



Attorney General  
& Justice

# Legal Services Blueprint

*Legal Service Delivery Reforms for the NSW Government*

August 2011

Legal Services Coordination  
Department of Attorney General & Justice  
[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)  
phone: 02 8061 9222  
fax: 02 8061 9370  
Level 14, 10 Spring Street SYDNEY NSW 2000 (GPO Box 6)  
GPO Box 6 SYDNEY NSW 2001 | DX 1227 SYDNEY

Translating and interpreter service  
If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.  
For alternative formats (audio tape, electronic or Braille versions) of this brochure, contact Legal Services Coordination on ph:02 8061 9222 or Diversity Services  
email: [diversityservices@agd.nsw.gov.au](mailto:diversityservices@agd.nsw.gov.au)  
phone: 02 8688 7507  
fax: 02 8688 9626  
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

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ISBN: 978-1-921590-73-3 (online)

## OVERVIEW

The NSW Government is committed to ensuring that its use of legal services is efficient, fiscally sustainable and delivers value for money for the people of NSW.

In order to ensure these goals are being met, the Government is introducing reforms across Government to achieve more transparency in the processes involved in the provision and procurement of legal services and greater coordination of legal services policy and knowledge sharing in legal services across Government.

The Government's *Legal Services Blueprint* endorses reforms in six key areas that will improve business processes and the delivery of legal services across Government. The reforms build on effective practices that currently exist in individual agencies and departments, and expands them across government to effect cost savings for agencies in the medium to long term. The changes will result in a strategic whole of government perspective in the provision of legal services to ensure that legal expenditure in NSW is transparent, efficient and aligned with government priorities.

The six priority areas for legal services reform across the NSW public sector are:

- Procurement;
- Fee Arrangements;
- In-house Legal Services;
- Measurement and Monitoring;
- Information Sharing; and
- Whole of Government Coordination.

The reforms are in line with the Government's *Five Point Plan* to rebuild the economy, return quality services, renovate infrastructure, restore accountability to government, and protect our local environment and communities.

The *Legal Services Blueprint* heralds a new era in the delivery of legal services in NSW and in the transparency of the use of legal services. Starting from 1 July 2012 agencies will be required for the first time to publicly report on certain information relating to their external legal services expenditure as part of their Annual Report.

The following table outlines the 12 reforms that form the *Legal Services Blueprint*.

## LEGAL SERVICES BLUEPRINT

Area	Reforms
Procurement	<ol style="list-style-type: none"> <li>1. Implement 'informed purchaser' training to enable individuals in agencies to coordinate legal service arrangements, drive better practices in procurement and ensure the agency obtains value for money legal services; and identify a Legal Service Manager in each agency.</li> <li>2. Move towards the use of cluster panels for legal services to capitalise on existing successful panel arrangements and to take advantage of the new Super Department structure.</li> <li>3. Establish standard tender packages and documentation to reduce costs for agencies and the firms tendering and to provide consistency across government.</li> </ol>
Fee Arrangements	<ol style="list-style-type: none"> <li>4. Assist agencies to make greater use of alternative fee arrangements for the engagement of private providers to change the incentives for providers and to shift risk for cost over-run from the government to providers.</li> <li>5. Review process for approval of Counsel by the Attorney General to more carefully manage Counsel fees across the government.</li> </ol>
In-house Legal Services	<ol style="list-style-type: none"> <li>6. Review legal service team structure at the cluster level and consider amalgamation of services within each cluster to drive efficiencies and cost savings.</li> <li>7. Coordinate the training of in-house lawyers relevant to their role in government to improve the efficiency and capability of in-house teams.</li> </ol>
Measurement and Monitoring	<ol style="list-style-type: none"> <li>8. Collect high level minimum data through an annual web based survey of legal services to improve transparency, allow identification of emerging issues and allow monitoring of long term trends in expenditure.</li> <li>9. Require agencies to report in their Annual Report certain information relating to external legal services expenditure.</li> </ol>
Information Sharing	<ol style="list-style-type: none"> <li>10. Provide cross-government access to legal resources through developing whole of government subscriptions to provide savings for agencies.</li> <li>11. Consider the establishment of an electronic web database for sharing, where appropriate, precedents and advice to reduce duplication and costs for agencies.</li> </ol>
Whole of Government Coordination	<ol style="list-style-type: none"> <li>12. Review all current legal services policies applicable to NSW Government agencies with the aim of developing a comprehensive policy document that will contain the NSW Government Legal Policy Framework.</li> </ol>

## 2010 REVIEW OF LEGAL SERVICES

### **Background**

In 2010 a Review of Legal Services Expenditure in NSW was undertaken as part of a joint project between NSW Treasury and the then Department of Attorney General and Justice.

The aim of the Review was to assist agencies to achieve efficient and fiscally sustainable expenditure on legal services over the period of the forward estimates and to institutionalise continuous business improvement within agencies.

