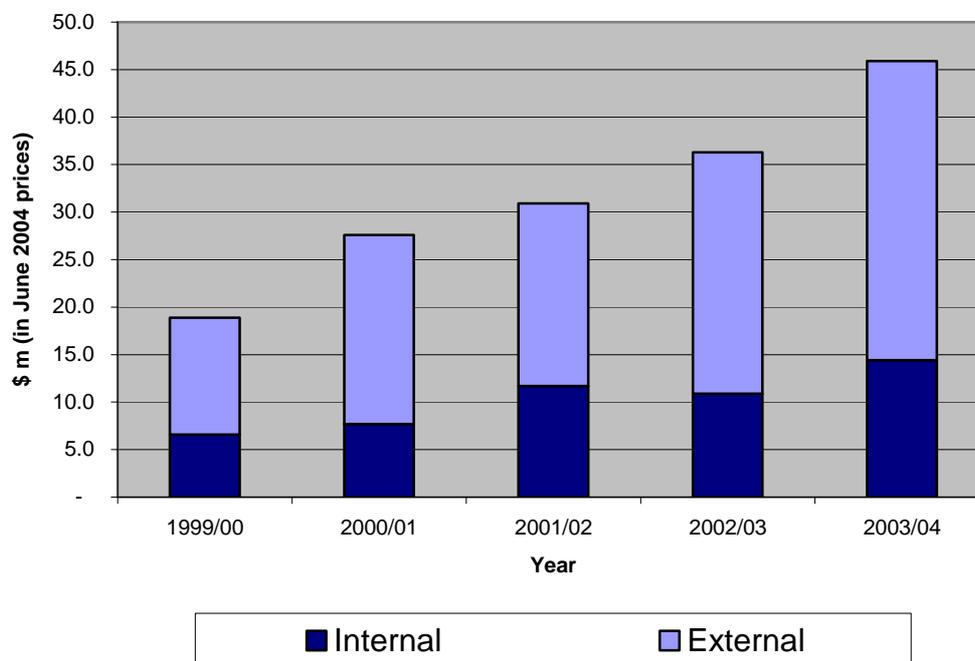
Source: ANAO based on survey data

### *DIMIA*

**2.28** DIMIA is responsible for enforcing immigration law as part of its function to manage the permanent and temporary entry of people to Australia.

**2.29** As can be seen from Figure 2.7, DIMIA’s internal and external legal expenditure has increased significantly in real terms from 1999–2000 to 2003–04, reflecting an increase in its litigation caseload in that time from 1 000 cases in 1999–2000 to nearly 5 000 cases in 2003–04. The ANAO notes that DIMIA’s costs have increased at a significantly lower rate than its increase in workload. This suggests that DIMIA has improved the efficiency of its legal services, significantly reducing the average cost of its litigation per matter.

**Figure 2.7 DIMIA Legal Expenditure 1999–2000 to 2003–04**



Source: ANAO based on survey data

## Key drivers of legal services expenditure in a changing environment

**2.30** Any increase in the Government's legal services expenditure primarily reflects an increase in the hourly cost of the service, the volume of services required, or a combination of these factors. In addition, some Government policy decisions, such as the introduction of the GST, may also have an impact.

### Hourly rates and the costs of matters

**2.31** The ANAO notes that the hourly rates charged by legal service providers are not the sole or a definitive indicator of cost effectiveness when obtaining legal services. The overall cost, quality, relevance, usefulness and timeliness of advices are all critical considerations in assessing cost effectiveness.

**2.32** Audited agencies generally went to the market (usually by competitive tender) for selecting external legal providers. For most agencies, this meant that legal service providers offered their expertise at either a specified 'blended' hourly rate (a flat rate payable whether a partner or a junior lawyer provides the service), or specified hourly rates for particular staff or levels of staff.

**2.33** A number of agencies secured specified hourly rates for two or three years before being subject to review, while other agencies had built annual adjustments to the hourly rates into the contractual arrangements with their legal panel firms. As a result, the ANAO was able to identify whether changes in spending were influenced more by changes in the hourly rate, or volume of work. The ANAO found that increases in hourly rates accounted for up to 20 per cent of the total increase. The far more significant factor in expenditure increases was the volume of legal work being performed.

**2.34** It is common for agencies to have some variation in the hourly rates and the charging arrangements for their panel firms. For example, one agency had blended rates for panel firms of between \$250 and \$315 per hour, and for another agency, the rate for partners at panel firms ranged from \$300 to \$396 per hour. The ANAO notes that it is possible that changes in the share of work between partners and more junior staff, and/or between panel providers with different hourly rate charges, could influence changes in total expenditure. However, ANAO found no systematic evidence that this was the key driver of expenditure change. As a result, the ANAO concluded that the key driver is an increase in the overall volume of work referred to panel firms by agencies.

### Legal expenditure by category of legal work

**2.35** Most agencies were able to calculate or, if not, to estimate the breakdown of their legal expenditure by the legal categories described at paragraph 1.23. A summary of legal expenditure by category for 2003–04 is at Table 2.2.

**Table 2.2 Legal expenditure in 2003–04 by category of legal work**

Legal Category	Internal (\$m)	External (\$m)	Total (\$m)
Litigation	103.1	104.5	207.6
Legal advice on specific agency legislation	46.7	40.4	87.1
Legal advice to support corporate functions	8.1	5.9	14.0
Other legal advice	8.3	4.0	12.3
Commercial or contract law	12.3	18.8	31.1
Management/corporate tasks	5.8	0.5	6.3
<b>Sub total</b>	<b>184.3</b>	<b>174.1</b>	<b>358.4</b>
Unallocated	45.5	42.1	87.6
<b>Total</b>	<b>229.8</b>	<b>216.2</b>	<b>446.0</b>
Note: Two agencies were unable to calculate or estimate their legal expenditure by these categories, resulting in unallocated legal expenditure of \$86.8 million.			

Source: ANAO based on audit survey data

**2.36** Litigation accounts for 58 per cent (\$207.6 million) of categorised legal expenditure,<sup>26</sup> and is clearly the major category of legal expenditure. The ANAO notes that most of the top ten agencies have a significant litigation workload,<sup>27</sup> and that litigation, legal advice on specific agency legislation and commercial/contract law together accounted for over 90 per cent of categorised legal expenditure.

**2.37** The ANAO notes that this accords with the workload drivers identified by agencies as having a high impact on their legal service requirements. The most common of these were changes to portfolio legislation or regulations; and changes in agencies' need to respond to, or investigate and initiate, litigation.

**2.38** The ANAO also notes that the impact of these factors will vary substantially, depending on the agency concerned. As a result, it is important to identify the agencies with the largest impact on total legal spending, and understand the reasons for changes in their legal service needs.

#### *Changes to portfolio legislation or regulations*

**2.39** Commonwealth agencies are responsible for the administration of over 1 000 separate pieces of legislation, with Parliament estimated to spend half of its sitting time considering legislative changes.<sup>28</sup>

**2.40** The House of Representatives *Bills Digest* indicates that between 1999–2000 and 2003–04, 910 pieces of legislation or amendments to legislation were introduced into the House of Representatives, averaging 182 per year, and varying from 201 in 1999–2000 to 172 in 2003–04.<sup>29</sup> This suggests a relatively consistent workload of legislative change, although it is clear that some agencies have been more significantly affected than others, both in quantity of legislative change and complexity/sensitivity. In particular, analysis of the *Bills Digest* indicates that the ATO, DIMIA, the Department of Health and Ageing (Health) and the Department of Employment and Workplace Relations (DEWR) regularly have legislation listed.<sup>30</sup> The ANAO notes that this is consistent with ATO and DIMIA, indicating that legislative changes have had a high impact on their legal costs, and acknowledges that the resources required to manage legislative change depend on the complexity of the required amendments.

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<sup>26</sup> The term 'categorised legal expenditure' refers to the total of \$358.4 million of legal services expenditure that agencies were able to identify by category of legal work.

<sup>27</sup> Note that litigation can include a wide range of work, involving many kinds of disputes and often work that may never get to a court, and could include preliminary work on a matter, advice on settling a dispute, or using alternative dispute resolution.

<sup>28</sup> Australian Parliament, *Making Laws Information Sheet*, No.7 April 2002, p. 1.

<sup>29</sup> Australian Parliament, *Bills Digest*, <<http://www.aph.gov.au/bills/index.htm>> [21 December 2004].

<sup>30</sup> *Ibid.*

**2.41** For 2003–04, legal advice on specific agency legislation accounted for 24.3 per cent (\$87 million) of total categorised legal services expenditure.

*Litigation*

**2.42** Litigation can be simply defined as legal action in pursuit or furtherance of a claim, and in the context of the Directions, ‘is intended to include proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes’.<sup>31</sup>

**2.43** The two most common ways in which agencies become involved in litigation are as a plaintiff or applicant, (when an agency commences proceedings against a person or entity) or as a defendant or respondent, (when a person or entity commences proceedings against the Australian Government).

**2.44** Agencies with a strong regulatory function are more commonly involved in litigation as a plaintiff or applicant, as they are more likely to initiate action as part of their positive enforcement role. Such agencies include; ASIC, the Australian Competition and Consumer Commission (ACCC), the ATO and the Australian Customs Service (Customs), but also include a range of policy and program agencies, such as DIMIA and the Department of Family and Community Services (FACS) (although these latter agencies are more commonly involved in litigation as a respondent). The regulatory agencies, whose legal expenditure is summarised in tables 2.3 and 2.4 below, are all in the ten agencies with the highest legal services expenditure.

**Table 2.3 External Legal Expenditure by Agencies with Regulatory Functions**

Agency	1999–00 (\$m)	2000–01 (\$m)	2001–02 (\$m)	2002–03 (\$m)	2003–04 (\$m)
ATO	24.2	26.2	31.8	28.8	34.2
DIMIA	10.7	17.7	18.1	24.7	31.4
ASIC	2.5	2.8	6.1	7.7	7.2
ACCC	17.3	10.4	14.2	17.9	18.4
Customs	5.4	6.8	7.2	9.4	9.5

Note: This table contains actual reported expenditure (exclusive of GST), and has not been adjusted for CPI.

Source: Developed by the ANAO

<sup>31</sup> *Legal Services Directions*, op cit., p. 9.

**Table 2.4 Internal Legal Expenditure by Agencies with Regulatory Functions**

Agency	1999–00 (\$m)	2000–01 (\$m)	2001–02 (\$m)	2002–03 (\$m)	2003–04 (\$m)
ATO	N/A (1)	1.5	33.0	43.0	52.0
DIMIA	5.7	6.9	11.1	10.6	14.4
ASIC	21.6	21.5	23.2	24.1	28.8
ACCC	2.5	1.7	1.9	2.2	2.6
Customs	0.4	0.3	0.4	0.4	0.3
Note: This table contains actual reported expenditure, and has not been adjusted for CPI.					
(1) Expenditure not able to be specifically identified					

Source: Developed by the ANAO

**2.45** Of these agencies, DIMIA has experienced the most significant increase from 1999–2000 to 2003–04, due to changes to portfolio legislation and regulations over the five-year period (including changes to Australia’s Migration Zone) and in its need to respond to litigation, as described in paragraph 2.28 above.

**2.46** The ATO experienced increased legal expenditure in the context of major tax reform initiatives, including the introduction of the GST. In its survey response, the ATO also indicated that a number of court decisions have resulted in changes in the way the ATO responds to litigation, including the engagement of high quality counsel and expert evidence, and greater resourcing in the earlier stages of litigation.

**2.47** ASIC employs a large number of internal lawyers, particularly for its enforcement activities, with its external legal spending predominantly attributable to the engagement of counsel. ASIC’s regulatory function means that it can run cases in criminal and/or civil courts. The ANAO found that the increase in ASIC’s demand for external legal services is, in part, a reflection of an increase in the volume of cases subject to civil action. In criminal cases (other than cases involving minor regulatory offences), the DPP represents the Commonwealth in court (at no direct cost to ASIC). In civil matters, ASIC itself directly engages and pays for counsel. ASIC has also experienced major expansions of its regulatory and enforcement responsibilities in recent years, and has experienced legal workload increases in the context of the HIH and Cole Royal Commissions.<sup>32</sup>

<sup>32</sup> B. Bailey, *Report of the Royal Commission into HIH Insurance*, No. 32, Department of the Parliamentary Library, Canberra, 13 May 2003.

The Honourable T.R.H. Cole RFD QC, *Royal Commission into the Building and Construction*, 2003.

**2.48** A third way agencies can become involved in litigation is as an interested party. DEWR is an agency that can be involved in litigation in such a way, by intervening in disputes between two parties in courts or in the Australian Industrial Relations Commission. In this way, the Government is able to provide its view on the intent of the workplace relations legislation that it administers. The ANAO notes that DEWR's external legal expenditure is lower in 2003–04 than it was in 1999–2000, and considers that this area of litigation has not led to material increases in the Government's total legal services expenditure.

**2.49** In all of these situations, the Commonwealth requires legal services including representation. Government policy requires agencies in most circumstances to obtain external legal services for litigation.<sup>33</sup>

#### *Changes in the delivery model for non-core services*

**2.50** The Australian Government's policy of market testing, and the resultant outsourcing of a range of corporate functions in recent years have increased the volume of commercial and contract-related legal work for many agencies. The ANAO notes that as outsourcing has been a feature of the operating environment over the five years examined by this audit, it is difficult to isolate the extent of its impact on the Commonwealth's legal costs over time. However, based on the audit survey, commercial or contract law accounted for 8.7 per cent (\$31.1 million) of categorised legal expenditure in 2003–04. The ANAO also notes that this figure is likely to be understated, as two of the three agencies that were unable to provide reliable estimates of their legal expenditure by category, have business needs that are likely to involve significant amounts of commercial or contract advice.

## **Reasons for outsourcing vs insourcing**

**2.51** The audit examined agencies' legal services outsourcing decisions, and found that the four most common reasons to outsource were to: seek specialist advice that is not available in-house; better manage large and complex matters; obtain an independent legal opinion to mitigate the agency's risk on particular matters; and/or cope with peaks in legal services workloads.

**2.52** In addition, the ANAO notes that agencies with a litigation focus are bound by the Government's policy requirement to outsource most litigation. This reason was also cited by such agencies as a rationale for outsourcing these legal services.

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<sup>33</sup> Attorney-General's Department, *Legal Services Directions*, 1999, para. 5.

**2.53** The most common reasons, given by the ten largest users of legal services, for insourcing were that the in-house team: has a better understanding of the agency's business; has specialist expertise relating to the agency's legal needs; and was a mechanism for building and retaining corporate knowledge. A number of agencies also perceived lower costs as a reason for obtaining legal services in-house.

