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REPORT OF THE REVIEW OF

COMMONWEALTH LEGAL SERVICES PROCUREMENT

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Review of Commonwealth Legal Services Procurement

6 November 2009

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

We are pleased to present our report of the Review of Commonwealth legal services procurement.

In preparing this report, we have reviewed the efficiency and effectiveness of Commonwealth legal services procurement. We have also addressed the specific issues referred to us in the terms of reference as well as other issues raised with us by interested parties.

We are aware that several other reports related to legal services more broadly have recently been provided to you; for example on access to justice. While we have touched on some issues similar to those covered in the other reports, we are confident that our findings and recommendations would not conflict with, and would indeed complement, any proposed in those reports.

Yours sincerely

Anthony Blunn AO Sibylle Krieger

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Abbreviations and key terms

ABS	Australian Bureau of Statistics
AGD	Commonwealth Attorney-General's Department
Agency/agencies	Used generically to refer to both FMA and CAC agencies in the Commonwealth
AGLP	Attorney-General's Legal Practice
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
CAC Act	*Commonwealth Authorities and Companies Act 1997*
CAC agency/ agencies	Agency regulated by the CAC Act
CPGs	Commonwealth Procurement Guidelines – FMG 1 issued by the Minister for Finance and Deregulation under Regulation 7 of the *Financial Management and Accountability Regulations 1997*
Finance	Department of Finance and Deregulation
FMA Act	*Financial Management and Accountability Act 1997*
FMA agency/ agencies	Agency regulated by the FMA Act
GBE	Government Business Enterprise
LSDs	Legal Services Directions
OLSC	Office of Legal Services Coordination

Findings

In our view:

1. Increasingly, managing legal risk is among the most challenging tasks faced by any enterprise, including government.

2. In general, there is inadequate attention, and a lack of strategic direction, in relation to the management of legal services across the Commonwealth as an entity.

3. By any measure, demand for legal services across the Commonwealth has increased significantly over the last two decades and is unlikely to reduce, although the rate of increase may not be sustained.

4. Factors influencing that increase in demand have included:

    - the volume of legislation
    - significant changes to administrative law
    - the moves by the Commonwealth to a 'free-market' economy and its increased interaction with the private sector as a consequence
    - the resultant growth in regulatory authorities
    - the decentralisation of legal services and the greater choice and improved responsiveness of providers
    - the greater accountability placed on agencies and in particular on agency heads
    - the increasing development of a 'rights' orientation within Australian society generally, and
    - the related development of well-informed and well-funded community and commercial bodies able and willing to challenge government actions.

5. Despite recent initiatives which have improved the quality of the data collected by the Attorney-General's Department, there is no reliable data on either the demand for, or the cost of, legal services across the Commonwealth. There is no reliable data on the cost to the Commonwealth of agencies calling for and evaluating tenders for legal services, or to service

providers in responding to requests for tender. Anecdotal evidence, however, suggests that the total costs to agencies and service providers are substantial.

6. The data collected by AGD on the costs of legal services for the past four years almost certainly understates the true costs of providing those services.

7. The available evidence suggests that the growth in the Commonwealth's demand for legal services as measured by estimated aggregate spending is broadly comparable to the growth in the non-government sector over the same period.

8. The most significant development in recent times has been growth of large, and increasingly professional, in-house practices, particularly in the larger agencies.

9. While it is evident that some in-house practices are well managed and efficient, there are no standards against which to measure performance between agencies or against broadly comparable external legal services providers.

10. There are no accepted service-wide measures against which to assess whether agency practices are appropriate or efficient, or that staff are appropriately qualified or relevantly trained and experienced, in relation to the levels of responsibility required of them in providing legal services.

11. While there have been numerous attempts to measure costs, there is nothing against which to measure the value of legal services, although each agency head is responsible for assuring themselves that the value of legal services is commensurate to the expenditure.

12. Despite the fact that some agencies have already made significant savings from legal services spending by contributing to agency savings targets and are managing the role effectively, there are further savings that can be made across the Commonwealth.

13. Those savings will largely depend on the more effective management of in-house practices; in particular, on the further development of in-house informed purchaser skills and closer cooperation between agencies.

14. We have found nothing to support any view that significant savings can be sensibly achieved in the area of legal services in the short term.

15. The imposition of additional arbitrary cuts to running costs targeting legal services would expose the Commonwealth to considerable additional risk.

16. The critical function of an in-house practice is to manage the effective, economical and timely delivery of appropriate legal services having regard to the particular interests of the agency and to the overriding interests of the Commonwealth as a whole.

17. In-house lawyers within Commonwealth agencies are the key decision-makers in how the Commonwealth procures legal services.

18. The role(s) of in-house lawyers in agencies need to be clearly defined, whether as service providers, informed purchasers of externally provided services or intermediaries between line officers and external service providers, or a mix of all these functions.

19. In-house lawyers within Commonwealth agencies need to be professionalised – that is, to be organised, managed, supervised and trained as in-house lawyers, both in order to improve service delivery and to improve the procurement, management and cost control of externally sourced legal services.

20. The professionalisation of in-house practices would be facilitated by the establishment of an Australian Government legal service network, and the network in turn would assist in developing and implementing a coordinated and strategic approach to the management of legal services across the Commonwealth.

21. Fundamental to achieving better management of legal services is the development of the role of the informed purchaser within in-house practices and relatedly the development and promulgation of service-wide best practice models.

22. The role of an informed purchaser in relation to the procurement of external legal services is appropriately and adequately identified in the Auditor-General's report *Legal Services Arrangements in Australian Government Agencies: Better Practice*.[1]

23. The Auditor-General's report identified examples of 'best practice' with regard to those arrangements.

[1] Auditor-General, *Legal Services Arrangements in Australian Government Agencies: Better Practice*, August 2006.

24. A number of agencies, but by no means all, have developed the role of the informed purchaser, and are effectively managing relationships with external legal service providers.

25. A comparison with large commercial purchasers of legal services suggests, however, that efficiencies may be achieved by a more rigorous appraisal of the value added by doing work in-house, and by better informed and more effective control of external service providers.

26. The role of the informed purchaser can be significantly strengthened by greater knowledge of the market from which those services are being purchased, enhanced skill in scoping the services being purchased and improved costing data to enable the costs of outsourced services to be controlled better.

27. Although it is already happening to some extent there is greater scope for agencies, particularly but not exclusively smaller agencies, to make use of the legal services arrangements of large agencies (that is, to piggy-back).

28. There is a strong case for greater coordination of the provision of legal services across the Commonwealth, particularly through centralised support for the professionalisation of in-house practices and for development of informed purchaser skills within agencies.