The Review undertook a comprehensive data collection exercise. Around 100 NSW Government agencies were surveyed on legal services expenditure, procurement arrangements for legal services, and the type, cost and drivers of legal services.

The Review found that NSW has a highly complex and decentralised model of legal service provision. There is wide variation in expenditure and in the structure of legal services.

The Review noted that legal services are an important part of NSW Government work, finding that effective legal services provide assurance that the government's legal risks are being adequately managed and that government actions are legally appropriate.

In 2006/07, excluding frontline legal services providers, (i.e. Office of the Director of Public Prosecutions (ODPP), Police Prosecutors, Legal Aid Commission (LAC) client services and the Public Defender's Office), the NSW Government spent \$247.7 million on legal services.

Of that amount \$83 million was spent on purchasing services from external providers and \$107 million was spent on in-house providers. Legal costs associated with insurance claims through the TMF amounted to \$57 million.

NSW Government expenditure on legal services increased by \$48.2 million from 2006/07 to 2008/09. The table on pages 7 and 8 summarises the reasons for \$41.3 million, or 86 per cent, of this increase and shows that \$23.6 million is attributable to one-off factors.

In 2008/09, excluding frontline legal services providers, the NSW Government spent \$296 million on legal services.

Of that amount, \$103 million was spent on purchasing services from external providers and another \$130 million was spent on in-house providers, including the Crown Solicitor's Office.

Legal costs associated with insurance claims through the Treasury Managed Fund (TMF) accounted for \$62 million.

The amount of \$296 million spent on legal services in 2008/09 represented 0.6 per cent of general government expenses in that financial year.

The Review found that expenditure growth, adjusted for one-off factors, is \$24.5 million giving a Compound Annual Growth Rate (CAGR) of 4.8 per cent. This CAGR is below general government expenditure growth.

### **Expenditure Drivers**

A number of key factors influenced the demand for legal services, both internal and external, over the period 2006/07 – 2008/09. These included:

- **Asset Transactions:** Significant demand was generated by initiatives to transfer monopoly government providers to the private sector. For instance, work done on selling the rights to the output of the electricity generators cost \$10 million in legal fees in 2007/08 and 2008/09.
- **Infrastructure:** Infrastructure projects were an important driver of legal expenditure, particularly for transport agencies.
- **Regulatory and legislative changes:** The introduction of new laws and regulations increased demand as government agencies ensured compliance with the law. For example, the RTA reported a \$2 million increase in prosecutions and advocacy from 2006-07 to 2008-09 relating to an increase in the regulation of heavy vehicles and an increase in the number of penalty notices being challenged in Court.

The introduction of the *Crimes (Serious Sex Offenders) Act 2006* has led to a \$1.5 million increase in Core Legal Fund costs. This Act provides for the extended supervision and/or continuing detention of serious sex offenders at the end of their sentence. Matters are heard in the Supreme Court and offenders often have long criminal histories that cross several jurisdictions, increasing case complexity.

- **Special Inquiries:** Inquiries into government service delivery increased legal expenditure for agencies both during the inquiry process and afterwards when recommendations were implemented.
- **Increased Demand for Government Services:** For example, legal costs at the Department of Community Services increased by 37 per cent from 2006/07 to 2008/09. Over the same period the number of children and young persons entering out-of-home care increased by 30 per cent.

- **General Community Factors.** In a Report on the procurement of legal services by the Australian Government, titled “Report on the Review of Commonwealth Legal Services Procurement”, the authors, Anthony Blunn AO and Sibylle Krieger argue that heightened awareness in the community of legal rights and of natural justice combined with well-informed and well-funded community and commercial entities able and willing to challenge government actions has imposed additional demand on government legal services.<sup>1</sup> For example, in NSW legal expenses associated with disputed land tax matters increased by 205 per cent from 2006/07 to 2008/09.

It has been argued that there is increasing community expectation of government enforcement and regulation. Although the public’s view on regulation is complex, there is some evidence for example, that in the context of the global financial crisis, the Australian public is supportive of increasing government regulation and oversight of the economy.<sup>2</sup>

The following table summarises the key expenditure drivers:

Driver	Growth from 2006-07 to 2008-09	Amount attributable to one-off factors	Comment
Infrastructure	10.8	7.2	Sydney Metro represents \$5.1 million and the Public Ticketing Transport Corporation \$2.1 million.
Demand for government services	8.7	-	Largely Community Services matters (includes significant expenditure through the Core Legal Fund).
Special Inquiries	5.8	5.8	<ul style="list-style-type: none"> <li>• Special Commission of Inquiry into Child Protection Services NSW by Hon James Wood AO QC</li> <li>• Special Commission of Inquiry into Sydney Ferries by Bret Walker SC</li> <li>• Special Commission of Inquiry into Acute Case Services in NSW Public Hospitals by Commissioner Garling</li> <li>• Inquiry into the Conviction of Phuong Ngo by Acting Judge Patten</li> </ul>

<sup>1</sup> Blunn, A S & Krieger, S (2009) *Report on the Review of Commonwealth Legal Services Procurement*, Commonwealth of Australia: Canberra at page 22.