## Conclusions

**2.54** The most significant categories of legal work in terms of cost are: expenditure on litigation, which accounted for 58 per cent of agencies' categorised legal expenditure; legal advice on specific agency legislation, which accounted for 24.3 per cent; and commercial/contract law advice, which accounted for 8.7 per cent.

**2.55** Based on audit survey responses, the reported external legal services expenditure between 1999–2000 and 2003–04 has increased by 23 per cent in real terms. The improved capture and reporting of internal legal services expenditure in recent years is a factor in the reported increase in that category. Growth has been predominantly driven by an increasing volume of legal work performed. Periodic increases in the charge-out rates of providers accounts for a smaller proportion of the increase. It is noteworthy that from 2001–02, legal services expenditure has been shared almost equally between internal and external providers with a slightly increasing trend towards internal service providers.

**2.56** Of the 190 entities that constitute the purchasers in the Government's legal services market, four agencies had total (internal and external) legal expenditure greater than \$40 million in 2003–04, and three had total expenditure in the range \$10–\$40 million. The remaining 33 surveyed agencies recorded individual total expenditure of less than \$10 million on legal services.

**2.57** Of the 40 agencies surveyed, 16 reported decreased expenditure on external legal services in 2003–04, compared to 1999–2000. Of these agencies, 10 reported an increase in expenditure on internal legal services over that period. This could suggest that internal resourcing has increased over time, in order to reduce the need to outsource at least some types of legal services. The most common reasons to outsource were to: seek specialist services that is not available in-house; better manage large and complex matters; obtain an independent legal opinion to mitigate the agency's risk on particular matters; and/or cope with peaks in legal advice workloads.

## 3. Strategic Planning and Review of Legal Services Arrangements

*This chapter examines the 16 audited agencies' approaches to selecting the most appropriate model for legal services, and how informed the key purchasers of legal services were in terms of agency business and legal needs. This chapter also considers whether agencies were able to make well-informed adjustments to purchasing arrangements on an ongoing basis and examines communication within agencies. In addition, it discusses agencies' approaches to legal risk management and whether agencies reviewed their legal services purchasing needs.*

**Figure 3.1 Chapter overview**



Source: Developed by the ANAO

### Strategic Level Input

**3.1** Agencies should have in place well-organised and strongly coordinated legal services purchasing processes at the day-to-day business level. However, at a higher level, agencies should also decide on the structure of the purchasing model that best suits their needs. This model structure then provides the broad context within which services are purchased at the day-to-day level, and underpins the extent to which legal services are provided on a cost effective basis.

**3.2** To do this effectively, agencies should have data on how well current legal services arrangements are working, to inform assessments of whether any changes should be made. To put the model into practice, agencies should have a strong and well-functioning point of coordination (for example, the legal services manager), who should be an informed purchaser working

between the agency's senior managers, and those who actually deliver legal services, whether they be internal or external.

**3.3** Strategic level input in the planning for legal services is considered in more detail under the subheading of 'communication within the agency'.

## The Informed Purchaser

**3.4** Whatever legal services purchasing model is being used by agencies, as with any other purchase of goods or services, it is essential that agencies are able to strongly and competently protect the Commonwealth's interests. Audit fieldwork sought to establish whether agencies' interests were being identified and protected by an informed purchaser, who was responsible for procuring or coordinating both internal and external legal services, and who was able to achieve appropriate/competent legal services on a cost effective basis for the agency.

### Case study 3.1 - Informed purchaser – what does this really mean?

#### *Some potentially better practice agencies*

A number of agencies had an in-house legal unit that was the required first point of contact for staff seeking legal services. The in-house team was able to identify whether or not legal advice was needed, what the legal issues were, and how the question should be framed. The senior staff in the in-house legal unit were also well-placed to determine whether the issue had been the subject of previous advice, or if the legal advice should be prepared in-house or by a particular external provider (based on the required expertise, timeframe, cost and knowledge of the market).

As such, these agencies had processes in place where staff, who were informed purchasers, understood the agency's business, the context of the request for legal services, their capacity to identify the most appropriate provider, and to 'translate' the request into appropriate legal questions. The in-house legal unit staff also tended to be better placed than line managers, in assessing the cost of individual matters in terms of value for money, and were prepared to challenge firms' invoices for over-charging or over-servicing.

#### *An agency with significant room for improvement*

In one instance, the ANAO found that the internal legal unit was not the central control point within the agency for obtaining legal advice. Agency staff were encouraged, but not required, to approach the internal unit when contemplating the need for legal advice. However, the internal unit was generally considered by line area staff to be more of a bottleneck than a facilitator. As a result, line area staff tended to deal directly with external panel providers for legal advice. This agency was not centrally capturing the

purchased advices for possible future use, and was unable to provide assurance that external legal advices were necessary and providing value for money. In particular, the line area managers purchasing the external advices did not necessarily understand the implications of the Directions on their matter or, any relative strengths and weaknesses of individual panel firms, and were not aware of the terms of the contractual arrangements with the external providers (including the hourly rates charged by different firms). As a result, purchasing decisions were not necessarily made by informed purchasers.

**3.5** The ANAO examined nineteen agency legal units,<sup>34</sup> and rated these units across a range of audit criteria as ‘demonstrates key elements of better practice’, ‘competent’ or ‘requires improvement or is being implemented’.

**3.6** With regard to the cost-effective provision of *internal* services, audit findings are summarised in Table 3.1. All of the agencies that potentially met better practice standards maintained a well-managed internal legal unit. The same applied to those rated as competent in this area. The informed purchasers of better practice agencies were able to recruit and manage staff effectively, had good quality control processes within the legal unit, and importantly, had fostered a strong focus on providing a high quality and timely service to agency staff seeking legal services. By comparison, agencies that did not have an informed purchaser to represent the agency’s interests in the provision of legal services, had limited or no co-ordination in their internal legal services arrangements. This included some agencies with more than one legal unit within the agency.

**Table 3.1 Ratings on the informed purchaser**

		Percentage of Agencies	
		Internal Services	External Services
↑	<b>Demonstrates key elements of Better Practice</b>	39%	40%
	<b>Competent</b>	39%	25%
	<b>Improvements required or are being implemented</b>	22%	35%

Note: the above percentage figures are based on the ANAO audited agencies’ legal units.

Source: developed by the ANAO

<sup>34</sup> Of the 16 line agencies audited, two had more than one legal unit. As a result, a total of nineteen legal units were examined.

**3.7** The audit also sought to establish how well agencies managed the cost effective purchase of *external* services (see table 3.1). A total of 65 per cent of legal units were regarded as potentially adopting better practice, or as competent. However, 35 per cent of legal units fell below this threshold, and of these, half were considered to have no effective systems in place at all. This indicates that a significant proportion of agencies (including some agencies with high levels of expenditure on external services) do not have their interests sufficiently protected by an informed purchaser, and were unable to provide sufficient assurance that their external legal services were cost-effective.

**3.8** Agencies that rated highly had well co-ordinated purchasing arrangements for external legal services, where one or more informed purchasers (usually in the internal legal unit) acted on the agency's behalf on a day to day basis. Other agencies, with limited or no coordination, require improvement. The ANAO observed in some agencies that legal services were being purchased by staff with no knowledge of the agency's standing arrangements with external providers (including agreed rates), or any knowledge of the requirements of government policy. Agencies with insourced agreements (where an external provider provides lawyers to work on-site at the agency) tended to require improvement, particularly where the contract did not fully protect the agency's interests, and/or the contract was not managed by a sufficiently informed purchaser. In this context, the ANAO noted that the external legal services provider was often responsible for determining the nature and scope of legal advices to staff within the agency, and the spread of work to other firms on the agency's legal panel. In the absence of an informed purchaser to represent the agency's interests, potential conflicts of interest in the management of legal services could arise.

**3.9** Overall, the ANAO found that most of the agencies regarded as potentially better practice in internal purchasing also rated highly for external purchasing, indicating the existence of good management, combined with well-run systems, enabling the agency to achieve very good outcomes from both internal staff and external providers. However, it is of some concern that four agencies did not have adequate systems and processes in place to be able to readily demonstrate the achievement of cost-effective legal services from either their internal or external services purchasing arrangements. Another two entities were competent in one area of purchasing, but not in the other.

## **Recommendation No.1**

**3.10** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they have an identified team / person to act as a coordination point within the agency for obtaining legal services. The coordination point should be capable of actively managing the provision of legal services, and understand the:

- business needs of the agency, and
- relative strengths and weaknesses of legal service providers in the market.

#### Agency Responses

**3.11** All 16 audited agencies agreed with this recommendation.

### Communication within agencies

**3.12** The audit sought to establish whether legal managers were up to date with agency business developments, whether the agency’s senior managers received regular reporting of legal expenditure and significant legal risks, and whether senior managers approved significant legal purchasing decisions. For example, decisions about employment of additional internal staff, or decisions governing external contractual arrangements.

**3.13** Seventy-two per cent of audited agencies’ legal managers demonstrated that they were proactive in keeping up to date with significant agency business developments (see table 3.2). Of these, 22 per cent were potentially better practice, with legal managers actively involved in seeking information about significant developments in their agencies, and regularly involved in the agency’s executive management processes. The ANAO considers that the systematic inclusion of legal managers in higher level executive meetings and forums assists legal managers to be aware of factors that have the potential to impact on the agency’s requirements for legal services. In appropriate cases, having senior legal staff included in senior management forums, provides the opportunity for other senior managers to seek early reactions to the potential legal risks or implications of proposed courses of action. This arrangement has the potential to significantly contribute to overall risk management practices in the organisation.

**Table 3.2 Ratings on communication**

		Percentage of Agencies	
		Up-to-date with business developments	Regularly report to senior executive on legal issues
↑	<b>Demonstrates key elements of Better Practice</b>	22%	17%
	<b>Competent</b>	50%	61%
	<b>Improvements required or are being implemented</b>	28%	22%
Note: the above percentage figures are based on the ANAO audited agencies’ legal units.			

Source: developed by the ANAO

**3.14** Regarding executive communication, the ANAO noted that 78 per cent of agencies reported significant legal issues (such as expenditure on legal services, and legal risk management issues) to the senior executive on a regular basis (see table 3.2). Of these, 17 per cent were potentially better practice in this area of upward reporting. In these instances, the ANAO observed sound systems including templates that could be used on a regular basis. However, of the remaining 22 per cent of agencies, some had no systems in place to alert senior managers of legal developments, and others had only ad hoc or ineffective arrangements in place.

**3.15** High-performing agencies did not necessarily create separate streams of legal risk reporting, but instead tended to integrate reporting into existing processes, designed to track overall programme performance. In the same way, legal expenditure was not necessarily reported separately. Several well-designed legal-expenditure reporting systems were integrated into existing budget reporting systems. However, in a few cases of better practice, agencies did make the judgement that the volume or importance (or both) of the agency's legal activity – particularly litigation – did justify separate reporting to senior managers. In these few cases, the agency's judgements seemed to be well justified, reporting processes sound, and reporting judged by clients to be useful.

**3.16** Finally, agencies were strongest in the area of gaining senior managers' sign-off of significant legal purchasing decisions. Only one agency was considered to require improvement in this area. In particular, agencies routinely sought appropriate approvals for the establishment or renewal of panels of external providers, or of significant contractual arrangements. Agencies less commonly made formal business cases for the employment of additional internal legal staff.

### **Case study 3.2 – A practical example of Communication**

#### *Being a part of the team*

A number of agencies' corporate governance arrangements involve the Chief Lawyer as an observer at executive leadership group/board meetings. This approach offers real-time legal input, to inform discussion on emerging strategic issues by the most senior decision-makers in the agency, and provides clearer guidance for the legal unit in assessing the legal impact of an agency's emerging policy priorities. The ANAO found a number of examples where the Chief Lawyer's attendance at these forums resulted in demonstrably more informed and pragmatic decision-making, taking into account the timeframes for legislative amendments and other non-legislative options.

**3.17** The ANAO notes that the role of the in-house legal unit within the agency's corporate governance structures represents one aspect of effective communication arrangements. The role of the internal legal unit in providing

guidance to agency staff on the why, when and how to seek legal advice is discussed in Chapter 4.

## Matching Evolving Needs with Cost-effective Solutions

**3.18** The audit looked at agencies' overall ability to assess the cost effectiveness achieved by their legal services purchasing arrangements on an ongoing basis. The audit assessed whether there were systems in place to enable the informed purchaser (where one existed) to assess current arrangements for quality of advice, cost, and suitability to likely future needs. The ANAO found that agencies had some arrangements in place to allow the informed purchaser to check for quality of advice and suitability to likely future needs.

**3.19** An important indicator of whether agencies are able to achieve cost effective legal services on an ongoing basis is a demonstrated ability of agencies to assess their legal services needs, and adjust their legal services purchasing arrangements when necessary. The audit sought to establish whether agencies were able to develop strategies to address emerging legal risks or workload pressures.

**3.20** Few agencies performed very well in this area, but overall, about half of agencies were able to demonstrate that they could respond to, or anticipate, changes to legal services requirements and adjust arrangements (including resourcing) accordingly. Changes were more frequently made to the management and resourcing of a particular area of legal services (e.g. an increased demand for litigation services), rather than to overall arrangements, and were underpinned by a well researched, clearly articulated business case that (where necessary) received prompt attention and approval from senior managers.

### Case study 3.3 - Adjusting legal services arrangements to meet emerging legal needs – what does it really mean?

One agency experienced a change in its operating environment with regard to employee entitlements, in the context of some high-profile company insolvency cases. The nature of the issue suggested that this emerging area of law was going to become an area of ongoing activity. The agency chose to develop in-house expertise in this area of law for the following reasons:

- sources of specialist legal services were not present in the market (as there were some government-specific aspects to the issue), so outsourcing would have resulted in the agency paying for a firm to develop expertise in this area;
- due to the absence of existing expertise, the agency would develop an ongoing reliance on the successful external provider for subsequent advices (as the firm would enjoy a monopoly over this newly acquired expertise); and

- the agency judged that the ongoing work generated by this area could be more cost effectively handled in-house, where the expertise could be applied over time without paying a premium for re-using precedents and knowledge.

The agency understood its business needs, knew the capacities of providers to meet this need, and the agency's internal costs for developing expertise in-house, based on its identified business needs.

The agency indicated that it generally engages external providers where it requires one-off advice within an external provider's area of expertise; advice on areas of contentious law, (the agency prefers to mitigate its risks involved in such advice), when the capacity to provide timely in-house advice is limited due to existing workloads, or when the service can be provided more cost effectively by an external provider.

The ANAO considers that this example demonstrates how an informed purchaser might respond to changes in the operating environment in order to generate a cost effective solution.