29. There is a need for a better system, such as the web-based Commonwealth legal services interface canvassed in this report, to provide coordinated support both to the role of the informed purchaser and the collection and management of data.

30. The development of standard documentation, as has already been done in relation to the common form tender package, offers considerable scope for efficiencies and therefore cost savings.

31. AGD, through the Office of Legal Services Coordination, has been effective in establishing and maintaining the Attorney-General's Legal Services Directions, which impose legal obligations on agencies in relation to legal services, and has provided guidance and assistance on the application of those LSDs. Any attempt to provide more general guidance on the provision of legal services has, however, been problematic.

32. Despite the relevant recommendations of the Logan Review, the wider functions intended for AGD related to the provision of general guidance have never been adequately resourced either in terms of numbers or relevant skills.

33. The development of those wider functions is critical to the provision of effective legal services across the Commonwealth.

34. AGD does not have a clear leadership role nor does it have the skills essential to any meaningful role in assisting in the effective management or coordination of legal services, whether in-house delivery or external procurement.

35. The Australian Government Solicitor also does not have a leadership role but it does have many of the management and technical skills to assist with the procurement of legal services, as do many private sector providers and some agencies.

36. Any such use of AGS would raise questions about its role as a provider of contestable legal services.

37. In any event such a central role is more appropriate to AGD but to perform it AGD would need to acquire the necessary management and technical skills.

38. There is a number of ways in which those skills could be acquired including through an appropriate commercial arrangement with AGS or perhaps even a private sector provider or by drawing on the skills present in some agencies.

39. Any arrangement to assist with the provision and coordination of legal services should avail itself of the management and technical skills which exist in some agency practices.

40. The independent and uncoordinated development of in-house legal practices has been a major factor in the erosion of the role of the Attorney-General as the First Law Officer, and as such, responsible to Cabinet for ensuring the provision of appropriate legal services across the Commonwealth.

41. Any coordinated process to achieve greater cooperation between agencies in relation to the provision of legal services must balance the responsibilities of agency heads for the achievement of agency-specific objectives with the Commonwealth-wide objectives related to the provision of legal services generally.

42. The current system of agencies individually tendering for legal services is very costly both to the Commonwealth and to external service providers tendering, particularly to AGS which has little effective option but to tender for all Commonwealth work.

43. Even under existing instructions and guidelines there would appear to be more efficient and probably cheaper procurement options.

44. Those more efficient options would not remove from agency heads the responsibility for ensuring that the legal services procured were appropriate to the needs of their agency and represented value for money.

Recommendations

We recommend that:

1. A more coordinated and strategic approach to the provision of Commonwealth legal services be adopted.

2. The Attorney-General's Department and the Department of Finance and Deregulation review the current uncoordinated and largely agency by agency procurement arrangements for legal services with a view to introducing a coordinated procurement process having regard to the issues canvassed in Chapter 4 of this report.

3. Any arrangements for the coordination of legal services recognise and appropriately balance the responsibility of agency heads for the achievement of agency-specific objectives with the Commonwealth-wide objectives related to the provision of legal services more generally.

4. A web-based Commonwealth legal services interface be introduced as part of any new coordinated procurement approach but in the event that such a new approach is not adopted, consideration still be given to the introduction of such an interface noting that it could serve a number of other needs.

5. AGD be given responsibility for analysing and disseminating information to improve coordination, information exchange and the facilitation of benchmarking relating to legal services (including information captured as the result of any introduction of a web-based Commonwealth legal services interface).

6. The role of the informed purchaser be recognised across the Commonwealth as key in the effective and efficient procurement of legal services and the effective management of service providers and costs, and that the role be developed as elaborated in this report.

7. In-house legal practices within Commonwealth agencies be ‘professionalised’ as discussed in this report in order to improve service delivery and also to improve their key role in the Commonwealth’s procurement of externally sourced legal services.

8. The role(s) of in-house lawyers in all agencies be clearly defined, whether as service providers, informed purchasers of externally provided services or intermediaries between line officers and external service providers, or a mix of all these functions.

9. AGD be tasked and resourced to provide more guidance and assistance to agencies in relation to procurement and ensuring that the best use is being made of legal services across the Commonwealth. AGD's role should include the development of standards, training and support to strengthen informed purchaser skills throughout the Commonwealth, and to assist agency in-house practices in the procurement and provision of legal services.

10. As part of a more coordinated approach to the procurement and use of legal services, and to reinforce the importance of a whole-of-government perspective, emphasis be given to the concept of an Australian Government legal service network based on the obligation of all lawyers in government service to serve the rule of law and the role of the Attorney-General as the focus for that in government.

11. As part of developing the concept of an Australian Government legal service network and to facilitate the development and appreciation of realistic and appropriate standards, senior agency lawyers be involved as partners in the design, marketing and implementation of any change processes, and their practice management and other skills be harnessed by AGD for the benefit of all Commonwealth agencies.

12. Measures be introduced to reinforce and assist agencies to meet their obligation to ensure that the Solicitor-General and/or the Attorney-General, as appropriate, are informed in a timely manner of potentially significant emerging issues.

13. To the extent that they are useful and appropriate, the skills, experience and practices of large corporations in managing the procurement and provision of legal services be identified and utilised in developing Commonwealth approaches to the management of legal services.

14. AGD establish an appropriate forum to facilitate such a process.

15. In addition to any other training provided by agencies, agency heads be required to ensure that in-house lawyers receive appropriate, relevant and continuing professional training in order to develop and maintain their professional skills to an appropriate standard.

16. As part of the development of the proposed Australian Government legal service network and in consultation with agencies, AGD ensure that appropriate standards are identified and that suitable training is available.

17. AGD and Finance identify the data, including cost data, needed to determine and report on the effectiveness of Commonwealth legal services over time on the basis that the collection of any such data is justified by the use to which it is to be put.

18. AGD provide agencies with clear directions as to their reporting obligations.

19. Agency heads be held directly responsible for ensuring that those obligations are met.

20. Unless exempted by the Attorney-General, CAC agencies (other than Government Business Enterprises and *Corporations Act 2001* companies controlled by the Commonwealth) be treated in the same way as FMA agencies in relation to the procurement and provision of legal services.

21. Wherever practical, AGD develop, promulgate and maintain standard form legal documentation along the lines of the recently introduced common form tender package for use by agencies.

22. Any review of the role of AGS as the whole-of-government legal practice have regard to the role and growth of agency in-house practices and the impact of those practices on AGS's ability to maintain a highly specialised, skilled and professional legal practice limited to Commonwealth work, and on the ability of the Commonwealth to maintain consistency of approach with regard to matters of legal principle.