<sup>2</sup> BBC World Service (2009) *Global Poll Shows Support for Increased Government Spending and Regulation Backgrounder: Country-by-Country Results*. [Viewed online 11 August 2011]  
[http://www.globescan.com/news\\_archive/bbc2009\\_globalPoll-04/backgrounder.html](http://www.globescan.com/news_archive/bbc2009_globalPoll-04/backgrounder.html)

Driver	Growth from 2006-07 to 2008-09	Amount attributable to one-off factors	Comment
Asset transactions	5.3	4.9	Energy sale represents \$4.1 million and market testing for Sydney Ferries \$0.8 million.
New agencies/restructures <sup>1</sup>	1.3	1.3	A number of the apparent increases in expenditure at an agency level were related to changes in agency responsibility during the survey period. These reflect shifts in expenditure between entities (with some entities ceasing to exist) rather than actual growth.
Litigation	4.4	4.4	Public Transport Ticketing Corporation
General Community Factors (taxes and duties)	2.3	-	Disputes over the payment of taxes and duties, such as land tax disputes largely funded through the Core Legal Fund.
Legislative Changes	1.5	-	<i>Crimes (Serious Sex Offenders) Act 2006</i>
Award/Employment	1.3	-	
<b>Total</b>	<b>41.3</b>	<b>23.6</b>	

<sup>1</sup> This excludes the impact of new agencies/restructures on internal expenditure (\$3.1 million).

## Expenditure Comparisons

Comparison with other jurisdictions is difficult, as legal expenditure is not well understood:

*"... there is no reliable data on either the demand for, or the cost of, legal services across the Commonwealth ... data collected by Attorney General's Department on the costs of legal services for the past four years almost certainly understates the true costs of providing those services".<sup>3</sup>*

Of the Australian jurisdictions that do publish data on government legal services in 2008/09:

- the Australian Government spent \$555.2 million on legal services; and
- the Victorian Government reported that \$71.69 million was spent on legal service by the 31 government departments and participating statutory authorities who use the central Legal Services to Government Panel Contract.<sup>4</sup>

Other Australian jurisdictions do not publish data on government legal services, meaning further observations were not possible.

<sup>3</sup> Blunn, A S & Krieger, S (2009) *Report on the Review of Commonwealth Legal Services Procurement*, Commonwealth of Australia: Canberra at page 21.

<sup>4</sup> Victorian Department of Justice (2009) *Government Legal Services Annual Report 08-09*, Victorian Government: Melbourne.



## Findings

Adjusting for one off factors, expenditure growth of \$24.5 million from 2006/07 – 2008/09, gives a CAGR of 4.8 per cent which is below general government growth. This suggests that fundamental reform of the government’s legal system is not required – many agencies have effective in-house legal teams and efficient processes to procure legal services.

However, the Review found that the use and procurement of legal services can be improved to get better value for money. It proposed a number of reforms focusing on better procurement practices, development of the “informed purchaser” model, training and information sharing for government lawyers and centralised coordination of legal services.

The Review did not identify areas for reform that would bring substantial or quantifiable savings in the short term without exposing the government to significant risk.

The Review did not propose a universal savings target for legal services as the imposition of a universal savings target for legal services would not be beneficial to government because:

- costs are often driven by government policy decisions;
- legal services reduce risk; and
- different agencies use different types of legal services.

Instead, the Review recommended policy reforms that are expected to improve value for money in the use and procurement of legal services and result in cost savings to agencies in the medium to long term.

## 2011 LEGAL SERVICES BLUEPRINT

The Government has now endorsed reforms in six areas in the delivery of legal services, based on findings from the Review, that will result in a strategic whole of government perspective and ensure that legal services expenditure in NSW is more transparent, efficient and aligned with Government priorities. These reforms form the *Blueprint for Legal Services* and fall across six broad categories each designed to improve business practices. The areas for reform are:

1. **Procurement:** improve procurement practices through implementation of the informed purchaser model and establish at cluster level specialist panels and standardised tender processes.
2. **Fee arrangements:** improve value for money and reduce risk to government in the purchase of external legal services through the greater use of alternative fee arrangements.
3. **In-house legal services:** support well-developed in-house legal services through the coordination of training and consider options for efficiency arising from the agency amalgamations.
4. **Measurement and monitoring:** improve consistency of monitoring through the use of an annual survey on legal survey expenditure and commence annual report reporting on certain external legal services expenditure from 1 July 2012.
5. **Information sharing:** streamline the provision of services, remove duplication and manage knowledge across the sector through sharing advice and precedents where appropriate and providing cross-government access to legal resources.
6. **Whole of Government coordination:** establish a whole of government framework for legal services policy and drive the implementation of the Blueprint reforms through establishing the Legal Services Coordination Unit (**LSC**) within the Department of Attorney General and Justice.