**3.21** However, some agencies appeared to lack sufficient co-ordination, organisation and management strength to be able to identify changes to workload drivers and respond to changes in needs for legal services. In some instances, the agency had experienced significant changes to legal services requirements without any response from legal managers. In other instances, cases for a change in resourcing or arrangements were made to senior managers, who then offered no response to legal managers. Overall, most of these agencies were the same agencies that tended to have difficulty demonstrating that they had mechanisms in place that would help them to achieve cost effective legal services as a whole.

**3.22** While it is less crucial for agencies to collect cost data for every single matter managed internally or externally, it is important to retain the capacity to compare internal and external providers when the need arises to justify a change in arrangements. Given information about overall quality and value delivered by current legal services arrangements, and access to sufficient information about agency business developments, the informed purchaser should be able to anticipate when arrangements need to be adjusted, rather than constantly react to developments once they have occurred.

**3.23** The challenge for the informed purchaser is to understand the agency's business and legal needs and the legal market well enough to understand the nature and expected frequency of legal services requests, and the costs of choosing a particular provider option (see case study 3.4). For example, if 90 per cent of an agency's legal work requires specialist and/or independent advice in order to resolve an issue or manage or mitigate an agency's legal risks, the informed purchaser may adjust the internal resourcing to match the expected needs, and operate a legal service that is predominantly focused on the purchase of external legal advice. In contrast, if 90 per cent of an agency's

legal work is generated by the interpretation of its own administered legislation, and has no need to mitigate its legal risk by obtaining external legal advice, the agency could be expected to perform most of its legal work in-house.

### **Case Study 3.4 – Costing of Internal Services**

One 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, variable overheads and fixed overheads.

The salary rates reflected the relevant salary points (from the agency's certified 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 1 210 billable hours for junior and senior lawyers and 1 100 hours for principal lawyers and general counsel. These annual hours reflect an expectation of 5.5 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 is that an internal legal resource can be fully costed, as well as the 'marginal cost' per hour/day for work that could be given to external providers. It is important to note that the hourly rate is 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 worker's compensation (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 accommodation/rent, furniture and fittings, communications, office expenses, travel, and a provision for annual recruitment costs for the legal unit.

Using this methodology, the agency can determine the marginal cost of employing additional internal legal resources, and assess whether the workload can be more cost-effectively managed through external or increased internal servicing. The ANAO considers that this approach provides a full cost basis for comparison, and also enables productivity-based measures (through the calculation of billable hours) to be considered. This model can provide management with the basis for informed decision-making, particularly when combined with a sound understanding of trends in legal services needs.

A further point to note is that the fixed cost per staff member needs to be recalculated each time the number of staff changes. In the above example, the fixed costs represent 20–30 per cent of the total costs (and therefore, the relevant hourly rate) for 9 lawyers. An additional three lawyers would reduce the overall hourly rate by up to 7 per cent.

**3.24** The ANAO acknowledges that the informed purchaser will often face uncertainty in forecasting the extent and nature of their agency's future legal requirements. However, the ANAO considers that information on reasons for

expected workload changes, and understanding the relative costs and benefits of handling particular matters internally or externally, are fundamental to sound decision-making. The costs and benefits may include the cost comparison of internal and external legal advices, the flexibility and potential expertise offered by panel firms weighed up against the development of in-house expertise and the potential cost of recruiting and paying for an in-house lawyer, particularly if the workload increase is difficult to accurately estimate. The need to make such decisions in potentially uncertain environments, highlights the importance of the informed purchaser in the decision-making process.

### Underlying demand for legal services

**3.25** The audit found that agencies had a variety of approaches to determine their underlying demand for legal services. The approaches varied from internal charging for individual advices, annual internal charging for specified internal legal resources, and funding the internal legal unit corporately to ensure that price was not an impediment for line areas to come forward with possible legal issues. A number of agencies' internal legal units operated as a 'triage' point for determining whether or not a legal advice would be required on a particular matter, and whether an advice should be handled in-house or externally. In this way, these legal units were able to understand the level and drivers of the underlying demand for legal services within the agency.

**3.26** The ANAO considers that the merit of these approaches is dependent on the legal model in operation and the risk culture of the agency. Some of the benefits and disadvantages of the different approaches are summarised in Table 3.3 below.

## Recommendation No.2

**3.27** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they have appropriate systems in place to capture, record and report their legal services expenditure, and monitor workloads and trends in legal services. This should provide a sound basis for agencies to assess and match their legal service needs with cost effective service delivery.

### *Agency Responses*

**3.28** All 16 audited agencies agreed with this recommendation.

**Table 3.3 Charging approaches for legal services**

Model	Pros	Cons
Internal charging for individual legal services	<ul style="list-style-type: none"> <li>- Provides a budgetary incentive (and discipline) for legal advice to be sought only when necessary, and for the internal legal unit to be cost conscious.</li> <li>- Where line areas well understand their legal risks, can lead to a robust basis for determining underlying demand for legal services.</li> </ul>	<ul style="list-style-type: none"> <li>- If legal risks are not well understood by line areas, can lead to a disincentive to seek legal advice (which may compromise the agency's ability to manage its legal risks).</li> <li>- Implicitly assumes that line areas are informed purchasers.</li> <li>- Some resources are required to administer the internal invoicing and payments.</li> </ul>
Annual internal charging for specified internal legal resources	<ul style="list-style-type: none"> <li>- Administratively simpler than charging for individual advices.</li> <li>- May work best when combined with time recording, so that management analysis of workload can better inform purchasing decisions.</li> </ul>	<ul style="list-style-type: none"> <li>- As line areas are forward purchasing internal legal resources, there is a risk that 'supply will create its own demand'.</li> <li>- The line area 'ownership' of legal resources can be an impediment to the agency quickly redeploying internal resources to meet emerging priorities.</li> </ul>
No user charging	<ul style="list-style-type: none"> <li>- Provides no impediment to seeking legal advice.</li> <li>- Can work effectively when line areas well understand the role of legal services and the management of their legal risk.</li> </ul>	<ul style="list-style-type: none"> <li>- Relies on a strong control point within the internal legal area for assessing legal service requests, who can also represent the agency's broader interests. In the absence of this, strong control point, can lead to over-servicing or inefficient service delivery.</li> </ul>

Source: ANAO

## Risk Management

**3.29** The audit assessed whether agencies were actively managing the risks relating to their ability to provide and purchase quality legal services.

**3.30** When examining the agency's ability to manage risks to provide *internal* legal services, the audit assessed whether the agency had sufficient management capability and systems in place to recruit and adequately manage internal lawyers and support staff, to meet the agency's needs. Nearly two-thirds of audited agencies were considered to be competent or potentially better practice against these criteria (see table 3.4). However, a number of

agencies indicated that it was difficult at times to recruit appropriately qualified staff for internal legal units.

**3.31** For managing the risk to the agency's ability to purchase *external* legal services, the audit assessed whether the agency had robust arrangements in place with external providers, and effective relationship management systems to enable the agency to gain good value from the relationship, and to provide for continuity of services. Two-thirds of agencies were competent or potentially better practice against these criteria (see table 3.4). Most, but not all, agencies that performed well in managing their agency's ability to purchase external legal services also demonstrated strategies to manage their risks in providing internal legal services.

**Table 3.4 Ratings on risk analysis by agencies**

		Percentage of Agencies		
		Risks to Internal Services	Risks to External Services	Risks to core activities
↑	Demonstrates key elements of Better Practice	12%	21%	17%
	Competent	53%	47%	39%
	Improvements required or are being implemented	35%	32%	44%

Note: the above percentage figures are based on the ANAO audited agencies' legal units.

Source: developed by the ANAO

**3.32** Improvement in risk management is required for agencies that do not comprehensively coordinate their external legal services, and which do not manage relationships with external providers with a sufficient level of scrutiny.

**3.33** Agencies should identify and manage the legal risk to their ability to deliver the Government's programs and services (their core activities). The ANAO found that just over half of agencies could be regarded as competent or potential better practice in this area. (see table 3.4). Other agencies performed ad hoc or no assessments at all. The ANAO considers that the early identification and treatment of such risks underpins the efficient and effective operation of an agency's legal services arrangements.

## Recommendation No.3

**3.34** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they regularly assess the legal risks to their core activities, and the risk that their legal service approach will not meet agency business needs.

### *Agency responses*

**3.35** All 16 audited agencies agreed with this recommendation.

## Review of Legal Services Purchasing Arrangements

**3.36** The audit examined whether agencies had reviewed their legal services purchasing arrangements, and if so, how recently the review was conducted, what the review encompassed, and why it was undertaken.

**3.37** Almost all agencies had undertaken some kind of review or assessment of legal services within the last five years, and ten agencies had undertaken an assessment in the last two years. Reviews took several forms. In some cases, a review of current arrangements formed part of a more comprehensive legal services market testing exercise; in other agencies, independent consultants had conducted reviews. In a few cases, reviews were undertaken by another internal agency unit. Most reviews looked at both internal and external purchasing arrangements, however in two agencies, only external arrangements were considered. Reviews tended not to be conducted on a regular basis. Rather, reviews tended to occur in response to particular problems identified by agency managers.

**3.38** The ANAO was encouraged by the degree of review activity in audited agencies, which demonstrates the interest of agencies in improving their legal services arrangements. Of those agencies with room for improvement, most had undertaken recent reviews of their legal services. While undertaking a review does not necessarily lead to any changes being made, it does at least provide the necessary justification for changes to occur. The audit found several examples where recommendations of reviews had been implemented, as well as other examples where reviews appeared to have had no impact on arrangements.

**3.39** The ANAO examined reviews for comprehensiveness of coverage. While reviews considered many factors, the audit checked whether the review had taken into account the nature of the agency's work, the factors driving demand for legal services, the agency's risk profile, and the agency's structure. Reviews and assessments were also tested for their ability to make quality comparisons between internal and external providers for the required levels of technical expertise, response times, compliance with government policy, comparative full cost, and ability to address identified risks.

**3.40** In most cases, agencies' reviews did discuss the nature of the agency's work, demand drivers, risk profile, and structure. Of the other factors, most reviews were able to compare internal and external providers for response times, required levels of expertise, and compliance with government policy, although about one third of reviews did not cover these points thoroughly (or at all, in a few cases). Most reviews also addressed identified risks. However, only four reviews contained an assessment of comparative full cost of internal and external providers. Some reviews contained no relative assessment of costs, and others compared the full cost of the external provider with the partial cost of the internal provider. Clearly, this is the most difficult area for agencies to assess. Although the *cost* of the service is not the same as the *value* of that service, understanding the true relative costs of the service is important when deciding whether to use more internal or more external providers to meet growing or changing agency needs.

### **Case Study 3.5 – Comparing costs of in-house and external providers**

One agency tested whether commercial law firms would be relatively more efficient than in-house lawyers. The issue examined was whether a law firm's higher hourly rates (driven by different cost structures, including a profit factor for the firm), would be more than offset by possibly higher standards of work efficiency, to generate advice at a lower cost than an in-house lawyer on the same matter.

The agency, as part of its market testing assessment process, had tested whether a private law firm would be more cost-effective in providing the same advices than the in-house team. The agency selected a number of representative matters that had been completed by the in-house team. The selection was based on matters where the total number of hours worked by the in-house lawyers was known, and where the work was handled exclusively in-house.

A law firm was asked for estimates in hours of the time it might take a commercial law firm with a reasonably high level of expertise and experience in the conduct of the agency's matters, and with effective working relationships with line areas of the agency, to provide similar quality advice.

Statistical testing showed clearly that there was no significant difference between the actual times taken by the in-house team and the estimate of the time that would have been used by a commercial firm. Assuming the quality of the work was the same, the in-house team would have provided better cost effectiveness for the Australian Government.

The ANAO noted that for the purposes of the market testing exercise, the cost of the cheapest external provider was 69 per cent higher than the full cost of the in-house legal team. For this agency, this suggests a compelling case for using the in-house team in preference to external providers whenever possible for general legal work, and relying on external providers where reasons such as specialist expertise, independent advice or urgency preclude the use of the in-house team.

**3.41** A key issue in the effective management of legal services is exercising sound judgement by an informed purchaser who understands the scope and

nature of the legal services request, and understands the capacities of the in-house lawyers and the costs and benefits of having the work performed in-house or externally to maximise cost effectiveness.

**3.42** In this context, recognising when external specialist expertise will yield a more cost effective outcome (including timeliness, cost and quality) than the use of in-house resources is a key management judgement. The ANAO considers that the methodology outlined in case study 3.5 offers agencies scope to critically assess the cost-effectiveness of the ongoing outsourcing of legal work that an adequately resourced in-house team could perform.

## Conclusions

**3.43** The ANAO noted that while some agencies had an ‘informed purchaser’ to act as a control point and manage their legal services, a significant number of agencies required improvement in this area. Similarly, the ANAO concluded that there is scope for some agencies to further improve their internal communication and better monitor legal purchasing decisions.

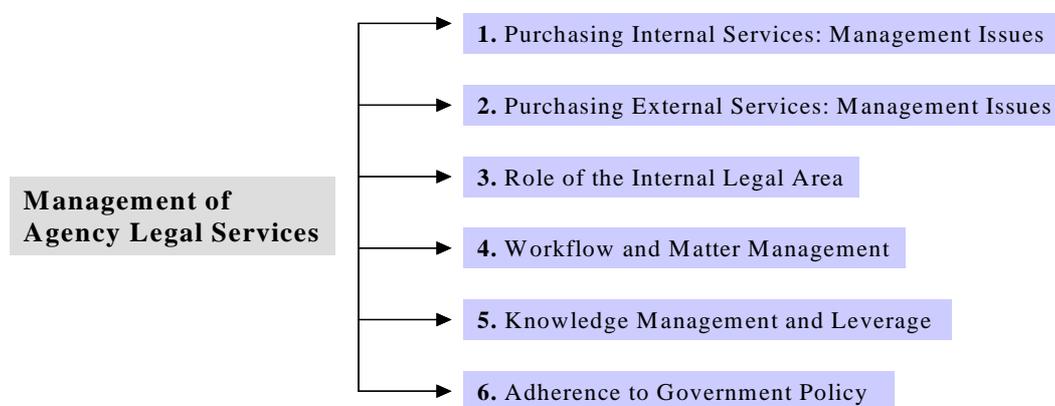
**3.44** The ANAO concluded that while several agencies were able to adjust their legal services as their needs changed, others did not have sufficient systems in place to monitor their workload and expenditure to enable them to recognise and respond appropriately to change. The ANAO also considers there is significant scope for improvement in the management of risks to the agency’s core business and ability to purchase quality legal services.