23. AGS be included, as of right, on all agency panels.

1 Introduction

1. Effectively we are required, as part of the Government's legal services reform agenda, to examine current practices for the procurement of legal services by the Commonwealth and to advise on whether any other procurement model should be adopted. We are also asked to examine how the Commonwealth can make best use of its in-house legal services. Our terms of reference are at Appendix A.

2. Key to our Review is the desire of the Government to achieve further efficiencies and to maximise value for taxpayers' money in the procurement of legal services.

3. We are not required to identify potential savings but in the course of our Review we have had regard to the opportunities for efficiencies in the procurement and utilisation of legal services. In our opinion the recommendations we have made will, if pursued, produce efficiencies and therefore long-term savings in agency running costs and in budget outlays on dispute resolution. Although our view is also that there are unlikely to be large savings in the short term, because immediate savings are likely to be off-set significantly by the increased resources required, the longer term savings to be achieved will more than make up for the initial investment.

4. We note that there have already been significant cuts to agency running costs and that agency legal service areas have made contributions to meeting these cuts. Presumably these contributions have reflected the judgement of the agency head about the need to maintain essential legal services.

5. For the purposes of this Review, the phrase 'legal services' is taken to mean those professional services used by agencies to determine their legal position on issues, to manage legal processes, to advise on managing legal risk or achieving results lawfully, or to document contractual or other legal obligations. Thus it does not include those resources used on the development or implementation of policy proposals, including legal policy, or drafting, except to the extent that professional legal services as outlined above are utilised in those processes.

6. There are three sources from which the Commonwealth obtains legal services, namely:

    - agency in-house practices
    - commercial legal practices, including the Australian Government Solicitor in relation to other than 'tied' work, and the private bar, and

- centrally provided services; that is, the Solicitor-General, the Director of Public Prosecutions, Office of Parliamentary Counsel, the Attorney-General's Department, Department of Foreign Affairs and Trade, and in relation to tied work, AGS.

7. Given our terms of reference, we have concentrated on the first two sources, but recognise that increasingly the effectiveness of centrally provided legal services is heavily influenced by developments in relation to the other two sources of legal services.

8. We note that the more widespread use of alternative dispute resolution (ADR) techniques will affect the requirement for legal services. While there will always be matters where litigation is the appropriate, and in some cases inevitable way in which to resolve a dispute, the Government's emphasis on the use of ADR has the potential to reduce both demand for, and use of, legal services. The emphasis on ADR will increase the need for some forms of preventative legal services, however, such as ensuring that tailored and appropriate ADR clauses are included in all contracts to which agencies are parties.

9. Given that many ADR processes are in effect a structured negotiation, managing those processes in the context of disputes is not necessarily a role for lawyers. However, it is likely that an exploration of the costs and benefits of the avenues to deal with disputes will involve some consideration of the legal issues and of the likely costs involved. In our view it is too early to assess the impact that the increasing use of ADR will have on legal services but it would seem appropriate to consider some mechanism to measure that impact.

10. In the course of our report we refer to the nature of, or the particular circumstances of, the legal services market. That market has some things in common with other professional service markets, but is different in several important respects. Providers of legal services have obligations beyond those owed to their clients – for example, obligations to the courts in litigation matters and professional, ethical and fiduciary obligations in all matters. This is so even if 'the client' is also the employer of the legal service provider in question. At its core, the relationship between client and legal service provider is one of trust and confidence, as is recognised by the special position given to it by law. That confidence depends largely on the knowledge, understanding and judgement of the service provider, often an individual.

11. The Commonwealth and its agencies are highly complex and regulated entities. Their powers are circumscribed by the Australian Constitution and laws made under it. Legal risk affects almost everything they do. Their needs for legal services are widely varying, ranging from

predictable, homogenous, low risk, commoditised services calling for good systems and strong cost control to highly unusual, specialised, high risk advice calling for the undivided attention of a senior expert with outstanding judgement.

12. Like other complex entities, the Commonwealth and its agencies frequently gravitate to service providers who can provide most if not all of the range of services required and develop working relationships with them over time. This makes obvious sense from the perspective of managing the procurement efficiently rather than fragmenting the work and spreading it too thinly. Also, smaller niche players frequently find the resources required to tender for and win Commonwealth work onerous to muster compared with the workflow they might expect to gain. A consequence is that a relatively few large providers dominate the full-service market. But for the existence of AGS as a dedicated Commonwealth service provider, this market structure has the potential to create problems for the Commonwealth when conflicts of interest arise and other preferred full-service providers are unable to act.

13. As part of the Review, we met with a number of key stakeholders (listed at Appendix F) from all three sources of legal services provided to the Commonwealth and invited, and mostly received, written submissions from private law firms, Law Societies, Bar Associations, departments and a number of other portfolio agencies (listed at Appendix E).

14. Finally we record our appreciation to those who so freely assisted us in the Review. Our particular thanks go to Ms Melissa Tracey-Patte and Ms Alison Lapidge of AGD for their contributions to this report.

2 The structure of the Commonwealth legal services market

15. The current market structure reflects in part the then Government's response to a 1996 review of the provision of legal services (the Logan Review).[2] In 1995-96, contestable work (work for which agencies could choose the provider – namely, the Attorney-General's Legal Practice (AGLP), in-house lawyers, private firms and/or private counsel) comprised some 82% of the estimated total Commonwealth legal services expenditure. The remaining 18% of expenditure was attributable to work 'tied' to the AGLP, including all litigation.[3] The evolution of the Commonwealth legal services market from Federation, and details of the findings of three reviews undertaken since then are described in Appendix B.

16. The Logan Review resulted in the creation of AGS to provide, on a commercially competitive basis, the legal services previously provided by the AGLP, and to support the role of the Attorney-General whose specialist legal needs were seen as core to government. The Logan Review also confirmed the principle, accepted by Government, that generally agencies should be free to manage their own legal service requirements including litigation and to decide when to use in-house lawyers, AGS or private sector lawyers and be directly accountable for their decisions.

17. An exception to that principle, also accepted by Government, was that agencies should be required to use AGS for the provision of legal services which relate so closely to a core executive activity of government that sound risk management makes coordinated central provision desirable or where there is a significant and unacceptable risk that cannot be adequately managed in any other way; that is, 'tied' work. Tied work is estimated by AGS to constitute some 5% of the Commonwealth's demand for legal services, although there is some debate as to whether, in a competitive sense, the tied work is more significant than this small percentage of demand would suggest. There is also considerable debate as to whether the scope of tied work should be larger or smaller. This latter issue has implications for the roles of the Attorney-General, the Solicitor-General, and AGS.