## 1. PROCUREMENT

There are three reforms in the area of procurement that will assist in the development of a more coordinated and strategic approach to the procurement of legal services across government. The focus is on standardising an approach to procurement across Government, and removing the somewhat isolated basis in which many agencies currently operate. The reforms are:

1. Implement “informed purchaser” training to enable individuals in agencies to coordinate legal service arrangements, drive better practices in procurement and ensure the agency obtains value for money legal services; and identify a Legal Service Manager in each agency.
2. Move towards the use of Cluster panels for legal services to capitalise on existing successful panel arrangements and to take advantage of the new Cluster structures.
3. Establish standard tender packages and documentation to reduce costs for agencies and the firms tendering and to provide consistency across government.

### **Informed Purchaser**

Currently a number of the legal teams in larger agencies have developed the role of informed purchaser for the procurement of external legal services and management of external providers. This informed purchaser model is driving better practices and efficiencies across those agencies, however it is not consistently found across the Government.

The variation in agency development of informed purchaser models impacts the quality of decision making around legal services procurement. As the Australian National Audit Office (ANAO) notes, “for larger agencies, the absence of an informed purchaser (which may or may not be an in-house legal unit) could pose a significant risk to the cost-effectiveness of the legal services provided”.<sup>5</sup> For example, a number of the larger agencies surveyed noted that they were dealing with or had previously encountered issues with legal expenditure oversight due to the decentralisation of legal procurement outside the in-house legal team. This could be improved in agencies through mandating that engagement of external providers and approval of external expenditure must be done by an informed purchaser (for example General Counsel).

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<sup>5</sup> Australian National Audit Office (2006) *Report on the Legal Services Arrangement in the Australian Public Service*, Commonwealth Government: Canberra at page 16.

LSC is to take a leadership role to assist agencies in becoming informed purchasers through the development of training materials. The informed purchaser training for in-house legal teams should promote:

- increased knowledge of the legal services market for those purchasing external legal services
- an ability to define more precisely the services required and to assess and evaluate costs better (not just price but value)
- knowledge sharing to avoid duplication of advice.

To decide on the agency's legal services procurement requirements, the informed purchaser requires expertise and experience to assess:

- external provider behaviour drivers
- which external providers are best placed to meet the agency's legal services needs
- which form of payment provides the best value for money for the agency
- the likely cost of a particular service (i.e. whether quoted rates are reasonable)
- whether external services are of acceptable quality
- the impact on the agency of developments in the legal services market.<sup>6</sup>

Following the procurement of services, each agency must evaluate the value of legal services obtained from external providers. It is the role of the informed purchaser to monitor the performance of the external provider to confirm that services provided are appropriate and demonstrate value. The informed purchaser will be in a position to advise where provided legal advice:

- may not readily be understood in the agency
- does not adequately address the question or key points
- does not take the agency's business or circumstances adequately into account
- appears to be significantly under or over-researched
- is not provided in good time or in the right format.<sup>7</sup>

The benefits of implementing the informed purchaser model across government are considerable. Through the roll out of the informed purchaser training, in addition to support from LSC, agencies will have greater knowledge of the legal services market enabling them to select the most appropriate (and best value) service provider. This will support better alignment of work to the most appropriate external firm, and may promote a switch from using top tier firms for the majority of work to other capable (and perhaps lower cost) providers.

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<sup>6</sup> Australian National Audit Office (2006) *Report on the Legal Services Arrangement in the Australian Public Service*, Commonwealth Government: Canberra at page 33.

<sup>7</sup> Australian National Audit Office (2006) *Report on the Legal Services Arrangement in the Australian Public Service*, Commonwealth Government: Canberra at page 44.

## Cluster Panels

Panels of legal firms are currently being used by a number of government agencies across a variety of areas of law including commercial, property, medical negligence, employment and coronial. In general, these panels have been established through a public tender process and the selection of a small number of pre-qualified providers following tender evaluation. Most panels have no guarantee as to expected volume or share of work and include smaller and medium size law firms in addition to larger top tier firms.

From 2011, agencies are now moving to cluster panels to capitalise on existing successful panel arrangements and to maximise government savings. As part of the agency amalgamations, legal services requirements are being assessed at the cluster level to determine what panel arrangements are suitable for the cluster. Existing contractual arrangements may need to be reviewed if significant changes in demand are forecast. Some independent agencies may not be able to be included in a cluster panel arrangement. For example, the Independent Transport Safety and Reliability Regulator would need to retain its independence in the Transport & Infrastructure cluster as it regulates RailCorp and the Rail Infrastructure Corporation.