**3.45** The ANAO found that almost all agencies have undertaken some kind of review or assessment in the last five years of their legal services. However, these have been in various forms, with varying degrees of rigour. In future, the ANAO concludes that there would be value in ensuring agency assessments include a full-cost comparison of internal and external providers, in addition to other relevant factors such as quality, timeliness and reliability of legal services.

## 4. Management of Agency Legal Services

*This chapter examines the 16 audited agencies' approaches to the management of legal services. As noted earlier, it is essential that agencies' staff who manage the legal services procurement process are informed purchasers. Regardless of the legal services procurement model adopted, active management by an informed purchaser of the selected service mix is the key to an agency's effectiveness in achieving quality, cost effective legal services.*

**Figure 4.1 Chapter overview**



Source: Developed by the ANAO

### Purchasing Internal Services: Management Issues

**4.1** Overall, legal units that were managed as a single team, rather than as a loose collection of decentralised units or individuals, tended to perform well and were viewed by clients as delivering good value. These centralised units combined a strong client service culture with a clear understanding of how the legal services they provided contributed to the work of the agency as a whole, which reflected a good standard of leadership and management within the unit.

**4.2** Better practice legal units were aware of their clients' needs, able to prioritise work effectively, and in most instances, able to deliver work to agreed deadlines (see table 4.1). These agencies were also active in setting expectations regarding standards of service delivery (including satisfactory standards for routine matters), and in what circumstances these standards could be varied.

**4.3** Strong performance management processes, conducted regularly, with identifiable performance measures and a planned approach to training and

further legal education, also featured in highly performing units. These units also tended to be supported by effective knowledge management systems and practices, including regular contact between staff to share and discuss significant advices and relevant agency business developments. These practices helped to maintain appropriate levels of knowledge across more than one area of expertise, and kept staff informed of likely changes to the agencies legal service needs. A feature of well-managed units was the ability of managers to secure and administer resources to provide coverage and backup for team members during planned or unplanned absences.

**4.4** The audit sought to assess whether agencies’ internal management frameworks protected the agency’s interests. Agencies’ internal quality assurance processes were examined to determine whether the agency’s management practices produced services of suitable quality. Eighty-three per cent of agencies were assessed as having effective processes in place, and of these, 11 per cent demonstrated elements of better practice (see table 4.1). However, 17 per cent of audited agencies’ legal units had no internal quality assurance processes in place.

**4.5** Overall, the ANAO considers that these are good results. Most agencies had identified where internal quality assurance was necessary – e.g. for particular issues with high visibility or elements of risk, or in areas of work where highly specialist expertise is required, or for new or more junior staff members – and had viable quality assurance processes (usually some form of second counselling) in place.

**Table 4.1 Ratings on management issues - purchasing internal services**

		Percentage of Agencies				
		Services reflect knowledge of agency’s business	Legal area has good relationship with clients	Services are provided within deadlines	Agencies have adequate quality assurance processes	Internal legal area seeks client feedback
↑	<b>Demonstrats key elements of Better Practice</b>	15%	22%	5%	11%	22%
	<b>Competent</b>	75%	50%	80%	72%	34%
	<b>Improvements required or are being implemented</b>	10%	28%	15%	17%	44%

Note: the above percentage figures are based on the ANAO audited agencies’ legal units.

Source: developed by the ANAO

**4.6** Agencies varied more significantly in the degree to which internal legal areas sought feedback from clients on the quality of legal services provided by internal staff. Twenty-two per cent of agencies consistently sought feedback in a way that was considered better practice, and another 34 per cent were reasonably effective in this area. However, the rest of the agencies examined either did not seek client feedback at all, or were ineffective in their efforts.

**4.7** Client feedback helps the legal area to proactively manage relationships with key internal clients and stakeholders, and enables legal managers and staff to target their effort more appropriately. Feedback processes need not be onerous to deliver significant benefits to both legal units and clients. Feedback sought at intervals, or on a selection of issues, could be sufficient in many cases.

## **Purchasing External Services: Management Issues**

**4.8** Mutually agreed and understood protocols for interaction provide the basis for effective relationship management between agencies and their external legal services providers. In highly performing agencies, the informed purchaser undertook responsibility for overall management of the relationship, and decided who else in the agency (if anyone) was entitled to instruct external providers. Informed purchasers able to co-ordinate external services were, in general, better able to demonstrate that the relationship between external providers and the agency was delivering value to the agency.

**4.9** In agencies without an informed purchaser(s) coordinating requests for external advice, ANAO noted various instances where agencies had identified that firms, at their own initiative, had undertaken unnecessary work; provided products and services that went well beyond the agency's requirements; or consistently included unnecessarily large delegations of staff in client meetings, all of which increased the costs of these matters. These instances typically occurred in agencies where line area staff instruct and manage day-to-day relationships with panel firms directly, and where agency staff were not sufficiently knowledgeable or experienced to manage these issues.

**4.10** Where legal services is not centrally coordinated, line area managers should become informed purchasers of legal services, if this approach is to deliver value. In some instances, the ANAO found line area managers to be well enough informed to act as their own informed purchaser. In most audited agencies however, line area staff did not know about the agency's terms of engagement with external legal providers, were unaware of what rates applied, and did not understand how the Directions impacted the tasking of external providers. This situation is highly unlikely to deliver cost-effective results for the agency or for the Australian Government. The ANAO concluded that this decentralised approach remains a higher risk model, unless

there are clear benefits (for example, where informed purchasers coordinate legal services within a specialist area within an agency, and understand the specialist area's business and legal requirements).

**4.11** In highly performing agencies, quality assurance (including over-servicing risks) were often managed by clearly communicating the agency's requirements, engaging external providers with sufficient expertise at the appropriate level, limiting unnecessary attendance at meetings, remaining aware of the progress of matters (especially high-risk, large or complex matters), and closely scrutinising invoices to check whether services charged for had in fact been satisfactorily delivered. In some cases, the agency was also able to negotiate extra value, such as 'learning discounts' to rates in cases where the external provider was new to the agency's work, fixed fees for certain types of services, or discounts to rates when it was identified that the external provider's quality assurance processes had failed and they had produced work of insufficient quality.

**4.12** However, when co-ordinating external advice and other legal services, it was important that the agency's informed purchaser (or other legal unit staff) did not become a bottleneck. For a number of agencies, a significant factor in the decision to purchase work externally was the judgement that internal resources could not deliver the necessary level of services within required timeframes. Any unnecessary delay by the informed purchaser(s) in forming that judgement and in tasking the external provider downgraded the overall quality of services delivered to the agency. Agencies that used clearly understood and agreed criteria could make the initial decision about whether to perform work internally or externally quickly and consistently, with better results for the agency. Relevant audit fieldwork results are summarised in Column 1 of Table 4.2.

**4.13** The audit also examined whether the agency and external provider had a clear understanding about service standards; whether agencies monitored external provider performance and dealt with problem issues; and whether agencies proactively managed relationships with external providers (see Table 4.2).

**4.14** Ideally, purchasers and personnel of external services should be sufficiently knowledgeable about the performance of external providers to be able to deal with issues as they arise. Careful scrutiny of invoices, and ongoing monitoring (where necessary) of the progress of individual matters, and internal client feedback on the quality of externally provided services will help informed purchasers to extract value from relationships with external providers. One better practice agency also included external legal services providers on the distribution of internally generated reporting on significant litigation outcomes, which helped external providers to better understand the

agency’s business, which was ultimately seen to enhance the level of service provided to the agency.

**4.15** In better practice agencies where the internal legal area centrally coordinated the purchasing of external services, internal clients were able to identify the value added by this arrangement. In particular, internal legal staff were seen by clients as able to assess whether advice or services provided externally were in fact of sufficient quality; and were also able to ‘interpret’ advice so that it could be sensibly applied to the business context of the internal client.

**Table 4.2 Ratings on management issues purchasing external services**

		Percentage of Agencies			
		Agency co-ordinates requests for external legal services	Agency and provider are clear about service standards	Agencies monitor performance and deal with deficiencies	Agency pro-actively manage relationship
↑	Demonstrates key elements of Better Practice	21%	16%	21%	21%
	Competent	53%	58%	42%	53%
	Improvements required or are being implemented	26%	26%	37%	26%
Note: the above percentage figures are based on the ANAO audited agencies’ legal units.					

Source: Developed by the ANAO

**4.16** The audit found that where agencies were strong or at least proficient in one area of external provider management, those agencies were likely to be strong across all areas. In the same way, agencies that were challenged in the management of their external providers were likely to require improvement in all areas.

**4.17** Twenty-one per cent of agencies demonstrated potential better practice in how they monitored external providers’ performance and dealt with deficiencies (e.g. poor quality advice, over-servicing and exceeding quotes), another 42 per cent were reasonably effective. However, the ANAO considers that 37 per cent of agencies require improvement at managing and monitoring performance of external providers, especially some agencies that have high levels of expenditure on external providers.

**4.18** It is the responsibility of the agency to assure itself that external providers deliver quality services. While agreed service standards should apply, and the external providers have their own quality assurance processes in place, these are not guarantees that external providers will deliver quality, cost effective services every time. Agencies should maintain a capacity to readily identify and seek redress for poor quality work from external providers.

## **Recommendation No.4**

**4.19** The ANAO *recommends* that agencies review their existing procedures to ensure they have appropriate frameworks in place to monitor the performance of external providers (where applicable) and to identify and deal with deficiencies as they arise.

### *Agency Responses*

**4.20** All 16 audited agencies agreed with this recommendation.

## **Role of the Internal Legal Area**

**4.21** Internal clients tend to highly value readily available assistance to help them refine exactly what the issue is that needs to be addressed, or what the particular question is that needs answering. The informed purchaser and the internal legal area can potentially play a valuable 'gatekeeping' role for the agency by educating internal clients on an ongoing basis about why, when and how to seek legal services. When performed consistently over time, the resulting improvement in knowledge of internal clients, and the ability to cull out requests for legal services that turn out to be primarily requests for policy advice, can combine to provide significant value for money for the agency.

**4.22** All agencies should provide specific policy guidance about how legal services should be accessed or purchased. The responsibilities of agency staff and internal and external legal service providers need to be clearly understood. It is better practice for legal services purchasing policies to be comprehensive (providing guidance on when and why legal services should be sought, as well as the how) as well as being readily accessible. Policies should be included in or linked to other relevant purchasing policies, and regularly updated. It is also better practice for the agency to be able to regularly assure itself the policies are being followed by agency staff. In agencies where this does not occur, agency managers cannot expect to achieve value for money from their legal services arrangements. Agencies that do not co-ordinate the purchase of legal services through an informed purchaser are particularly vulnerable in this area.

**4.23** The audit assessed agencies' instructions and policy guidance for purchasing legal services. The majority of agencies had comprehensive instructions on obtaining legal services (see table 4.3), with 36 per cent of agencies considered to be potentially better practice. However, 21 per cent of agencies either had no policies, or ineffective policies that were consistently disregarded by line area staff.

**Table 4.3 Rating on role of internal legal unit**

		Percentage of Agencies	
		Agencies have policies on obtaining legal advice	Agencies are pro-active in the education of internal clients
↑	Demonstrates key elements of Better Practice	36%	13%
	Competent	43%	47%
	Improvements required or are being implemented	21%	40%
Note: the above percentage figures are based on the ANAO audited agencies' legal units.			

Source: Developed by the ANAO

**4.24** Educating line areas about their responsibilities and those of the legal providers about how best to access legal services mostly occurs in the normal course of the legal units' day-to-day activity (see table 4.3). However, it is better practice for agencies to take an active approach in educating internal clients about legal purchasing, and management of legal risks. This is especially the case for agencies that have devolved structures.

**4.25** Sixty per cent of agencies undertook some form of active education of internal clients. This included formal training sessions about the agency's legal services purchasing arrangements (often included in induction training courses) and training on agency specific aspects of legal services or legal risk. In one case, tailored training had been developed for senior agency managers. Other agencies either did not provide any active training or education for internal clients, or did so ineffectively.

## Recommendation No.5

**4.26** The ANAO *recommends* that agencies review their existing procedures and policies to ensure that their agency staff are fully educated on when and how to seek legal services.

## Agency Responses

**4.27** All 16 audited agencies agreed with this recommendation.

## Workflow and Matter Management

**4.28** To get the most cost effective legal services, it is crucial that agencies have an appropriate system in place to effectively distribute work to internal and external legal service providers. The audit examined whether agencies' matter management systems assisted the agency to assign work to the appropriate provider and effectively track matters (which also assists with quality assurance). The audit also assessed whether the system assisted the agency to gather and report relevant data (including cost data) to help managers better understand the key drivers of the agency's legal work.

**4.29** Agencies use a wide range of matter management systems. All except one agency had a matter management system in place, however the effectiveness of the systems used varied significantly (see table 4.4). Seventy-two per cent of agencies had matter management systems that were rated as effective; of these 22 per cent were potentially better practice. The remaining 28 per cent of agencies had ineffective systems for managing workflow.

**Table 4.4 Ratings on matter management systems**

		Percentage of Agencies
		<b>Matter management systems are efficient, up-to-date and help allocation of work</b>
↑	<b>Demonstrates key elements of Better Practice</b>	22%
	<b>Competent</b>	50%
	<b>Improvements required or are being implemented</b>	28%
Note: the above percentage figures are based on the ANAO audited agencies' legal units.		

Source: Developed by the ANAO

**4.30** As agency requirements, risk management approaches, and service standards differ, there is no best 'one size fits all' system design. However, potentially better practice systems all relied on an informed purchaser, who was able to centrally co-ordinate the distribution of work, taking into account client needs, the nature of the matter, cost, and government policy. Internal clients were able to easily identify who the first point of contact is for them, and understood the process that followed.

**4.31** Some effective and better practice systems depended on constant oral communication between legal managers and internal staff, but with decisions taken centrally about when to send work to external providers. Other effective systems used communication via e-mail, or custom designed electronic applications. Agencies that required improvement in this area often lacked coordination of matter allocation, or relied on uninformed purchasers of legal services to make decisions about where matters should be allocated, or consistently allocated matters only to external providers, irrespective of agency or government policy.

### **Knowledge Management and Leverage**

**4.32** Knowledge management systems should also be in place to assist the agency to gain the maximum value from legal services and advice which it has already sought and paid for previously. An appropriate knowledge management system allows agencies to capture and use knowledge from previous advices, eliminate the possibility of purchasing or providing duplicate advice, and provide consistent advice that fully incorporates the agency's expert knowledge of its own business and operating environment.