18. An important recommendation of the Logan Review was for the establishment within AGD of the Office of Legal Services Coordination to support the Attorney-General in relation to his responsibilities for legal services to the Commonwealth, to overview implementation of and

[2] Logan et al, *Report of the Review of the Attorney-General's Legal Practice*, March 1997.
[3] Ibid pp 61 and 69.

compliance with any legal services directions issued by him and to assist other agencies to manage their legal purchasing decisions. More generally it would appear that OLSC was intended to provide an overview of legal services. Such an office was established, but as discussed later in this report, its role and effectiveness has been problematic.

19. The arrangements which preceded the Logan Review are described at Appendix B. A result of the Logan Review has been that in-house practices and external legal services providers, including AGS, are competing in the provision of legal services to the Commonwealth. A more detailed overview of the current legal services market is at Appendix C.

2.1 The size of the Commonwealth market for legal services

20. Despite recent initiatives there is no completely accurate figure for the size of the Commonwealth legal services market. However, the reported external Commonwealth legal services expenditure figure is regarded as accurate, except for some minor adjustments related to GST.

21. The available data suggests that the total reported Commonwealth spend on legal services by FMA agencies is approximately $555 million.[4] Of that amount, almost $308 million is spent on purchasing services from external legal service providers (including AGS). The balance of $247 million is largely the cost of in-house practices.

22. A comparison of available data on spending on legal services for 1995-96 and 2008-09 suggests a very large increase over the period, particularly in relation to in-house practices and external legal service providers (including, although to a lesser extent, AGS).

23. AGD has only been collecting data on overall costs for the last four years. A simple comparison of that data also suggests that there has been a significant growth in the cost of in-house practices.

24. It is clear that one reason for the apparent increase year-on-year over the last four years is better reporting by agencies in response to the guidance promulgated by AGD. But it is also clear that there is still some lack of consistency in the way in which agencies report and that probably results in an understated total.

[4] For financial year 2008-09. We have been unable to establish an accurate figure for the cost of internal legal services but are satisfied the figure used is a realistic indication.

2.2 Growth in legal services generally

25. For the period 1987 through to 2007-08 there has been significant growth across the Australian legal services sector generally.

26. The Australian Bureau of Statistics periodically surveys businesses and organisations that are 'mainly engaged in the provision of legal services or legal support services'[5] to produce its *Legal Services Industry in Australia* series.

27. The reports of these surveys indicate that in 1987-88 there were 6,500 organisations in the sector employing 55,000 people and generating income[6] of $3.069 billion. At the end of June 1999, the figures were 11,026 organisations employing 79,763 people and generating $7.730 billion in income. By the end of June 2008 there were 15,326 organisations employing 99,696 people generating income of $18 billion.[7]

2.3 Growth in expenditure on Commonwealth legal services

28. As previously identified, despite recent initiatives, it would appear that there is no reliable figure for the total cost of legal services used by the Commonwealth.

29. Figure 1 below outlines the total internal and external expenditure reported to, and calculated by, previous reviews of legal services.

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[5] For the purposes of the ABS survey series, legal services includes barristers, solicitors, legal aid commissions, community legal centres, Aboriginal legal services, government solicitors and public prosecutors. It also includes businesses providing support services, such as administrative, secretarial, clerical or similar support services to barrister, solicitor or other businesses. It does not include in-house legal teams in government or private sector organisations.

[6] 'Income' is defined in the survey as including fee income from the provision of legal and legal support services, disbursements recovered, government funding and other income.

[7] ABS, *Legal Services, Australia 2007-08*, June 2009. The ABS advises that caution is required when comparing figures in its series of *Legal Service Industry in Australia* reports. Changes in the frame, scope and statistical unit, as well as better data capture makes it difficult to compare figures obtained in different surveys.

FIGURE 1 – LEGAL SERVICES EXPENDITURE ACCORDING TO PREVIOUS REVIEWS (NOMINAL DOLLARS)

YEAR	INTERNAL	EXTERNAL	TOTAL	SOURCE
1995-96	$65,000,000	$133,000,000	$198,000,000	Logan, p 61
1996-97	N/A	N/A	N/A	-
1997-98	N/A	N/A	N/A	-
1998-99	$29,131,292	$114,399,846	$143,531,138	Tongue,[8] p 54
1999-00	$132,800,000	$175,000,000	$307,800,000	ANAO,[9] p 32
2000-01	$138,500,000	$163,600,000	$302,100,000	ANAO, p 32
2001-02	$178,000,000	$184,900,000	$362,900,000	ANAO, p 32
2002-03	$203,700,000	$205,300,000	$409,000,000	ANAO, p 32
2003-04	$229,800,000	$216,200,000	$446,000,000	ANAO, p 32
2004-05	N/A	N/A	N/A	-
2005-06	$106,200,760	$207,121,983	$342,298,322	AGD
2006-07	$126,486,567	$280,014,849	$408,189,797	AGD
2007-08	$181,920,159	$310,912,966	$512,487,183	AGD
2008-09	$246,969,252	$307,680,459	$555,239,078	AGD

30. The data from each year is not, however, directly comparable, due to the different survey templates and methodology used by each review, as well as different reporting practices in each agency.[10] More than half of the increase of approximately $104 million recorded for 2007-08 over 2006-07 reflects the move of some agencies from the CAC Act to the FMA Act.[11]

31. When AGD began collecting data from 2005-06, there was no specific requirement for agencies to report on their internal legal services expenditure and those that did used different methods for calculating those costs. Agencies are now required to report internal expenditure against an

[8] Sue Tongue, *Report of the 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*, June 2003.

[9] Auditor General, *Legal services arrangements in the Australian Public Service*, Performance Audit, Audit Report No. 52, 2004-05.

[10] The Tongue Report, p 3, notes that its survey results are limited in their reliability due to, among other things, not all agencies attempting to complete the surveys, agencies only being able to estimate costs, and an inconsistent approach to the inclusion of GST after 2000. For example, the Tongue survey templates did not include a line item for library, training or other related in-house costs, although some agencies might have included such on-costs it is likely that some did not, and this might explain some of the difference between the Tongue figures and the ANAO and Logan figures.

[11] The obligation under paragraph 11.1 of the *Legal Services Directions 2005* for agencies to publish their legal services expenditure only applies to FMA agencies. From 1 July 2008, a separate reporting requirement was extended to CAC agencies.

approved template, commencing from the end of 2008-09. The increase from 2007-08 to 2008-09 is largely as a result of this new mandatory requirement to report internal expenditure. However, there is no mandated methodology for agencies to use to calculate their internal expenditure. Guidance issued by AGD recommends that agencies follow the model outlined in the Auditor General's 2006 *Legal Services Arrangements in Australian Government Agencies: Better Practice* guide, but AGD does not collect details of the methodologies used by each agency to calculate its internal expenditure.