In addition to accessing panels in their own cluster, agencies will be able to access any established cluster panels. Access to existing panel arrangements will enable smaller agencies to leverage off the government's purchasing power while also reducing administrative burden and other costs. Agencies with existing panels have demonstrated an interest in providing greater access to their panels. To facilitate agency use of current panel arrangements, a clause will be developed and implemented in existing contracts. LSC is overseeing the creation of this clause with the assistance of the Legal Service Managers of agencies with existing panels.

The sharing of information across panels relating to rates, performance and areas of specialisation is critical to achieving value for money and parity pricing across government. In the Australian Government, agencies report that disclosing statistics to its legal panel firms on their average costs and completion times has promoted competition among the firms and allowed the agency to form an ongoing assessment of the value gained. The management of information sharing will be led by LSC.

LSC, with advice from NSW Procurement, will also drive the facilitation of best practice procurement. Best practice principles can be seen across a number of the existing panel arrangements and should be identified and shared. Assessing best practice and value for money by panel providers requires close management of provider relationships and ongoing monitoring. For effective performance management, service delivery standards should be clearly identified with external providers including:

- mutually agreed and understood protocols for interaction
- reporting and performance monitoring against agreed standards
- regular meeting with panel firms to discuss performance and any disputes
- feedback to poor performing firms and removal from panels if required.

It is expected that greater use of panels will increase efficiency by limiting the number of legal service providers and providing continuous competition. Through the use of a limited number of providers it is expected that the agency-specific knowledge and expertise of the providers will be developed and client-provider working relationships will be improved.

### **Standard Documentation**

Standard documentation has been developed in a number of agencies, however it is not consistent across NSW. To support the implementation of best practice principles, consistency in procurement across agencies and reduction in costs, LSC is currently developing standardised tender documents and contracts. This is in line with the findings from Blunn & Kreiger that the introduction of a common form tender package by the Australian Government Attorney General's Department in 2009 has reduced costs for both the agencies and for the firms tendering.<sup>8</sup> Standard documentation will assist government to become a better purchaser of legal services.

### **Delivering the Reforms**

The Government has commenced work on improving the procurement practices for legal services across Government. Progress includes:

- The development of an Informed Purchasing Workbook by consultants currently being settled by an inter-agency working group.
- The nomination by agencies of a Legal Services Manager who will liaise with LSC to scope agency training requirements and identify which members of the agency are to be trained. The Legal Service Manager from each agency is responsible for implementing training across their agency. The agency amalgamations should assist in the development of the informed purchaser model through bringing together legal expertise at the cluster level.
- The establishment of a whole of government Cluster Panel Working Group to oversee the move to Cluster Panels.
- Work on standard tender documentation by an inter-agency working group, aiming to be available for use by the beginning of 2012.

## **2. FEE ARRANGEMENTS**

Expenditure on external legal services can be contained, in part, by the greater use of innovative fee arrangements across government. Presently, agencies are largely negotiating

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<sup>8</sup> Blunn, A S & Krieger, S (2009) *Report on the Review of Commonwealth Legal Services Procurement*, Commonwealth of Australia: Canberra at page 7.

fees based on hourly rates and are not utilising alternative fee arrangements which are routinely used in the private sector.

Two reforms are being progressed in relation to this area and include:

4. Assisting agencies to make greater use of alternative fee arrangements for engagement of private providers to change the incentives for providers and to shift risk for cost over-run from the government to providers.
5. Reviewing the process for approval of Counsel by the Attorney General to more carefully manage Counsel fees across the government.

### **Alternative Fee Arrangements**

Alternative fee arrangements are one of the key mechanisms to manage and reduce expenditure, as demonstrated in the private sector. These arrangements change the incentives for providers while also shifting risk for cost over-run from the government back to providers. The General Counsel Roundtable (Corporate Executive Board 2009<sup>9</sup>) has produced data on the impact of alternative fee arrangements on reducing law firm expenditure with the most effective options ranked in order as: fixed fees; risk sharing; flat fees; blended rates; capped fees; performance based bonuses; and volume discounts.

The Corporate Executive Board (2009) suggests that large corporations such as Telstra and Qantas have achieved savings of at least 20 per cent by utilising these billing arrangements for the bulk of their legal service expenditure. The Victorian Government's Legal Panel Gateway (LPG) system provides for fixed fee quotes on all matters over a specified amount. Fixed fees add the benefit of budget certainty for the procurement.

The Government considers that greater use of cluster panel arrangements will provide reduced pricing for agencies accessing these panels. In time, it is expected that there should be parity pricing between these panels for individual firms. However, to achieve reductions in expenditure, it will be important for agencies to move away from hourly rates where possible to alternative fee arrangements. LSC will support this move through the development of training and tools around alternative fee arrangements.