**4.33** A knowledge management system must be kept up-to-date and be searchable, if it is to be effective (see table 4.5). There must also be someone available who is able to interpret the advices contained within the system, to ensure their applicability to current circumstances. Of the fieldwork agencies with a knowledge management system, 16 per cent kept their systems up-to-date and searchable in a way that was considered potential better practice, and another 21 per cent effectively kept their system up-to-date and easily searchable. However, over half of agencies did not keep knowledge management systems up to date, or construct the systems so that they could be easily searched. This restricts the Government as a whole (as well as those individual agencies) from achieving cost effective legal services.

**Table 4.5 Ratings on knowledge management systems**

		Percentage of Agencies		
		System is kept up-to-date and searchable	System captures advices from external providers	Staff access system before providing/purchasing new advice
↑	<b>Demonstrates key elements of Better Practice</b>	16%	11%	5%
	<b>Competent</b>	21%	58%	74%
	<b>Improvements required or are being implemented</b>	63%	31%	21%

Note: the above percentage figures are based on the ANAO audited agencies' legal units.

Source: Developed by the ANAO

**4.34** Agencies should maintain systems that capture and record advices from external providers, as well as those provided internally. Again, agencies' ability to do this varied significantly, with only 11 per cent of legal units considered to be potentially better practice. While a further 58 per cent of legal units were reasonably effective, 31 per cent had either no arrangement in place to capture external advices, or arrangements were considered to be ineffective (see table 4.5).

**4.35** Whatever knowledge management system is in place, if it is to provide value to the agency, it must be used consistently (see table 4.5). Ideally, the system should be easily accessed by relevant staff, especially before purchasing or beginning a new advice. An easily searched knowledge management system should also allow agencies to draw on previous advice where it exists, and to re-use advice when appropriate. The audit examined whether agency staff consistently accessed knowledge archives before providing or purchasing new advice. Of agencies with a knowledge management system only five per cent of agencies were considered to be better practice, though 74 per cent were reasonably effective. Twenty-one per cent of legal units require improvement in this area.

**4.36** Overall, agencies encountered problems where advices were not stored centrally, or were not categorised correctly, or where there were no requirements to retain and store advices. Agencies also encountered problems with duplication of systems – too many options tended to create confusion among internal staff about how to use them.

**4.37** A further risk for agencies is lack of consistent usage of a knowledge management system. In some agencies, even where agreed protocols existed,

individuals had different understandings of what, in practice, they were supposed to do. Linkages between systems also posed problems. For many agencies, the most complete record of a matter was a physical, paper-based file. If this is the case, then fully referencing electronic records to the physical paper files becomes crucially important, especially when it is necessary to access the complete matter file to understand the context of the advice. Agencies that cannot achieve this degree of referencing cannot expect to achieve value for money from advice that they have already received and paid for, either externally or internally.

## Recommendation No.6

**4.38** The ANAO *recommends* that agencies review their existing procedures in order to ensure that they maintain effective knowledge management systems. Such systems should:

- have the ability to capture legal knowledge and advices already purchased (including standard form contract and template documents wherever possible); and
- be kept as up to date and as useable as possible (including having keyword search capability or cross-referencing mechanisms).

### *Agency Responses*

**4.39** All 16 audited agencies agreed with this recommendation. The Department of Defence agreed with qualification—refer to Appendix 3.

## Adherence to Government Policy

**4.40** The Directions outline government policy on the conduct of agencies with regard to legal services. Agencies must know whether the Directions apply to them, and if so, how conforming to the requirements of the Directions affects their delivery of legal services overall. In particular, it is important that purchasers of legal services (especially purchasers of externally provided legal services) are fully informed about the requirements of the Directions.

**4.41** The audit assessed whether agencies could provide assurance that they adhered to government policy requirements. Only 16 per cent of agencies showed a high level of understanding of how government policy impacted their legal services arrangements, while 63 per cent demonstrated an adequate understanding (see table 4.6). However, 21 per cent of agencies could not demonstrate that they adhered to (or had an adequate knowledge of) government policy requirements. Several agencies had contract or purchasing managers who were unfamiliar with the Directions and their requirements. In a number of agencies with devolved purchasing models (where line area managers or staff purchased services directly from external providers), staff

purchasing legal services from external providers appeared unaware that the Directions even existed.

**4.42** For internal providers of legal services, it is better practice that legal managers and staff are well educated about the requirements of the Directions, and understand how the Directions affect their day-to-day activity. It is important that new staff should be thoroughly briefed, that up to date material is included in induction manuals and in agency purchasing policies, and ideally, that requirements to comply with the Directions are reflected in performance agreements.

**4.43** Eighty-two per cent of agencies appeared to effectively educate internal legal staff about the Directions, of these twelve per cent demonstrated better practice by specifying compliance with the requirements of the Directions in internal performance agreements. Eighteen per cent of agencies could not demonstrate that internal staff were adequately informed about the requirements of the Directions (See table 4.6).

**4.44** Agencies are also responsible for ensuring compliance to the Directions by external providers. With some exceptions, most agencies included relevant clauses in the contracts governing the purchase of legal services from external providers. However it is also important that agencies effectively monitor external providers' adherence to the Directions. It is better practice for agencies to conduct their own monitoring of compliance, and not to rely on the external provider's processes. It is also better practice for agencies to seek to *prevent* breaches, through close coordination and appropriate allocation of requests made to external providers, rather than have to seek to address them once they have occurred.

**Table 4.6 Ratings on adherence to government policy**

		Percentage of Agencies		
		Understanding of how government policy impacts their legal services	Educate internal legal staff about the Directions	Monitors external providers adherence to government policy
↑	<b>Demonstrates key elements of Better Practice</b>	16%	12%	17%
	<b>Competent</b>	63%	70%	50%
	<b>Improvements required or are being implemented</b>	21%	18%	33%

Note: the above percentage figures are based on the ANAO audited agencies' legal units.

Source: Developed by the ANAO

**4.45** Fifty per cent of agencies were able to effectively monitor compliance, and another 17 per cent did so in a way that is considered better practice (see table 4.6). However, one third of agencies required improvement in this area, with some having ineffective monitoring processes in place, and others making no attempt at all to monitor their external providers' compliance with government policy.

**4.46** Agencies are also required to report any breaches of the Directions to the OLSC. The audit found a number of unreported potential breaches, and assessed that, due to the absence of any incentive to self-report breaches, there was a risk that agencies may not always identify and report breaches. In this context, the ANAO notes that the failure to report a breach constitutes a further breach of the Directions. In the agencies that could not demonstrate that their systems and processes gave strong assurance that their legal services adhered to government policy, there also appeared to be difficulties in consistently identifying breaches. Overall, the ANAO found evidence to suggest that there is confusion and misunderstanding about the interpretation of significant aspects of the Directions, including of reporting requirements.

## Conclusions

**4.47** The ANAO concluded that most agencies had satisfactory management practices in place for internal and external legal services; however obtaining client feedback is an area where most agencies could improve. In regard to external management issues, the ANAO found that a large number of agencies were not satisfactorily monitoring performance and dealing with deficiencies.

**4.48** Most agencies had a satisfactory matter management and knowledge management system in place, however over half of these require improvement in keeping their knowledge management system up-to-date and searchable.

**4.49** In regard to adherence to Government policy, ANAO has concluded that most agencies' legal unit staff were aware of the Directions and how they impact upon their role. However, a number of agencies did not actively monitor external providers adherence to the Directions.

**4.50** Overall, the ANAO concluded that agencies had a better chance of obtaining cost-effective legal services if they had a strong focus on client service, were active in setting and monitoring service standards, and maintained clearly understood protocols for interaction both internally and externally.

## 5. The Office of Legal Services Coordination

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*This chapter provides an overview of the role of the Office of Legal Services Coordination, in particular, in administering the Legal Services Directions and assisting agencies in managing their legal purchasing decisions. This chapter also examines options for the Office of Legal Services Coordination coordinating expenditure information for the Australian Government's legal services system.*

### The Role of the Office of Legal Services Coordination

**5.1** The OLSC was established within the Attorney-General's Department to develop and administer the Government's legal services policy. This policy provides agencies with the responsibility for determining their individual legal services needs, and how these needs may be met. Individual agencies' Chief Executive Officers are responsible for achieving value for money for their agency's legal services purchasing, consistent with their broader responsibilities under the *Financial Management and Accountability Act 1997*.

**5.2** OLSC is a Branch of the Legal Services and Native Title Division of the Attorney-General's Department. The OLSC's responsibilities in relation to Commonwealth legal services include:

- assisting the Attorney-General in the performance of his role as First Law Officer of the Commonwealth, especially in the administration of the Legal Services Directions (the Directions) issued by the Attorney-General under the *Judiciary Act 1903*, including monitoring their operation, promoting an awareness of their requirements and advising the Attorney-General on the need for any directions in relation to specific matters;
- assisting agencies to manage their legal purchasing decisions, including advising on the use of competitive tendering and contracting principles and on the development of mechanisms to manage the risks involved in purchasing legal services;
- consulting with legal services providers and agencies about the delivery of Commonwealth legal services;
- providing information about the Commonwealth's legal services system;
- monitoring and advising the Attorney-General on significant Commonwealth litigation;

- determining which agency should be responsible for Commonwealth litigation where this is unclear, in accordance with the guidelines in relation to Responsibility for Handling Litigation involving the Commonwealth;
- advising the Attorney-General and the Attorney-General's Department on the operation of the Australian Government Solicitor (AGS) as a separate authority under the *Judiciary Act 1903* and coordinating the Department's ongoing relationship with AGS;
- advising the Attorney-General's Department on the acquisition of its legal services; and
- advising the Attorney-General of applications made by Commonwealth Ministers for financial assistance under the Parliamentary Entitlements Regulations where a claim has been made or court proceedings have been instituted against a Minister.<sup>35</sup>

**5.3** OLSA responsibilities also include advising the Attorney-General on bankruptcy and personal insolvency (jointly with the Insolvency and Trustee Service Australia), classification (jointly with the Office of Film & Literature Classification), providing the secretariat to the International Legal Services Advisory Council, coordinating the participation of the Attorney-General and Minister for Justice and Customs in the Standing Committee of Attorneys-General, and a number of other activities. These functions were not examined, as they are not within the scope of this audit.

**5.4** The Logan Report of 1997 (discussed in Chapter 1) was a key factor in the establishment of the OLSA. Among other things, the report envisaged that OLSA would adopt consultative mechanisms to manage consistency, coordination and whole of government and public interest issues in relation to legal services. In particular, recommendation 8 of the Logan Report provided that the OLSA should, on behalf of the Attorney General, overview:

- (a) the implementation of, and compliance with the Directions; and
- (b) assist agencies in managing their legal purchasing decisions.<sup>36</sup>

**5.5** These two points are discussed in more detail below.

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<sup>35</sup> Attorney-General's Department, <<http://www.ag.gov.au/agd/www/Legalserviceshome.nsf>> [15 December 2004].

<sup>36</sup> Attorney-Generals Department, *Report on the Review of the Attorney-General's Legal Practice*, March 1997 p. 7.

## Administration of the Legal Services Directions

**5.6** The Directions, through the *Judiciary Act 1903*, are a statutory instrument made by the Attorney-General. As such, the Directions impose a responsibility on Chief Executives to identify and report breaches to the OLSC and to put in place appropriate management strategies to comply with the Directions. Hence, while agencies are free to manage their own legal services – they also remain directly accountable for their decisions.

**5.7** The OLSC is responsible for the administration of the Directions. This is an overview role that includes providing the Directions and related guidance to agencies, assisting agencies to put forward requests for approvals or exemptions and assisting the consideration of those requests by the Attorney-General or delegate, as well as monitoring agency compliance with, and education and clarification of, the Directions.

**5.8** The Directions are available from OLSC's website, along with related documents including:

- Compliance Strategy for Enforcement of the Directions;
- Assistance to Commonwealth Agencies for Legal Proceedings;
- Guidelines for Legal Work not charged for by the Attorney-General's Department; and
- Responsibility for Handling Litigation involving the Commonwealth.<sup>37</sup>

**5.9** These documents are designed to assist agencies to understand the context of the Directions and provide more detailed guidance on specific issues. In conjunction to this guidance, the OLSC also consults with legal services providers and agencies in response to specific issues arising from the daily operation of the Directions. Areas of interaction predominantly involve clarification of aspects of the Directions, responding to inquiries about possible exemptions and authorisations under the Directions and the investigation of possible breaches.

**5.10** The Directions require agencies to report significant issues to the OLSC; including sensitive litigation, jurisdiction issues, and problems affecting whole of government policy. The OLSC does receive reports from agencies, and is currently reviewing reporting guidelines in the Directions. The OLSC has advised the ANAO that it receives approximately 50 reports per year concerning significant issues, generally unprompted.

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<sup>37</sup> <<http://www.ag.gov.au/agd/WWW/legalservicesHome.nsf/>> [15 December 2004]

**5.11** The OLSC has a clear role in monitoring compliance with the Directions.<sup>38</sup> The OLSC recorded 42 breaches of the Directions between 29 October 1999 and 9 March 2005. Over the last few months, the OLSC has improved its systemic analysis of reported breaches, identifying issues of broader interest and alerting agencies through the OLSC Bulletin. More recently, the OLSC has also demonstrated its willingness to raise the issue of breaches with individual providers in order to develop a preventative approach.

**5.12** The ANAO found that the OLSC's approach to monitoring and compliance of the Directions relies heavily on alleged breaches being reported:

- by agencies themselves, this is referred to as 'self-reported' breaches; and
- from other sources, including opposing counsel, courts and tribunals, other agencies, the Ombudsman, and self represented litigants.

**5.13** It is less common that the OLSC discovers the breaches in the course of its administration of the Directions. While the OLSC considers that agencies' level of voluntary compliance with reporting guidelines is satisfactory, the ANAO found the OLSC does not proactively monitor agencies' compliance with the Directions.

**5.14** Furthermore, the current reporting process for breaches does not require any certification by agencies to OLSC to ensure that all breaches have been reported. As a result, and not withstanding the legislative obligation for agencies to report breaches, the OLSC is not assured that all breaches of the Directions are captured under the current agency self-reporting arrangements.

**5.15** The ANAO identified a number of possible breaches of the Directions that the OLSC was yet to identify, and which had not been self-reported by the agencies concerned. These and a number of other potential breaches, were identified during the course of audit fieldwork with some basic key word searching of agency opinions/advice databases. As a result, the ANAO considers that there is scope for the OLSC to improve its approach to identifying and reporting breaches of the Directions. One possible mechanism would be for the OLSC to require an annual agency sign-off on the completeness of its reporting of breaches. Currently, there is a review underway of the Directions by the OLSC. The ANAO considers that the findings of this review, in conjunction with those of this audit report, will enable the OLSC to draw on lessons learned and strengthen its administration of the Directions.