32. The difficulties in obtaining accurate and consistent data on internal legal services expenditure across agencies are exemplified by the widely varying reported figures over the period reflected in Figure 1 above. However, there has been a significant increase in expenditure although the figures almost certainly understate the size of that increase. In relation to external expenditure, which is known fairly accurately, Figure 1 indicates the increase over the period.

33. Although costs can and should be determined using common costing criteria, determining value is much more problematic, as it involves an assessment of the contribution legal services make to ensuring that the Commonwealth acts lawfully, and as a result avoids, or manages appropriately, what are among its most significant risks. So far as we are aware, the value of legal services is not regularly and systematically quantified, whether by government or by the private sector.

2.4 Factors influencing demand

34. Several significant changes during the last 30 or so years have resulted in a significantly higher demand for legal services across all sectors of the economy including the government sector. These include the development and implementation of national competition policy pursuant to which former monopolies are either exposed to competition or regulated in a manner designed to emulate what would occur in a competitive market. Legal services have also been affected by a number of developments peculiar to government, especially the expansion of administrative law which has made government decision-making far more transparent. In addition there has been a heightened awareness in the community of legal rights and natural justice requirements over the past 30 years and the related development of well-informed and well-funded community and commercial bodies able and willing to challenge government actions.

35. Significant demand for legal services has been generated as a result of the moves of successive governments to transfer to the private sector a range of what were previously monopoly government services. That demand is well illustrated by the history of government asset sales. For example, the Commonwealth Phase 1 Airports sale in 1997 involved legal services costs of $10.6 million, while the Commonwealth's legal services expenditure for the T3 sale in 2006 totalled $7.91 million. In addition, each year the Commonwealth is involved in a number of significant property divestments, acquisitions or related transactions which often consume large amounts of legal services. A related factor which influences the Commonwealth's need for legal services is the consequent growth in regulatory authorities; for example, in the area of telecommunications, and the willingness of market participants to challenge regulatory authorities.

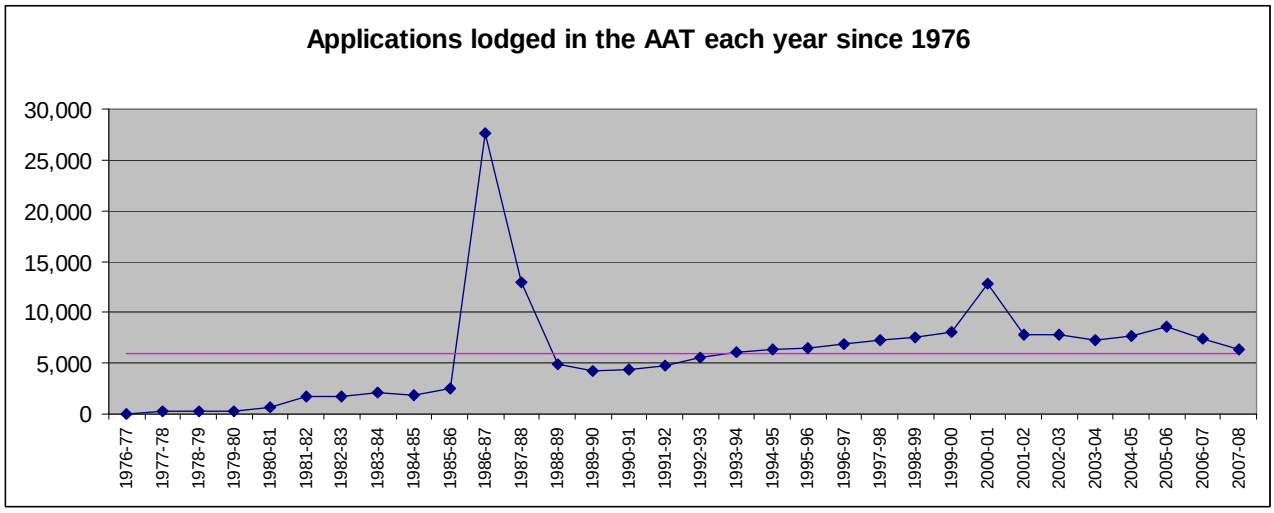
36. The administrative law reforms of the late 1970s and early 1980s referred to above imposed significant legal responsibilities on agency heads and are identifiable factors relevant to the growth of the Commonwealth's demand for legal services.

37. The FMA Act, which commenced on 1 January 1998, increased agency autonomy and the responsibility of agency heads in relation to agency-specific legal risk. As a result it generated demand for continuously available and agency-specific legal services. It has also led to the increased identification of employees with particular agencies rather than with the Commonwealth as a whole.

38. The *Freedom of Information Act 1982* introduced a new and almost universally available statutory right of access to information in the possession of government. The *Administrative Decisions (Judicial Review) Act 1977* codified and simplified the arcane law of prerogative writs and, most importantly, granted a statutory right to an aggrieved person to obtain a statement of reasons for an administrative decision. Further, the Administrative Appeals Tribunal (AAT) was established in 1976 to provide independent merits review of a wide range of administrative decisions made by Government ministers, departments, agencies, authorities and some Commonwealth tribunals. While access to a statement of reasons and the potential for merits review have significantly improved the quality and transparency of administrative decision-making in government, the administrative law reforms have also increased the legal risk of government by making challenges easier.

39. Between 1976 and 2008, on average, 5,936 applications were lodged with the AAT each year.[12] As shown in Figure 2 below, the number of lodgements has climbed steadily above this average since the early 1990s, peaking at more than 12,000 applications in 2000-01.[13] In addition, between 2005-06 and 2007-08, on average, 147 decisions of the AAT were appealed each year.[14] Over the same period, an average of 47 (slightly more than 30 per cent) of those appeals each year were allowed or remitted.[15]

FIGURE 2 – APPLICATIONS LODGED IN THE AAT EACH YEAR SINCE 1976



40. The outsourcing of some functions formerly carried out within government has transferred commercially valuable rights to private sector providers through tender processes. Partly due to the amounts of money involved, the processes of procurement and tender evaluation themselves have become the subject of increased scrutiny and legal challenge and, as a result, have contributed significantly to government demand for legal services.

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[12] The large spike in lodgements in 1986-87 and 1987-88 is related to the AAT assuming jurisdiction for the review of taxation decisions from 1 July 1986. Similarly, the significant spike in lodgements in 2000-01 reflects a substantial increase in the number of applications lodged in the AAT's Taxation Appeals Division (6,591 applications compared with 1602 in 1999-00). The spike was a result of taxpayers seeking review of objection decisions disallowing deductions for investments made in certain tax effective schemes.