### **Approval of Counsel**

Currently, agencies are required to seek approval from the Attorney General to brief Senior Counsel, under Premier's Memorandum (M 2009-17). Approval is not required for the

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<sup>9</sup> The Corporate Executive Board is a world-wide network of executives providing a shared-cost research model for identification and sharing of best practices of General Counsel. Services include strategic and short answer research, quantitative benchmarking and on-line services, including a toolkit of legal practice implementation support tools and templates.

engagement of Junior Counsel, regardless of the rate paid. There is anecdotal evidence that, at times, agencies engage Junior Counsel to circumvent the Premier's Memorandum and associated limit on rates. This may not provide the best value for money to government as Junior Counsel are likely to be engaged for longer than more experienced Senior Counsel.

The Australian Government has a scheme of pre-qualification of barristers who are willing to undertake government work. Barristers apply to be placed on the list with the central coordination unit. The unit has set fees although a barrister may negotiate a different rate within limits. When an agency engages a barrister, they obtain confirmation from the unit as to the agreed rate.

### **Delivering the Reforms**

Current progress in relation to the reforms includes:

- Establishing an inter-agency working group which is examining what training and tools could assist agencies make greater use of alternative fee arrangements.
- An upcoming review by LSC on the process for the approval of Counsel to more carefully manage Counsel fees across the Government.

## **3. IN-HOUSE LEGAL SERVICES**

The Government is committed to the following reforms in the area of In-house Legal Services:

6. Reviewing legal service team structure at the cluster level and consider amalgamations of services within each cluster to drive efficiencies and cost savings.
7. Coordinate the training of in-house lawyers relevant to their role in government to improve the efficiency and capability of in-house teams.

### **Legal Team Structure**

The new cluster arrangements provides an opportunity for the Directors General of each cluster to review their cluster's legal services and to consider the amalgamation of legal services at the cluster level to drive efficiencies. This process will include an assessment of agency legal requirements and the optimal structure of in-house legal services in the new cluster structure.



In reviewing legal team structures at the cluster level, existing tools such as the NSW Public Sector Capability Framework<sup>10</sup> will be utilised. LSC will also provide support to agencies in their review of legal service needs. This will include dissemination of generic legal officer position descriptions across government. For example, two legal officer position descriptions have been developed as part of the NSW Public Sector Capability Framework (2008). In addition, the Department of Attorney General and Justice has a resource titled *Guidelines for reviewing government legal* which provides a framework for agencies to assess their legal service requirements, consider what the role of in-house legal services in the agency should be and what the optimal structure of in-house services is. This would include, for example consideration of the role of paraprofessionals within an agency. It is essential that this review process be undertaken with the involvement of agency HR units.

Campbell & Lynch provide guidance on the optimal structure of in-house legal teams. To drive greater efficiencies in legal services provision and procurement they suggest that:

- government lawyers should hold practising certificates
- lawyers should report to a head of unit who should hold a practising certificate
- the head of unit should be directly accountable to the agency head
- agency advice requested should be provided directly to the unit to protect privilege
- legal files should be clearly identified and separated from other departmental files
- lawyers who provide legal services should be identified as lawyers or legal officers
- agencies should ensure the legal officers maintain a clear understanding of the role of government lawyers, especially the independent nature of their advice.<sup>11</sup>

These factors should also be considered in the review at the cluster level and will be promoted by LSC in its legal services policy.

## **Training**

Agencies with well-resourced and educated in-house legal officers improve efficiency and reduce the cost of legal services. In-house legal services add value as an agency resource, and often go beyond their primary function as they provide advice on a range of agency issues such as compliance and governance, policy and risk minimisation through the early identification of matters which require further action.

There is currently no government-wide approach to professional development and training of public sector legal officers in NSW. This affects the quality and consistency of legal services delivered through in-house teams.

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<sup>10</sup> The NSW Public Sector Capability Framework describes the knowledge, skills and abilities (capabilities) needed in public sector jobs.

<sup>11</sup> Campbell, S & Lynch, J & Victorian Department of Justice (2009) *Regulation of government lawyers: report to the Attorney-General*, Department of Justice: Melbourne.

In-house lawyers are critical to the delivery of legal services in NSW. In particular, professional in-house teams are directly delivering legal services as well as acting as the informed purchaser in the acquisition of external legal services. Centralised support will promote a greater degree of professionalism of in-house lawyers. At present, some in-house practices are well organised and managed, but this is not universal across the sector and this creates increased risk and costs to government.