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<sup>38</sup> Australian Parliament, Hansard, Senate Legal and Constitutional Committee, *2004-05 Budget Estimates*, 24 May 2004, p. 122.

## Recommendation No.7

**5.16** The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, review its current approach to identifying and reporting breaches of the Legal Services Directions, with a view to providing greater assurance that reporting arrangements are capturing all breaches of the Directions.

*Attorney-General's Department Response*

**5.17** Agreed. (A detailed response is included at Appendix 3)

## Assistance provided to agencies to manage their legal purchasing decisions

**5.18** There are a number of ways that the OLSC seeks to assist agencies in managing their legal purchasing decisions. These include:

- Various OLSC publications, including *Purchasing Legal Services* and the *OLSC Bulletin*;
- The distribution of model contract clauses;
- Involvement in information seminars; and
- Providing other information on request (including on counsel fees and bankrupt counsel).

### *Publications*

**5.19** The OLSC publication *Purchasing Legal Services*,<sup>39</sup> provides general guidance, and offers references to more widely applicable documents and guidance (for example, the *Commonwealth Procurement Guidelines*).<sup>40</sup> The ANAO notes that while the document describes the policy and legislative context of legal services procurement, and raises considerations relevant to the procurement process, a number of agencies have indicated an interest in more practical guidance.

**5.20** In particular, guidance does not tend to be specific, and does not comprehensively address issues such as risk management, or methodologies to help agencies achieve value for money from their legal services arrangements. For example, paragraphs 32 to 35 of *Purchasing Legal Services* deal with risk

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<sup>39</sup> Attorney-General's Department, <<http://www.ag.gov.au/agd/WWW/legalservicesHome.nsf/>> [16 December 2004].

<sup>40</sup> Department of Finance and Administration, *Commonwealth Procurement Guidelines*, July 2004 (revised Jan 2005). These guidelines are issued by the Minister for Finance and Administration under regulation 7 of the *Financial and Accountability Act 1997*.

management, indicating that managing risk is an integral part of good management and suggesting possible risks relevant to some agencies in obtaining legal services. The identification of risks (such as the risk of over-charging by a provider of legal services and non-compliance by providers with the Directions), without offering practical strategies to manage or mitigate the risks, has resulted in this guidance being of limited usefulness to a number of agencies.

**5.21** The Tongue Report recommended that the OLSC “provide a bulletin to agencies highlighting the services they provide and giving updates on new developments.”<sup>41</sup> In response to this recommendation, the OLSC produces the *OLSC Bulletin*, which is distributed to individuals and agencies on the OLSC mailing list, and is available on the OLSC’s website. The first bulletin was distributed in September 2003, with subsequent editions in February, August and December 2004. The ANAO considers that this Bulletin is a useful communication tool for the OLSC to inform agencies of current legal services issues. However, the ANAO notes that while the distribution of the OLSC Bulletin has increased over time, it is currently only sent to 54 out of 190 Commonwealth agencies.

#### *Model contract clauses*

**5.22** The OLSC has developed model contract clauses for use in preparing tenders and contracts for legal services. During the audit, officers from the OLSC indicated that these clauses are designed to give effect to the obligations of legal services providers to comply with the Directions, particularly with regard to tied work. This is seen by the OLSC as an important risk management mechanism, as tied work has been identified by the Australian Government as being of special sensitivity.<sup>42</sup> The ANAO considers the distribution of model contract clauses is a positive initiative as it promotes consistency across agencies and assists them in complying with the Directions.

#### *Seminars and Forums*

**5.23** OLSC officers have accepted speaking opportunities at forums run by organisations such as the Australian Corporate Lawyers Association, and seminars run by legal firms. The amount of seminars/forums in which the OLSC had some involvement has reduced over time. In 1999, the OLSC had involvement at 19 seminars. However, in 2004, the OLSC only had involvement in 5 seminars. Furthermore, the ANAO found that the OLSC has not regularly conducted its own seminars or forums to provide information on purchasing legal services, and although it is willing to offer training on

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<sup>41</sup> S. Tongue, *op. cit.*, p. 3.

<sup>42</sup> Attorney-General’s Department Submission to the ANAO, April 2004.

request, the ANAO is aware of only one agency making such a request. However, OLSC has recently created a legal services discussion group and held the first meeting of that group to discuss legal service purchasing arrangements. The OLSC has advised that it proposes to hold these meetings approximately every two months.

**5.24** Scope exists for the OLSC to strengthen its role, particularly in promoting better practice in legal services purchasing arrangements, and facilitating information sharing between agencies, for example, through running its own seminars (in particular taking into account the needs of smaller agencies). Recommendations to this effect were outlined in the Tongue Report. These included that the OLSC consider facilitating seminars or similar events allowing legal service managers and other interested agency staff to share information (recommendation 1).

*Provision of other information*

**5.25** The OLSC does not maintain information regarding the quality and costs of legal service providers, and has indicated a reluctance to make recommendations and comparisons between providers. The OLSC has noted that this may interfere with the operation of the market, and may create problems with firms being unfairly represented. The OLSC maintains information on bankrupt counsel (available on request) and has recently added to its website,<sup>43</sup> links to information about counsel's area of practice. Information can be accessed from the OLSC on counsel fees via an AGS database.

**5.26** The ANAO considers there is scope for the OLSC to provide more information about the legal services market including existing providers areas of expertise and pricing structures, drawn from the experience of other agencies. Knowledge sharing in this area would be particularly useful as agencies that regularly use external legal providers have better access to this information than agencies that require occasional external legal services.<sup>44</sup> Given the knowledge gained from day-to-day liaison with agencies and stakeholders, particularly concerning breaches of the Directions, there is capacity for the OLSC to facilitate more assistance to agencies on the skills and expertise of particular providers.

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<sup>43</sup> It is Government policy not to engage counsel who have made improper use of bankruptcy to evade taxation obligations.

<sup>44</sup> S. Tongue, op. cit., p. 43.

### *Other areas for improvement*

**5.27** The ANAO notes a number of legal providers' concerns that duplication of advice, in particular forum shopping,<sup>45</sup> and unintended duplication, leads to the multiple purchasing of the same or similar advice across a number of agencies.

**5.28** In this context, the ANAO notes that some agencies have failed to adequately manage or archive existing legal opinions, seeking instead to obtain a retrospective library of opinions from external providers. As indicated in the chapter on the ongoing management of legal services, the ANAO found that a number of audited agencies were unable to provide adequate assurance that multiple legal advices were not being purchased. The ANAO considers there is scope for the OLSC to facilitate the sharing of advice on cross-agency or even 'whole of government' legally related issues. The ANAO observed two instances where this was effectively done (see case studies 5.1 and 5.2).

### **Case Study 5.1 – the Vance decision**

During the course of the audit, the OLSC responded to some agencies' concerns over an ACT Supreme Court ruling (the Vance decision). The decision has the potential to impact on the ability of the Commonwealth to successfully claim access to legal professional privilege on advices from in-house lawyers, and had a number of agencies interested in a Commonwealth view.

The OLSC corresponded with a number of agencies via email, and disseminated some initial views on the court ruling, including the possibility of the Commonwealth seeking clarification of the decision or appealing the decision. This particular matter has potentially significant consequences for agencies where in-house advice is provided on matters that may subsequently become the subject of litigation.

The ANAO considered this to be an example of the leadership and coordination role that the OLSC could and should increasingly play, in the interests of the efficient use of resources in legal services. In the absence of such leadership, a number of agencies are likely to individually seek advice on such an issue, resulting in multiple instances of the Commonwealth purchasing the same legal advice from basically the same range of providers.

### **Case Study 5.2 – Cross-agency coordination**

The ANAO noted that in the second half of 2004, OLSC convened a group of litigators from agencies involved in litigation concerning asbestos-related diseases. These included Finance, DOTARS, Defence and the Stevedoring Investment Finance Committee. Meetings of this group provided an opportunity to discuss and identify better practice, in relation to approaches to settlement, records management and gathering evidence. It also facilitated better coordination of the handling of cases, especially those involving more than one group.

The ANAO considered this to be another example of the leadership and coordination role available for the OLSC to perform across a range of cross-agency issues.

<sup>45</sup> Forum shopping is where an agency seeks a particular outcome in requesting advice. In searching for its desired outcome, the agency may seek advice from a number of firms.

**5.29** The ANAO acknowledges that current Government legal services policy imposes legal obligations on, as well as emphasises the broader responsibilities of, agencies' chief Executive Officers to obtain value for money in managing their legal services needs.<sup>46</sup> The ANAO notes that in order to promote consistency of advice and to minimise the need for multiple advices, the current arrangements rely on the agency responsible for administering a piece of legislation to be consulted, prior to other agencies obtaining legal advice on that legislation.<sup>47</sup>

**5.30** The ANAO found that a number of issues relating to legislation were the subject of the multiple purchasing of advices across agencies, either because the agency responsible for the legislation was not consulted, or it did not provide sufficient clarification of its legislation to the requesting agency.

**5.31** Agencies needing advice on another agency's legislation should first approach the relevant agency and if arrangements are not effective, the OLSC should be informed. The OLSC's role in these situations could be to liaise with the agency responsible, in conjunction with these agencies getting advice, to articulate the importance of this aspect of the Government's legal services policy, and seek the agency's clarification of the relevant aspect of its administered legislation. This would be particularly valuable in circumstances where a number of agencies are experiencing difficulty with existing guidance on an issue of legal interpretation on particular legislation.

**5.32** The ANAO does not consider that the OLSC should be responsible for obtaining legal advices on behalf of agencies. The role would be one of facilitating sharing of advice between agencies. The ANAO considers that the OLSC, as part of its role in monitoring the Directions, has a clear opportunity to facilitate the sharing of advice in these circumstances, thus minimising the chance that the Commonwealth will duplicate the receipt of the same advice.

**5.33** In addition, in respect of specific, whole-of-government issues inherent to many agencies (as outlined in case studies 5.1 and 5.2), greater coordination by OLSC in encouraging agencies to disseminate potentially relevant topic advices has the potential to reduce overall costs. This could arise from reducing individual agencies' needs to purchase the same or similar advices through the OLSC facilitating opportunities for agencies to share their advices which may have broader relevance. The OLSC could also facilitate information sharing on a range of legal purchasing and management issues, to assist agencies' relevant staff to become better-informed purchasers. This would

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<sup>46</sup> This requirement is based on S44 of the *Financial Management and Accountability Act 1997*, and Finance Regulations 8–10, relating to the efficient and effective use of public moneys, and authority to spend public moneys.

<sup>47</sup> Attorney-General's Department, *Legal Services Directions*, paragraph 10, p. 6.

enable agencies to leverage off each other's experiences, which could particularly benefit low volume and/or irregular users of legal services. The recently formed OLSC Discussion Group (as discussed earlier in this chapter), could provide this opportunity.

**5.34** Some audited and surveyed agencies have previously indicated that the OLSC is reactive rather than proactive in assisting agencies to make legal purchasing decisions.<sup>48</sup> The ANAO survey also received comments on the OLSC from various agencies that expressed the view that OLSC's response to complex issues has been slow, and that it can be difficult to engage OLSC's interest, particularly in facilitating an information-sharing resource to minimise the purchase of the same legal advice across Commonwealth agencies.<sup>49</sup>

**5.35** Furthermore, some agencies appear to be unclear about the role of the OLSC, or even where the OLSC is located. Consultation conducted by the OLSC to understand agencies' needs and operating environments has been minimal, though occasionally OLSC officers have attended legal panel meetings, as an information gathering exercise. Apart from the Tongue Report survey, and the current review of the Directions (which sought agency comments), there are few opportunities for agencies and other stakeholders to provide and receive systematic feedback from the OLSC.

**5.36** Over half of the agencies surveyed by the ANAO indicated that they would value the following services from the OLSC:

- Interagency information sharing forums or seminars (71 per cent of survey respondents);
- Information about private providers, e.g. areas of specialisation, standard fees (69 per cent of survey respondents);
- Guidance on evaluating legal service requirements, and determining appropriate legal service delivery models (54 per cent of survey respondents);
- Guidance on recording expenditure on legal services, to inform agency cost/benefit analyses of legal services procurement options (56 per cent of survey respondents); and
- Educational seminars for agency staff, e.g. negotiation skills, tender and contract management (56 per cent of survey respondents).

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<sup>48</sup> S. Tongue, *op cit.*, pp. 36- 37, 42- 44.

<sup>49</sup> Agency responses to the survey used as part of this audit.

5.37 The ANAO considers that the OLSC could significantly improve the overall legal services procurement process if it considered these functions as an integral part of its responsibilities. If the OLSC is able to take these further steps to better facilitate information exchange and sharing, agencies are likely to benefit in the management of their legal purchasing decisions. The OLSC has advised that its capacity to increase its volume of services in this area is dependent on the availability of resources.

## Recommendation No.8

5.38 The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, consider implementing measures to better facilitate information sharing and exchange on legal issues across the Commonwealth.

### Implementation of Recommendation

5.39 The ANAO considers that there a number of ways the OLSC adopt this recommendation. For example, the OLSC could run a regular seminar/forum for Australian Government in-house lawyers, so that information on cross-agency legal issues could be shared and the risk of duplication of key advice be minimised. In addition, the OLSC could provide more information, through publications such as the *OLSC Bulletin*, about a range of issues of interest to agencies, including, but not limited to private providers, tenders and contract management issues and information on different legal service delivery models.

#### *Attorney-General's Department's Response*

5.40 Agreed. (A detailed response is included at Appendix 3).

## Providing guidance on the recording of agency legal services expenditure

5.41 The ANAO considers that agencies should monitor their legal services expenditure as a matter of sound financial practice, and to assist agencies in providing assurance that their legal services purchasing complies with the requirements of the *Financial Management and Accountability Act 1997*. The ANAO notes that a number of agencies do not currently collect this information in a consistent manner.

5.42 It is currently very difficult to determine legal services expenditure across agencies and for the Australian Government as a whole, as agencies do not have a consistent approach to collecting and reporting this data. The Tongue Report experienced these difficulties when attempting to determine total Commonwealth legal expenditure. This audit also experienced these

difficulties, as not all surveyed agencies were able to provide complete details of their legal services expenditure over time.

**5.43** The ANAO notes that there are currently no ongoing processes for the regular reporting of agency expenditure on legal services, nor is there any published guidance to assist agencies to facilitate consistency of recording and reporting expenditure information.

**5.44** There have been consistent calls for a 'whole of government approach' in the recording and reporting of legal expenditure. In particular, the Commonwealth's expenditure on legal services over time has been an area of significant ongoing interest from the Parliament and the public. In this context, the ANAO considers that there are opportunities for the OLSC to provide guidance to agencies on the collection and reporting of legal expenditure. This may involve the dissemination of better practice methodologies, appropriate guidelines and reporting mechanisms for agencies to capture, record and report internal and external legal expenditure.