[13] An explanation of the decline in applications lodged since 2005-06 is outlined in the AAT's annual reports for those years. The number of applications lodged with the AAT in 2007-08 was 14% lower than the number lodged in 2006-07. The decrease can be attributed to several factors across the Divisions, including a decrease in the number of applications lodged by the departments responsible for the administration of family assistance and social security entitlements; a decrease in the number of applications relating to taxation schemes and applications relating to assessments of income tax generally; a 25% decline in the number of applications lodged in the Small Taxation Claims Tribunal; and a general continuing decline in the number of applications lodged in the veterans' affairs jurisdiction. The number of applications lodged with the AAT in 2006-07 was 15% lower than the number lodged in 2005-06. This decrease can be attributed primarily to a significant decrease in the number of applications related to taxation decisions.

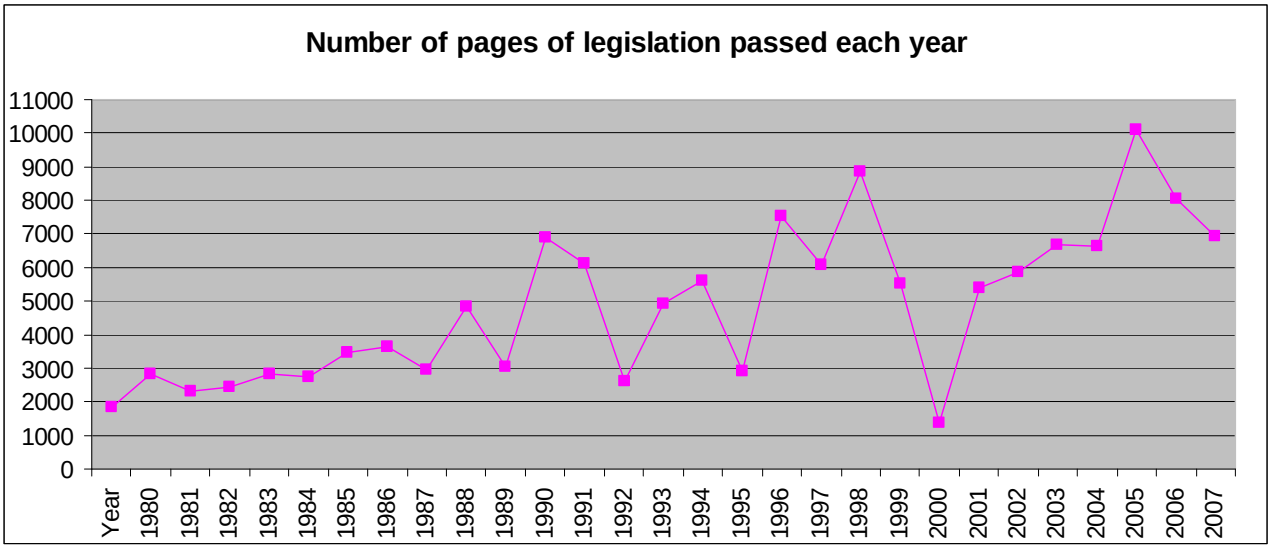
[14] AAT, Annual Report 2007-08, p 130.

[15] Ibid.

41. In summary there has been significant growth over the past two decades in the regulatory environment within which the Commonwealth operates and within which market participants interact with the Commonwealth.

42. In terms of legislation, while the number of Bills introduced and passed each year has not increased markedly over this time, the total size of legislation in force has increased, as the majority of Bills introduced add to, rather than replace, existing legislation. Compliance with, and in some cases enforcement of, legislation and legislative instruments, is core work for agencies. In addition, the number of pages of Bills introduced each year has increased over the period 1980-2007, although this can be attributed in part to the use of more white space in drafting since 1996. Comparison of the volume of material from 1980 to 1996 does, however, indicate the upward overall trend, as shown in Figure 3 below.[16]

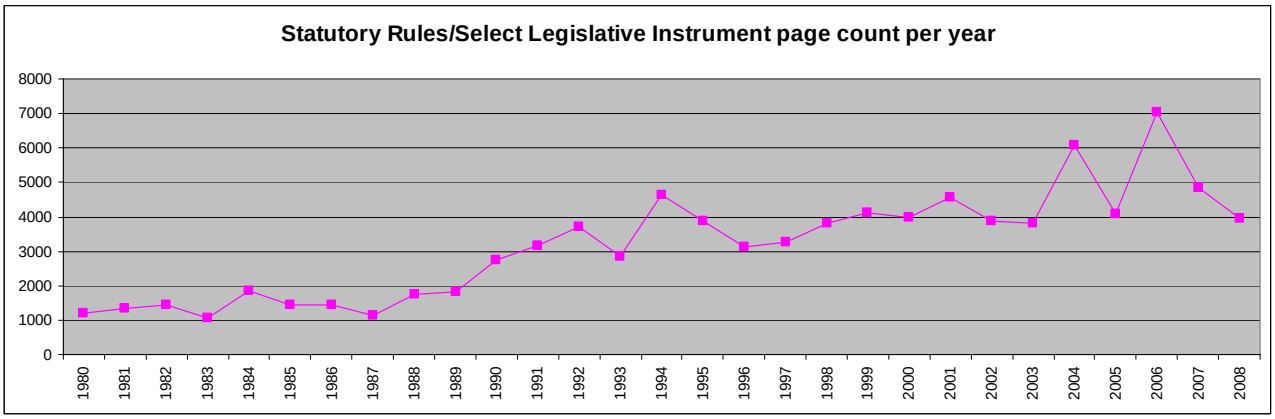
FIGURE 3 – TRENDS IN THE NUMBER OF PAGES OF LEGISLATION PASSED EACH YEAR



43. This growth has been coupled with increases in the use by the Commonwealth of legislative instruments as a regulatory mechanism. According to data supplied by the Office of Legislative Drafting and Publishing, while the number of legislative instruments has not increased over the past 30 years, the number of pages of legislative instruments made per year has been growing, as shown in Figure 4 below.

[16] The numbers of pages of legislation passed each year are generally lower in election years.

FIGURE 4 – INCREASE IN THE NUMBER OF PAGES OF LEGISLATIVE INSTRUMENTS MADE EACH YEAR



44. Taken overall, these factors, as outlined above, have contributed to an increase in the Commonwealth's demand for legal services, such that it is more important than ever that the procurement of these legal services is undertaken as efficiently and effectively as possible. The developments outlined above are also a large part of the reason why legal risk is now one of the most significant risks facing the Commonwealth and its agencies.

3 Provision of legal services

3.1 The management of Commonwealth legal services

45. As outlined above, each agency is generally responsible for determining its need for legal services, and for procuring, managing and delivering those services.