There is also merit in considering the policy regarding the holding of practising certificates by Government lawyers. It is estimated that greater than 90 per cent practising legal officers in the NSW Government were found to be holding practising certificates. Mandating of practising certificates was recommended by Blunn & Kreiger (2009) and Campbell and Lynch (2009) based on the following factors:

- recognition that government lawyers should meet the same professional standards as all other lawyers
- holding of practising certificates is to be taken into consideration by the courts in the determination of whether legal advice to government by in house legal officers is protected by Legal Professional Privilege
- the holding of practising certificates enhances career opportunities for government lawyers and increases the government's ability to attract graduates.

### **Delivering the Reforms**

Current progress in relation to these reforms includes:

- A review by the Director General of each of the Principal Departments of the legal services across the cluster where appropriate with an update to be provided to the Department of Attorney General and Justice later this year.
- Establishing an inter-agency working group that considered further the training needs of in-house government lawyers. Suggested topics include: Statutory interpretation; Model Litigant principles; Parliamentary Inquiries; Regulatory Prosecutions; Crown Copyright and Legal Professional Privilege for In-house Counsel. This training will be coordinated by LSC.

## **4. MEASUREMENT AND MONITORING**

Currently, there is not a whole of government approach to the measurement and monitoring of legal service expenditure in NSW. As there is no obligation on agencies in NSW to collect or report on legal services expenditure across government:

- there is not an agreed definition of legal services in NSW

- there is variation as to how in-house legal services are measured including whether indirect costs are included in calculations<sup>12</sup>
- external legal expenditure may be hidden within overall project costs for major infrastructure or allocated to corporate services
- there are not agreed measures of the quality of legal services
- Alternative Dispute Resolution (ADR) is not measured in a standard way across agencies and in many instances this information is not collected at all.

For the year commencing 1 July 2011 agencies will be asked to:

8. Collect high-level minimum data through an annual web based survey of legal services to improve transparency, allow identification of emerging issues and allow monitoring of long term trends in expenditure.

For the year commencing 1 July 2012 the Government will:

9. Require agencies to report in their Annual Report certain information relating to external legal services expenditure.

Past legal service reviews in NSW have consistently recommended that measurement and monitoring of legal services needs to be improved. Several categories of legal service expenditure measures could be developed to measure the amount of legal service expenditure, the quality of advice, how NSW compares to other jurisdictions and to monitor business processes. The following table indicates several categories of measuring legal services

Category	Agency measured	Key measures
1. Legal expenditure	Government agency	How much is the expenditure?
2. Advice and service quality	In-house provider External providers (CSO, external, Bar)	How good is the advice and service provided?
3. Provider management	Manager of external providers	What disciplines are in place to control costs and time?
4. Internal processes	In-house provider	What internal processes are in place to drive efficiency and effectiveness?
5. Aggregate	Whole of government	How does NSW compare with other jurisdictions?

<sup>12</sup> The Tongue Report (Commonwealth, 2003) found some agencies included indirect costs, such as apportioning consumables, library and capital expenditure to legal teams, while other agencies only calculated salary and on costs.

Although individual agencies may be currently monitoring legal service expenditure, business processes and advice at the agency level, NSW does not currently have a whole of government approach to measurement and monitoring in any of the five categories.

When considering how to measure legal services across Government, the following matters are important to consider:

- legal service measurement in NSW is at a low level of development and it would be costly to move towards a whole of government measurement and monitoring system
- basic high level service indicators need to be developed and implemented before measures of quality can be considered
- legal service expenditure is a small fraction of government and agency expenditure on services, therefore detailed monitoring of this area is not seen as cost-effective
- an annual survey is far less costly than whole of government systems, allows agencies to retain current measurement systems and improves transparency and accountability of expenditure in this area
- agreed measures means that agencies implementing reforms in data collection systems could move towards high level measures that are integrated into agency systems over time
- sophisticated billing and reporting systems in other jurisdictions are seen to be best practice but moving to these systems may not be justified or cost-effective in the short term in NSW.

### **Delivering the Reforms**

LSC will conduct a mandatory annual survey of legal services expenditure across the NSW Government. The survey will improve transparency, quantify and track the impact of the reforms, allow monitoring of long-term trends, and allow identification of emerging legal expenditure issues over time. Current progress includes:

- The development of reporting spreadsheets by LSC in consultation with Legal Managers, to capture expenditure information for the 2011-2012 Financial Year.
- The development of reporting spreadsheets by the Alternative Dispute Resolution (ADR) Directorate to capture information on the Government's use of ADR. ADR reporting will enable the Department of Attorney General and Justice to benchmark the percentage of matters (in particular civil matters) that are resolved without a judgment across NSW.

## **5. INFORMATION SHARING**

There are opportunities for agencies to share legal service resources, such as libraries and subscriptions as well as precedents and advice. The reforms identified in the area of Information Sharing include:

10. Providing cross-government access to legal resources through developing whole of government subscriptions to provide savings for agencies.
11. Considering the establishment of an electronic web database for sharing, where appropriate, precedents and advice to reduce duplication and costs for agencies.