## Recommendation No.9

**5.45** The ANAO *recommends* that the Attorney-General's Department, through the Office of Legal Services Coordination, assist the ANAO in the development and dissemination of better practice methodologies, appropriate guidelines and reporting mechanisms for agencies to capture, record and report legal expenditure.

*Attorney-General's Department Response*

**5.46** Agreed. (A detailed response is included in Appendix 3).

## Conclusions

**5.47** The ANAO notes that the OLSC was unaware of a number of possible breaches of the Directions, and concludes that the OLSC should review its processes in order to monitor breaches more effectively, and ensure that agencies understand their requirement under the Directions to recognise and report breaches to the OLSC.

**5.48** The ANAO notes that OLSC provides a range of material on its website to assist agencies with their legal purchasing decisions, and considers that some of this material would be of greater assistance to agencies if it included practical strategies in addition to the general guidance currently provided.

**5.49** The ANAO considers that the OLSC has an opportunity to build on its coordination and leadership role from recent welcome initiatives to facilitate guidance to agencies and coordination on a range of cross-agency legal issues. Agencies generally indicated a strong interest in the OLSC playing a greater

facilitative role in sharing information and better practice amongst agencies. The ANAO concluded that this is potentially a key area for the OLSC to further value-add in assisting agencies.

**5.50** The ANAO also notes that agencies' monitoring of their legal services expenditure is sound financial practice, and can assist agencies in meeting the requirements of the *Financial Management and Accountability Act 1997*. In this context, the ANAO considers that the OLSC could have a valuable role in providing guidance to agencies on the recording and reporting of their legal services expenditure, taking into account the ANAO's proposed Better Practice Guide on Legal Services Arrangements.

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Canberra ACT  
20 June 2005

Warren J Cochrane  
Acting Auditor-General

# Appendices



## Appendix 1: Audited and surveyed agencies' legal services expenditure

Table 1A: Audited agencies' advised legal service expenditure – unindexed

Audited Agency	Total expenditure on internal services					Total expenditure on external services (excluding GST)				
	1999/00	2000/01	2001/02	2002/03	2003/04	1999/00	2000/01	2001/02	2002/03	2003/04
Australian Competition and Consumer Commission	\$2,544,010	\$1,698,213	\$1,885,142	\$2,198,136	\$2,568,306	\$17,323,338	\$10,421,488	\$14,256,961	\$17,866,321	\$18,456,312
Australian Securities and Investment Commission	\$21,567,000	\$21,516,000	\$23,212,000	\$24,060,000	\$28,779,000	\$2,512,000	\$2,807,000	\$6,156,000	\$7,732,000	\$7,173,000
Australian Taxation Office	A	\$1,464,015	\$33,000,000	\$43,000,000	\$52,000,000	\$24,169,429	\$26,188,276	\$31,799,865	\$28,820,612	\$34,203,896
ComSuper	\$539,730	\$500,386	\$507,150	\$533,238	\$774,175	\$121,501	\$39,282	\$57,784	\$135,535	\$78,915
Department of Agriculture, Fisheries and Forestry	\$179,489	\$183,763	\$194,815	\$200,415	\$206,604	\$3,682,473	\$3,403,792	\$2,199,091	\$3,008,749	\$3,015,919
Department of Communication, Information Technology and the Arts	\$1,259,851	\$1,392,237	\$1,257,177	\$1,432,000	\$1,752,000	\$1,206,834	\$1,241,261	\$868,895	\$520,688	\$408,891
Department of Defence	\$9,000,000	\$9,205,144	\$10,205,144	\$22,500,000	\$22,300,000	\$17,000,000	\$19,100,000	\$23,800,000	\$38,800,000	\$38,700,000
Department of Education, Science and Training	\$3,092,000	\$3,390,000	\$3,317,000	\$3,989,000	\$4,490,000	\$1,322,000	\$1,928,000	\$1,156,000	\$1,602,000	\$2,099,000
Department of Employment and Workplace Relations	\$2,627,977	\$3,278,016	\$3,518,744	\$4,322,723	\$4,860,086	\$3,633,065	\$3,024,324	\$2,822,368	\$3,279,206	\$3,551,802

Audited Agency	Total expenditure on internal services					Total expenditure on external services (excluding GST)				
	1999/00	2000/01	2001/02	2002/03	2003/04	1999/00	2000/01	2001/02	2002/03	2003/04
Department of Family and Community Services	\$1,690,872	\$2,091,346	\$1,876,017	\$2,103,945	\$2,377,004	\$951,036	\$361,252	\$1,720,873	\$1,636,875	\$2,437,329
Department of Finance and Administration	B	B	B	B	\$569,000	\$7,132,000	\$5,218,000	\$9,172,000	\$5,961,000	\$4,764,000
Department of Health and Ageing	\$2,855,680	\$3,421,971	\$4,232,552	\$4,007,180	\$4,831,462	\$2,686,570	\$2,788,573	\$2,801,888	\$2,878,754	\$2,920,772
Department of Immigration and Multicultural and Indigenous Affairs	\$5,700,000	\$6,860,000	\$11,091,522 (1)	\$10,574,686	\$14,409,697	\$10,720,163	\$17,751,363	\$18,136,097	\$24,678,796	\$31,456,856
Department of Industry, Tourism and Resources (AusIndustry)	\$1,018,428	\$987,347	\$970,486	\$965,060	\$1,038,042	\$2,256,447	\$1,815,117	\$1,696,499	\$1,652,899	\$1,702,723
Department of Industry, Tourism and Resources (Corporate)	\$361,735	\$380,747	\$380,796	\$370,735	\$399,671	\$3,493,630	\$3,626,070	\$3,953,446	\$3,323,478	\$4,739,360
Department of Transport and Regional Services	\$605,977	\$710,352	\$1,112,661	\$1,227,807	\$895,849	\$1,883,637	\$1,283,632	\$3,527,694	\$2,295,766	\$2,228,270
Health Insurance Commission	\$707,268	\$830,054	\$801,094	\$908,513	\$961,996	\$793,533	\$1,072,998	\$1,669,493	\$1,874,328	\$2,242,970

<sup>A</sup> Agency was unable to specifically identified figure

<sup>B</sup> Agency only had external legal service costs

<sup>C</sup> Not applicable, as agency was not established

(1) Agency first applied a different costing basis this year

**Table 1B: Surveyed agencies' advised legal service expenditure – unindexed**

Survey Agency	Total expenditure on internal services					Total expenditure on external services (excluding GST)				
	1999/00	2000/01	2001/02	2002/03	2003/04	1999/00	2000/01	2001/02	2002/03	2003/04
Air Services Australia	\$861,616	\$777,975	\$1,051,414	\$1,221,000	\$1,287,000	\$3,600,000	\$1,272,727	\$2,909,091	\$2,372,727	\$2,818,182
Attorney General's Department	A	A	A	A	\$900,000	\$7,015,545	\$5,447,447	\$5,328,461	\$7,807,497	\$7,831,707
AUSTRADE	\$96,426	\$0	\$39,487	\$83,360	\$298,836	\$611,379	\$399,470	\$589,743	\$706,684	\$562,384
Australian Crime Commission	C	C	C	\$1,265,315	\$1,472,000	C	C	C	\$223,232	\$323,952
Australian Customs Service	\$440,157	\$350,116	\$370,921	\$365,251	\$340,888	\$5,419,768	\$6,786,448	\$7,259,054	\$9,386,764	\$9,477,507
Australian Federal Police	\$1,323,032	\$1,263,463	\$1,326,110	\$1,339,899	\$1,471,708	\$143,340	\$74,585	\$146,275	\$673,101	\$1,884,559
Australian Fisheries Management Authority	\$183,094	\$254,782	\$308,838	\$295,499	\$317,529	\$556,762	\$230,075	\$570,966	\$565,208	\$720,156
Australian Greenhouse Office	B	\$40,470	\$42,904	\$44,137	\$45,500	\$271,731	\$420,420	\$798,633	\$433,716	\$445,204

Survey Agency	Total expenditure on internal services					Total expenditure on external services (excluding GST)				
	1999/00	2000/01	2001/02	2002/03	2003/04	1999/00	2000/01	2001/02	2002/03	2003/04
Australian Nuclear Science and Technology Organisation	\$31,200	\$32,700	\$35,400	\$56,600	\$192,786	\$448,858	\$521,600	\$350,184	\$343,955	\$267,446
Centrelink	B	B	B	B	B	\$2,889,524	\$2,899,289	\$3,813,625	\$4,644,971	\$5,026,287
Child Support Agency	\$2,212,631	\$2,320,504	\$2,489,977	\$2,536,578	\$2,726,961	\$983,581	\$1,067,318	\$1,062,907	\$1,343,736	\$1,604,004
Civil Aviation and Safety Authority	\$1,687,000	\$1,690,000	\$1,722,000	\$1,652,000	\$1,898,000	\$469,000	\$384,000	\$301,000	\$790,000	\$747,000
Comcare	\$655,283	\$804,978	\$836,790	\$940,339	\$916,513	\$8,667,328	\$8,729,498	\$8,435,072	\$10,263,550	\$9,521,799
Department of Foreign Affairs and Trade	\$2,020,072	\$2,328,145	\$2,911,398	\$3,175,006	\$3,451,263	\$1,241,376	\$3,033,358	\$4,942,786	\$3,092,351	\$2,695,412
Department of Prime Minister and Cabinet	\$20,805	\$21,300	\$22,581	\$23,231	\$23,948	\$6,440,167	\$2,114,373	\$588,372	\$313,667	\$419,811
Department of Treasury	B	B	B	B	B	\$759,711	\$761,719	\$2,524,724	\$2,105,777	\$1,548,570
Director of Public Prosecutions	\$43,840,944	\$46,311,001	\$49,721,524	\$52,619,330	\$60,399,637	\$10,532,922	\$6,541,003	\$6,096,588	\$5,199,678	\$6,698,856

Survey Agency	Total expenditure on internal services					Total expenditure on external services (excluding GST)				
	1999/00	2000/01	2001/02	2002/03	2003/04	1999/00	2000/01	2001/02	2002/03	2003/04
Employment Advocate	\$742,250	\$731,344	\$786,559	\$679,186	\$833,420	\$656,317	\$621,376	\$391,148	\$139,795	\$217,451
Geoscience Australia	\$26,932	\$27,573	\$29,231	\$30,071	\$31,000	\$187,810	\$178,872	\$304,260	\$295,645	\$357,324
Insolvency and Trustee Services, Australia	C	\$47,915	\$54,305	\$77,881	\$98,655	C	\$1,041,176	\$593,031	\$745,474	\$799,273
Migration Review Tribunal	\$788,358	\$1,152,556	\$1,194,889	\$1,145,923	\$897,123	\$4,363	\$29,950	\$24,279	\$15,626	\$57,040
National Native Title Tribunal	\$393,012	\$417,042	\$457,210	\$617,776	\$646,761	\$111,979	\$75,169	\$52,264	\$42,591	\$53,785
Office of Parliamentary Counsel	\$5,997,000	\$6,322,483	\$6,383,158	\$6,384,240	\$7,442,524	A	\$11,517	\$32,842	\$29,760	\$3,476
Professional Services Review	C	B	B	B	B	C	\$657,612	\$1,182,756	\$1,387,553	\$1,740,443
Department of Health and Ageing - Therapeutic Goods Administration	\$365,625	\$438,061	\$549,735	\$689,735	\$941,352	\$95,517	\$127,058	\$229,809	\$239,291	\$203,608
<sup>A</sup> Agency was unable to specifically identify figure <sup>B</sup> Agency only had external legal service costs <sup>C</sup> Not applicable, as agency was not established										

Source: Developed by the ANAO based on survey data

## Appendix 2: Summary of ANAO-observed better practice

Chapter	Issues	Better Practice Standard
<b>Strategic Planning and Review of Legal Services Arrangements</b>	<b>Strategic Level Input</b>	Ensure agreement among senior staff on the agency's legal services purchasing arrangements (e.g. agency's legal needs, resources required and appropriate structure of legal services purchasing model)
	<b>The Informed Purchaser (May be an individual or group)</b>	Comprehensively understands the 'business' of the Agency and is able to protect that Agency's interests Co-ordinates all legal services arrangements and has an understanding of the market and how it operates. Provides a link between decisions taken at the strategic level and the day-to-day implementation Provides assurance that agency is achieving cost effective legal services Is aware of the developments both legal and otherwise that are likely to impact on the Agency
	<b>Communication Within the Agency</b>	Inclusion of the informed purchaser in senior management meetings Frequent re-assessment of agency needs through corporate planning and reporting processes Proactive management of client and provider relationships (both internal and external) Sharing of relevant information with providers (both internal and external)
	<b>Matching Evolving Needs with Cost-effective Solutions</b>	Recognise patterns in agency's legal service requirements Adjust for changes in service requirements when appropriate Tailor legal services arrangements to suit agency specific needs and priorities

Chapter	Issues	Better Practice Standard
	<b>Risk Management</b>	<p>Assess and manage legal risk to the agency's ability to deliver programs and services</p> <p>Assess and manage risk to the agency's ongoing ability to purchase legal services (e.g. determine demand for legal services and the type and level of services to be retained internally and those to be outsourced)</p>
	<b>Review of Legal Purchasing Arrangements</b>	<p>Conduct regular reviews of agency legal service purchasing arrangements (involving consultation with stakeholders and clients)</p> <p>Clearly define why the review is being conducted, as this will affect the objective and scope</p>
<b>Management of Agency Legal Services</b>	<b>Purchasing Internal Services: Management Issues</b>	<p>Adopt comprehensive staff management policies (e.g. training and succession planning)</p> <p>Measure quality of legal services against agreed standards (e.g. through regular feedback)</p> <p>Implement quality assurance methods (e.g. second counselling and knowledge sharing)</p>
	<b>Purchasing External Services: Management Issues</b>	<p>Implement mutually agreed and understood protocols for interaction between providers and clients</p> <p>Adopt relationship management methods that include sufficient reporting and monitoring</p> <p>Ensure clearly understood service delivery standards and immediately discuss issues where delivery does not meet expectations</p> <p>Consider negotiating volume rebates, learning discounts or other value delivery strategies.</p> <p>Implement performance measures (including regular feedback)</p> <p>Undertake regular discussions with external provider regarding overall relationship</p>

Chapter	Issues	Better Practice Standard
	<b>Role of the Internal Legal Area</b>	Implement agreed and mutually understood guidelines on when, and how to seek legal advice Clearly define responsibilities of both the client and provider Provide a 'gate-keeping' role (educating internal clients about whether to seek advice) Quickly acknowledge, co-ordinate and prioritise requests
	<b>Workflow and Matter Management</b>	Adopt appropriate system to consistently respond to and manage requests for legal advice and services to required standards; and enable matters to be picked up and taken forward by any staff member. Ensure system is flexible enough to accommodate changing needs
	<b>Knowledge Management and Leverage</b>	Ability to leverage any benefits from knowledge base and gain maximum value from services and advice for which the agency has already paid Ensure system is used according to agreed protocols Ensure system is flexible enough to accommodate changing needs
	<b>Adherence to Government Policy</b>	Ensure all providers are aware of and adhere to the Directions including understanding their basis. Adopt appropriate compliance monitoring process

## Appendix 3: Detailed Agency Responses

### Attorney-General's Department

#### **Recommendations 1 – 6**

The Attorney-General's Department agrees with these recommendations.