46. AGD, through OLSC, maintains, and provides a reference point for and guidance on, the *Legal Services Directions 2005* (LSDs). The LSDs are made under section 55ZF of the *Judiciary Act 1903*. The LSDs set out:

    - the types of work which may only be performed by Government providers of legal services
    - reporting obligations of FMA agencies regarding the provision of legal services, and
    - an outline of agencies' obligations in relation to litigation, including the use of in-house lawyers and the model litigant obligation.

47. While the LSDs, which have the force of law, and the guidance issued under them, detail requirements and impose a number of restrictions on agencies, they provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services.

48. There are large variations in the needs for legal services among FMA agencies. The cost of providing those services range from annual spends in excess of $50 million for some large agencies, which would equal or exceed the legal spend of most of the largest private sector corporations in Australia, down to legal spends of a few thousand dollars which are irregular and non-repetitive in nature and which could easily be over-shadowed by the cost of an elaborate procurement process.

49. As part of the broader Commonwealth financial framework FMA agencies and some CAC agencies are required to follow the principles identified in the Commonwealth Procurement Guidelines (CPGs) issued by the Minister for Finance and Deregulation under the FMA Act, and administered by his Department.[17]

[17] The CPGs are available at http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html.

50. The CPGs are designed to achieve transparent and accountable processes in order to lessen 'the risk of accusations of real or perceived conflicts of interest, fraud, theft or corruption'.[18] Presumably they are also intended to reduce the risk of those things happening.

51. The responsibility for ensuring that those objectives are met, and that value for money is achieved, rests with agency heads.

52. The CPGs apply to all procurement activity and are therefore appropriately wide in their formulation. In effect, they provide that the primary process for major procurements is through public tender, although there are simpler processes available in some circumstances. Tendering for legal services became common following the Logan Review and, other than for some smaller agencies, the selection of external legal service providers has been by public tender. The number of providers appointed to panels has varied from agency to agency according to the anticipated range and complexity of the legal services required.

53. Agencies have told us that the initial open tendering process was protracted and costly. Each tendering agency prepared its own request for tender and draft contract documents without reference to the others. Agencies did not coordinate their tenders or the deadlines by which tenderers were required to respond.

54. It is clear that there have been lessons learnt, which will be valuable for agencies undertaking subsequent tendering rounds; an important lesson being that there is a need for a smaller number of firms on panels (and in some cases a smaller number of panels).

55. The introduction by AGD in September 2008 of a common form tender package has been welcomed by agencies and service providers alike and although yet to be widely used, where it has been it has been effective in reducing complexity and therefore time and cost.

56. That said, given the nature of the legal services market, the tendering for legal services by individual agencies appears to be an extravagant use of Commonwealth resources.

57. On the evidence presented to us it seems that open tendering has been used because there is a perception that it is required by the CPGs; there is no acceptable alternative process which

[18] Australian Government Procurement Statement, released by the Minister for Finance and Deregulation, the Hon Lindsay Tanner MP, 28 July 2009, p 3, available at: http://www.financeminister.gov.au/media/2009/docs/Australian_Government_Procurement_Statement.pdf.

would meet the 'special needs' of the agency (and in some few cases that might be so), or because as a process it shielded the agency from having to defend its choices.

58. In our view these propositions do not, of themselves, warrant the use of individual open tender processes by all agencies.

59. The CPGs provide for processes, or a combination of processes, which could be more economical, could meet the general needs of most agencies and accommodate the particular needs of those agencies which genuinely do have such needs. Those processes could also, in our view, better suit the particular circumstances of the legal services market. By 'the particular circumstances of the legal services market' we mean those characteristics described in paragraphs 10 and 11 above.

60. Part 4 of this report identifies some of the issues facing Commonwealth agencies as they seek to deal with their legal services needs. Part 5 outlines the ways in which those issues might be addressed.

3.2 Private sector comparative experience

61. Discussions we had with large private sector organisations, including trading banks, revealed some valuable insights into how corporate Australia procures legal services, and how they use their in-house lawyers.

62. The private sector organisations which shared their experiences with us have both an in-house legal team and a panel arrangement with external providers. The division of responsibilities between the two varies based on an assessment of what the core role of the in-house team should be.

63. The core role is defined by the need for:

- intimate business knowledge or subject matter expertise
- insight into how the organisation does business, and
- thorough understanding of an organisation's governance.

64. If a legal matter does not meet these criteria and is not of high strategic value, then the organisations prefer to outsource it to an external legal service provider.

65. Key to best practice in private sector organisations is a clear definition and understanding of the role of in-house lawyers, a sound knowledge of the market from which external services are purchased and the ability and willingness to cost work rigorously and negotiate strongly on the basis of that costing with both external providers and internal clients as appropriate. Finally that ability to rigorously cost work and knowledge of the market has enabled a number of private sector organisations to experiment with different models of service delivery including alliance-like models in which risks and rewards are shared more openly than is the norm in Commonwealth legal services procurement.

66. Market knowledge derives in significant part from the fact that most corporate in-house lawyers have at some stage worked in large commercial law firms. The general counsel of many large private sector corporations have held senior positions in large commercial law firms, frequently at partner level. In addition to understanding the behaviours and commercial drivers of external service providers, these general counsel are also well versed in the hiring, training, supervision, productivity requirements and quality control practices of private firms and are able to adapt these to in-house application.

67. The positioning of the in-house legal team within the organisation is important. The general counsel is closely integrated into the most senior executive echelons of the corporation, frequently the confidant of the CEO and closely involved in strategic planning and corporate risk analysis. The general counsel is expected to be the lead manager of the internal legal practice, but also to be a lawyer of skill and judgement who can give independent and objective advice to the senior executives and to the board.

68. Panel arrangements usually involve a relatively smaller number of law firms than have been engaged by Commonwealth agencies of comparable legal spend. A number of the largest corporations have four to six major law firms as their core service providers with up to ten additional firms providing niche specialist services or systems-based services for commoditised work such as routine debt collection, routine personal injury, or workers' compensation matters.

69. There are different approaches when deciding whether to brief work out to panel firms – some selectively ask for bids on certain projects and then compare the prices against their own pricing of the matter. Others give specific types of work to firms (or, more specifically, to particular partners in that firm) which they consider are best placed to undertake the work.

70. Characteristically, private sector organisations strictly manage the costs of work given to external providers. The organisation expects to be kept up-to-date on how a matter is progressing, tracking the costs and the amount of work done against the agreed estimate – reporting obligations placed on the firms allow this monitoring to occur. The organisations will only pay over the estimate in limited circumstances. The strict controls in place in the organisations around estimates and payments include electronic systems to assist in tracking and managing legal costs.

71. The estimate process also enables the organisation to control who will be working on their matter. Some organisations require identified lawyers with particular expertise or knowledge to work on certain matters, and refuse to pay for other lawyers if they were not approved at the time the job was let.