Across-government or whole of government contracts for subscriptions are identified as a potential area for savings.

In addition, agencies have consistently identified the need for information sharing across the sector. There is a general consensus amongst Legal Managers of the utility of developing an intranet resource which would provide access to legal advice to government and fact sheets on relevant areas of law. Managing the use of this information still has to be considered, as there are obvious concerns about the inappropriate use of advice, which need to be addressed.

The use of information sharing is supported in other jurisdictions. For example, the Australian Government keeps records of significant cases for government, Judges have an established database and some private firms have such material available for the use by their staff.

It is recommended that LSC in consultation with the CSO establish and maintain a database of precedents and advice. Such a resource would include a record of:

- copies of advice or summary of advice in key areas
- fact sheets on areas of law common to most agencies.

This information should be used to maximise consistency and minimise risk by ensuring government legal offices are aware of matters and the government approach. It is expected that the resource would ultimately reduce demand for legal advice and assist agencies in deciding when further legal services are required. It is proposed that a Premier's Memorandum is developed to mandate provision of copies of certain advices to the LSC.

### **Delivering the Reforms**

Progress on these reforms includes:

- Scoping by LSC of the development of whole of government subscriptions and legal libraries. While savings opportunities for agencies are limited in the short term, it is recommended that any agencies identified as holding contracts greater than \$20,000 consult with LSC prior to establishing their own agreements.
- Establishing an inter-agency working group which is currently examining the proposal to share legal precedents and advice where appropriate.

## 6. WHOLE OF GOVERNMENT COORDINATION

The current arrangements for legal services provision within government have developed on an agency basis and largely in isolation; that is, without coordination or centralised monitoring. However, even though services have been developed in isolation, it is still the case that legal service provision in many agencies is well managed and provides effective and efficient legal services. In several agencies external accreditation has also been achieved.

However, it is still the case that there is little information sharing between agencies and no common understanding or guidance provided centrally on how best to maximise the efficiency of their legal expenditure and in-house teams.

In order to drive a comprehensive whole of government framework for legal services policy the NSW Government has established a new unit within the Department of Attorney General and Justice, Legal Services Coordination (LSC), which will play a key role in ensuring a more coordinated approach to the delivery of legal services across Government and to drive the delivery of the reforms leading to a more effective and efficient approach to the provision of legal services across government.

A further reform that LSC will have carriage of will be:

12. Review all current legal services policies applicable to NSW Government agencies with the aim of developing a comprehensive policy document that will contain the NSW Government Legal Policy Framework.

The creation of a central policy document dealing with legal services policy, likely to comprise a Premier's Memorandum, will assist Government agencies, external legal services providers, and the community, to understand, access and comply with Government policy applicable to the delivery of legal services in the NSW public sector.

## IMPLEMENTATION

LSC will have the lead role in implementation of the reforms. For reforms that LSC does not have the lead responsibility, LSC will retain oversight of implementation. LSC will report back (quarterly) to government on implementation of the reforms on progress to:

- develop informed purchaser procurement practices
- develop standard tender packages and documentation
- adopt alternative fee arrangements
- review process for approval of Counsel
- support and train in-house legal services
- develop annual measurement and monitoring
- centralise information sharing.

The Directors General of the Clusters are also to take the following actions to improve the efficiency of legal service procurement and in-house legal services within government, and report back to government through LSC on progress to

- implement informed purchaser training across government
- identify a Legal Services Manager in each agency
- move towards cluster panel arrangements.

In addition, the Directors General of the Clusters will report back to government through LSC on the quantification of opportunities presented by the amalgamation of legal services across the Cluster.

### Implementation Plan

Area	Reforms	Timeframe
Procurement	Implement 'informed purchaser' model across government and identify Legal Services Manager.	Quarter 2 2011/12
	Move towards cluster panels for legal services.	Quarter 2 2012/13
	Establish standard tender packages and documentation.	Quarter 4 2011/2012
Fee Arrangements	Assist agencies adopt alternative fee arrangements for engagement of private providers.	Ongoing

	Review process for approval of Counsel by the Attorney General.	Quarter 4 2011/2012
In-house Legal Services	Review legal service team structure at the cluster level.	Quarter 1 2012/2013
	Coordinate training relevant to lawyers in government.	Ongoing
Measurement and Monitoring	Develop annual legal services expenditure survey.	Quarter 1 2011/2012
	Require agencies to report in their Annual Report certain information relating to external legal services expenditure.	To be implemented in the Annual Report for FY 2012/2013
Information Sharing	Develop whole of government subscriptions to provide savings for agencies.	Quarter 1 2012/2013
	Share legal precedents and advice where appropriate.	Quarter 1 2012/2013
Whole of Government Coordination	Develop a comprehensive policy document containing the NSW Government Legal Policy Framework.	Quarter 1 2012/2013