#### **Recommendation 7**

The Attorney-General's Department agrees with this recommendation. The Department will conduct the proposed review to ensure that optimal approach is being adopted, within available resources, to identify breaches of the Directions.

Any approach that is adopted will need to be consistent with the fact that the obligation to achieve compliance with the Directions is imposed on agency chief executives under paragraph 11 of the Directions. The Department notes that the regulatory approach adopted since the implementation of the Directions reflects this legal obligation, is consistent with the Government's approach in other areas, and was envisaged by the Logan Report. Any approach that is adopted will also need to balance the possible gains from securing further assurance of compliance with the Directions against the resource commitment required to secure that assurance. In any system of enforcement seeking 100 per cent assurance of compliance is likely to be extremely resource intensive.

#### **Recommendation 8**

The Attorney-General's Department agrees with this recommendation. The Department is assessing existing and potential measures to facilitate information sharing and exchange in the most effective way, within available resources. The Department notes that to adopt all of the suggestions made in the Report would require a significant increase in OLSC's resource.

As noted in the Report (paragraph 5.23), OLSC has recently initiated a discussion group, to provide a forum in which Australian Government agencies can identify best practice opportunities in purchasing, risk management and managing legal services expenditure, as well as handling legal matters. This facilitative role reflects the current legal and policy settings making chief executives wholly responsible for achieving outcomes in these areas. The discussion group will provide an informative-exchange forum to assist chief executives to better discharge their responsibilities. This will complement existing outreach activities such as delivering seminars, disseminating guidance material and giving advice on a one-on-one basis in response to issues that arise for agencies in applying the Legal Services Directions to particular circumstances.

The Department notes the ANAO's suggestion that OLSC should provide information about legal services provider expertise and 'pricing structures' (paragraph 5.26). Information about the expertise offered by legal services providers is already available from commercial directories that publish a wide range of information and assessments of legal services providers. The Department also considers that the enormous variety in possible pricing structures for legal services, the fact that these can change rapidly and the circumstances-specific nature of purchasing arrangements with particular agencies mean that there would not be value in purporting to maintain pricing information.

The Department supports the approach to consultation on and sharing of advice outlined at paragraphs 5.29 to 5.32 of the report.

### ***Recommendation 9***

The Attorney-General's Department agrees with this recommendation, subject to resources being available to perform this function.

### **Australian Competition and Consumer Commission**

With respect to proposed recommendations 1 to 6 the ACCC supports them all.

### **Australian Securities & Investments Commission**

ASIC's only comment on the proposed report is to agree in principle with the 6 recommendations directed to the 16 agencies reviewed as part of the audit and as set out in the report. It should be noted that each agency's capacity to implement the relevant recommendations will be contingent upon the resources available to it for that purpose.

### **Australian Taxation Office**

The Tax Office welcomes and agrees with the recommendations of the audit, including those pertaining to the OLSC. We endorse the ANAO's approach in not seeking to prescribe any one model for the provision of legal services, recognising instead that each agency is free to choose how its legal needs are met. Many of the general observations made by the ANAO about agencies' legal services mirror conclusions we accepted from an independent own motion review finalised for the ATO in late 2003. The improvements we had set in train even before the time of the audit in August 2004 mean we can confidently say that we are already making significant progress towards implementing the ANAO's recommendations. We also welcome recommendations pertaining to the ways in which the Attorney-General's Department through OLSC might assist all Commonwealth agencies in areas of common legal endeavour.

While we consider that the ATO as a large organisation is reasonably proficient at managing the range of legal services covered by the audit, we also acknowledge the importance of having formal procedures firmly in place to ensure consistency and ready demonstration of value for money in the provision of legal services. As we are currently moving to establish a wider panel of external legal services providers, the ANAO's comments about better practice are particularly timely for us.

## **ComSuper**

### **Recommendation No. 1 Para 3.10**

Agreed. Although we note it is not clear whether the recommendation is referring to internal and external legal services, or just external? The Legal Services Manager is responsible for managing the provision of legal services (whether internal or external) to ComSuper senior managers and other relevant staff within ComSuper. Regular (weekly) meetings between the Legal Services Manager and other senior managers within ComSuper keep him apprised of legal and business needs or requirements of ComSuper. Whilst currently there is only one provider of legal services ComSuper's intention is to seek market knowledge about the cost of external legal service providers in the near future through an appropriate tender process.

### **Recommendation No. 2 Para 3.28**

Agree. We note the Legal Services Manager monitors the workloads and trends in the business needs of ComSuper through regular meetings with senior management, and through the monitoring of the Work performed by the Legal Services Section.

### **Recommendation No. 3 Para 3.35**

Agree. ComSuper's Legal Services Manager, in consultation with senior management, is responsible for identifying legal issues created by trends in business needs and continually monitoring whether the legal service model is appropriate.

### **Recommendation No. 4 Para 4.19**

Agree. The Legal Services Manager and his team work closely with ComSuper's current legal services provider to identify value.

### **Recommendation No. 5 Para 4.26**

Agree. ComSuper has centralised the process for requesting legal advice and created a small centre for excellence which is staffed by experts who should be able to identify issues which may require legal assistance.

**Recommendation No. 6 Para 4.38**

Agree. ComSuper has such a system and is currently making it available to appropriate staff.

**Department of Agriculture, Fisheries and Forestry**

The Department has reviewed the report and is in full agreement with its recommendations. The issues identified in the report will be addressed as part of the implementation of the new legal services contract due to commence on 1 August 2005. Appropriate issues raised in the survey have been incorporated into our request for tender and contract documentation. We will also amend internal processes and procedures in line with the service delivery requirements of the contract.

**Department of Communications, Information Technology and the Arts**

The Department agrees with the recommendations contained in the report. The Department's existing practices are generally consistent with the recommendations and we have action in hand to address the three specific areas identified by the ANAO as requiring improvement.

**Department of Defence****Recommendation No. 1 Para 3.10**

Agree - Defence has already reviewed its existing procedures and is in the process of setting up a new Defence Legal Services Panel, including a detailed strategic business management process that accommodates this type of recommendation. The proposed new Panel arrangements will include two central legal units acting as the ultimate coordination points for the provision of internal legal advice and obtaining external legal services: a legal unit within the Department and, as the Defence Materiel Organisation will become a prescribed agency in July 05, a separate unit within the DMO.

**Recommendation No. 2 Para 3.28**

Agree - Defence has reviewed its existing procedures for capturing, recording and reporting legal services expenditure and confirms that its current financial management system has this capacity. A number of procedural changes are currently being made to better enable the system to meet this requirement. The systems for monitoring workloads and trends in legal services will continue to be refined, together with proposed new arrangements for managing external legal services, as part of the new Defence Legal Services Panel.

**Recommendation No. 3 Para 3.35**

Agree - Internal legal services are directly relevant to Defence's core activities. Currently legal officers are integrally involved in all facets of the Defence Mission from advising on relevant international agreements through to the planning and conduct of exercises and all operational deployments. Implementation of several recent reforms in Defence's internal legal unit are intended to provide similar support to the departmental function, while a new legal unit within the DMO will provide support to the new prescribed agency.

**Recommendation No. 4 Para 4.19**

Agree - Defence is currently developing a database, policy manual and evaluation mechanism that will ensure frameworks are in place to monitor the performance of external legal providers. Enhanced performance monitoring mechanisms are also intended to be an important feature of the new Defence Legal Services Panel.

**Recommendation No. 5 Para 4.26**

Agree - Defence is in the process of setting up the new Defence Legal Services Panel, including a detailed strategic business management process to accommodate this type of recommendation. New procedures and policies will be promulgated in a readily available format that will inform personnel on when and how to seek legal services.

**Recommendation No. 6 Para 4.38**

Agree with qualification - Defence is building a database to capture legal knowledge obtained externally, and already makes substantial use of standard form contract and template documents wherever possible. Whereas the database will facilitate the maintenance of up-to-date advice and effective search capability, its accessibility by Defence elements will necessarily be limited due to privacy and security concerns.

**Department of Education, Science and Training****Recommendation No. 1 Para 3.10**

Agree - recommendation is met.

DEST's legal services are coordinated by the Procurement, Assurance and Legal Group with all coordination actively managed by the Chief Lawyer with support from each of the legal section heads in the Group. The Chief Lawyer and the lawyers working under his supervision are DEST's 'informed purchasers' of legal services.

**Recommendation No. 2 Para 3.28**

Agree - recommendation is met.

DEST uses a number of systems to capture information related to the delivery of legal services. Workload data is reviewed regularly using the legal area's data management system. This records data on the progress of matters, the time costing of each matter and whether the work is undertaken internally or externally. Monthly legal services expenditure reports are also used to determine expenditure trends and assist in anticipating changes to legal service requirements. The 'informed purchaser' approach also assists the Department to better assess the need for legal services and to respond quickly and effectively to changes in workloads.

**Recommendation No. 3 Para 3.35**

Agree - recommendation is met.

At the strategic level, the coordination of all legal services is through the Chief Lawyer, who is also part of the DEST Corporate Leadership Group and has direct communication links with the DEST Executive. This ensures that legal risks to core activities are identified and assessed. At the operational level, the management of in-house lawyers is based around legal sections, managed by a senior lawyer, providing dedicated legal services to specific programme areas of the Department. An annual client survey is also conducted to ensure that both internal and external legal services are relevant to the needs of clients, the core business activities of the Department, and are provided to a service standard which meets the clients' needs.

**Recommendation No. 4 Para 4.19**

Agree - recommendation is met.

The purchasing and monitoring of external legal services is centrally coordinated by the Chief Lawyer and the legal section heads. The Chief Lawyer has overall responsibility for the relationship management with external providers. DEST makes decisions to outsource legal services based on agreed criteria and regular, accurate expenditure and performance data. External providers' invoices are closely scrutinised with particular reference to quality and value for money of the legal service being provided. The external providers are assessed against the provisions set out in the Deed of Standing Offer agreements. Performance issues are formally discussed at regular relationship meetings. An annual client survey is also conducted to ensure that external legal services are relevant to the needs of clients, the core business activities of the Department, and are provided to a service standard which meets the clients' needs.

**Recommendation No. 5 Para 4.26**

Agree - recommendation is met.

Instructions and guidance on when and how legal services should be accessed is available to all DEST staff via a number of delivery mechanisms. The legal area of the department has its own Intranet web site which has this information. The legal area has developed and delivered a number of training courses on specific legal related topics. It has produced an information brochure on how and when to seek legal advice. All DEST staff must use a procurement management system to undertake procurements. This includes access to all procurement policies and procedures and legal requirements, including automatic referrals to lawyers. The Chief Lawyer is a member of DEST Corporate Leadership Group and has direct communication links with the Department's Executive to ensure that legal services are incorporated into DEST's business at the strategic level.

**Recommendation No. 6 Para 4.38**

Agree - recommendation is met.

The Department's legal area has a specific 'Legal Knowledge Management Section' staffed by lawyers who are responsible for the Legal Advice Database (LAD), the area's Intranet, law library and proforma documents. LAD is an electronic, searchable repository of legal advice provided in-house and purchased from the Department's external legal service providers. LAD is managed by a dedicated lawyer/editor who is responsible for ensuring the information in the database is up-to-date. Protocols exist in the legal area where the legal staff consistently access LAD before providing advice or referring a matter to an external provider.

**Department of Employment and Workplace Relations**

The Department of Employment and Workplace Relations (DEWR) notes the general recommendations to agencies contained in the report (i.e. Recommendations 1-6) and the specific recommendations in relation to the Attorney-General's Department (i.e. Recommendations 7-9). DEWR agrees with Recommendations 1-6, and notes that actions consistent with these recommendations had been implemented within DEWR some years previously, and have been regularly reviewed as part of the Department's commitment to continuous improvement. As a consequence, DEWR has legal arrangements in place to ensure that it is able to respond effectively and efficiently to the diverse business needs of the portfolio. DEWR is not well placed to make an assessment of the recommended course of action in Recommendations 7 and 9 and has no comment, DEWR agrees with Recommendation 8.

## **Department of Family and Community Services**

The Department of Family and Community Services agrees with the report's findings and the recommendations. The Department continues to lead in the development of the public private partnership model of legal service provision and the report is a valuable contribution to that process, as it will assist in driving normative change in the organisation, delivery, assessment and refinement of legal services within the Department.

The report, in section 1.16 describes the Public Private Partnership model in place in this Department. I believe it is important that this useful summary of FaCS legal services arrangements be expanded slightly to acknowledge the appointment of a Legal Services Contract Manager. This position ensures that the overall relationship between the Department, the externally provided Legal Services Manager and the Legal Panel firms are managed appropriately providing assurance that this Public Private Partnership is delivering value for money, fulfils the Department's requirements and does not allow overcharging practices. Without this elaboration, the Public Private Partnership may seem to embody little overall control and management of the Legal Services Management firm.

## **Department of Finance and Administration**

The Department of Finance and Administration (Finance) agrees with recommendations 1-6 made in the report.

## **Department of Health and Ageing**

Agree with the recommendations.

## **Department of Immigration and Multicultural and Indigenous Affairs**

### **Recommendations 1 - 6**

Agreed in principle. I note that the Department currently complies with these recommendations and has existing procedures in place.

## **Department of Industry Tourism and Resources - including AusIndustry**

The Department and AusIndustry agree to the recommendations in the report.

## **Department of Transport and Regional Services**

The Department supports recommendations 1 to 6 contained in the draft Audit report. The Department has no comment in relation to recommendations 7 to 9.

### **Health Insurance Commission**

HIC agrees with the thrust of the report, which sees agencies' delivery of high quality legal services being demonstrated by a strong, client-focused coordination point for procuring and managing legal services; flexibility in adjusting arrangements to meet changing needs; an active risk management approach; and appropriate systems in areas such as workload, expenditure and knowledge management. HIC agrees with recommendations 1-6 contained within the proposed audit report.

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