72. Systems are in place, which allow the corporate client to provide feedback to the outside legal service provider on its performance, and for the provider's lawyers to provide feedback on the performance of the client organisation. This allows continuous improvement of both the in-house lawyers and external lawyers. In-house lawyers or instructors obtain a better understanding of how to provide information and work with external lawyers, and external lawyers gain a greater understanding of how the client company operates, the type of advice and the risks to be managed by the organisation. All the private sector organisations recognise the importance of building strong relationships with external firms to get the best results possible, and all emphasised the importance of trust and candour in those relationships.

73. All of the corporate organisations recognise that they require a level of investment from their external providers and that this will not be forthcoming unless they give some assurance of the level and predictability of workflow. Once that assurance is given, however, they expect and negotiate for considerable 'value-add' services such as continuing legal education and other training, access to short telephone advice without further charge, and access to secondees. They also negotiate for priority in the event of a conflict of interest.

74. Corporate in-house lawyers maintain competitive tension among the external service providers by measuring and comparing hours spent and costs incurred for similar work. Frequently the comparative data is shared with the external service providers so that they can benchmark their performance against their competitor providers.

75. The informed purchaser role is generally performed by members of the in-house team. They assist line areas in identifying the appropriate external firm to do the work and, as appropriate, act as the liaison between the organisation and the external provider. In one trading bank, however, line managers with considerable experience in a specialised area instruct outside lawyers directly on the basis that the work in question is well defined, the risks are well identified and the in-house lawyers do not consider that they are in a position to add much value if they were to insist on becoming involved.

76. In some cases the strength of the relationships with external service providers and the predictability of service requirements has enabled organisations to enter into fixed fee/risk sharing relationships with their external service providers. The service provider is paid a fixed annual fee and for this they are expected to carry out all work of an agreed description, whether or not on an hourly basis the fees for the work would have been higher. In essence this arrangement shifts the risk of inefficiency to the service provider, but the predictability of revenue enables the service provider to allocate dedicated resources to the particular client. It also holds out to the service provider the incentive of above-normal profits if the work can be carried out with greater efficiency. At least one Commonwealth agency is seeking to develop this sort of relationship with its external legal service providers. In the Commonwealth, fixed fees on a per matter basis for volume work are more common than the 'retainer' style of fixed fee arrangement.

77. The private sector organisations generally use panel arrangements to limit the number of external providers used. The organisations seek to leverage their buying power by avoiding the fragmentation of their work, and to limit the unnecessary cost of contract management which results when the number of service providers is large. They also acknowledge that the investment of service providers and the value-add services offered by them will be less if only a small or irregular flow of work is offered to external providers, and they will not be able to insist on priority access to preferred service providers if they do not refer enough work to keep those service providers busy, productive and profitable.

78. The private sector organisations recognise that to obtain maximum value from the external service providers on their panel they need to be able to predict their requirements for legal services with reasonable accuracy and be prepared to share information, such as the estimated requirement for services and the legal services budget, with external service providers.

79. In-house counsel of private sector corporations have a strong network and share their experience of management issues including techniques to monitor and control the cost of externally sourced legal services.

4 Issues

4.1 Inadequate data collection

80. A major issue confronting us has been the inability to establish reliable data, particularly comparative data. As a consequence we have not been able to assess the additional costs which result from the less than effective management of legal services. That there are savings is demonstrated by the introduction by AGD in September 2008 of a common form tender package for legal services which has reduced costs for both the agencies which have used it and for the firms tendering. The evidence given to us indicates that there is considerable scope for the introduction of other common user forms and documentation.

81. As previously identified, we are concerned that there is no reliable data on the cost of internal legal services, and in particular, no reliable data that allows any comparison between agencies in relation to costs and efficiency. There is an urgent need for relevant data to be assembled on a consistent and coordinated basis to enable this to be done. Paragraph 188 below describes how a web-based Commonwealth legal services interface could assist agencies with implementing and managing this issue.

4.2 The management of legal services

82. In our view the most important issue arising out of the Review is the need for a more holistic and strategic approach to the provision, and particularly to the management, of legal services across the Commonwealth.

83. The increasing demand for legal services across the Commonwealth, which is discussed earlier in this report, has resulted in the development of large, and in some cases very large, in-house legal practices. Those practices are from many points of view an effective way, and perhaps now, the only effective way, to deliver some legal services. They are however the one part of the market which is not contestable in any rigorous way and in some cases their growth has not been coupled with a commensurate decrease in spending on external legal services. The critical issues are how well they are managed and how well they reflect the wider interests of the Commonwealth.

84. The current arrangements have developed on an agency basis, without coordination or centralised monitoring. This has resulted in those in-house legal practices developing into what,

from a Commonwealth-wide perspective, can perhaps best be described as legal 'fiefdoms'. Some are well managed and provide effective and efficient legal services. There is, however, little in the way of any continuing overview of efficient management and delivery of legal services across the Commonwealth.

85. The lack of any effective central guidance has resulted in each agency developing its approaches, systems and methods largely in isolation. There is little evidence of any systematic sharing of information or experience and legal service standards and approaches vary widely between agencies. That isolation often also results in a failure to recognise the wider interests of the Commonwealth. Indeed there is evidence of agencies withholding information and advice from other agencies, regardless of any wider Commonwealth interest, where they perceive sharing it may not be in the peculiar interest of the agency.

86. Many of these issues arise from the fact that, despite the recommendations of the Logan Review, AGD does not have a clearly defined role and the resources have not been made available to develop one.

87. The Logan Report envisaged that AGD would guide agencies and their procurement and legal risk management strategies in a 'non-intrusive' manner. As a result, AGD has adopted a 'light touch' approach, publishing guidance notes and providing seminars to agencies on request. In practice, that 'light touch' has made little or no impression. Since 2005-06, AGD's role has been extended to compiling Commonwealth-wide figures on legal services expenditure, at least in relation to FMA agencies, but little use has been made of the figures.

88. Later reports have been critical of this approach, calling on AGD to be more proactive. During our Review, it was observed by some agencies and private firms that there was a lack of central guidance when it came to procuring legal services. Some stakeholders commented that it was – or should be – AGD's responsibility to act as a central coordination point. Both agencies and firms wanted AGD to continue to streamline and standardise tender requirements, and ensure that government tenders were timely and staggered appropriately. It was suggested that AGD take on a greater leadership role, driving reforms to improve procurement and other processes and provide more support for agencies undertaking procurement of legal services.

89. Currently, except in some specialised areas such as the Office of International Law and the Constitutional Policy Unit, AGD does not have the practice skills either to provide that assistance or to support the Attorney-General's roles as the 'guardian' of the rule of law;

ensuring that the Executive has appropriate legal advice, and that Government demonstrates a consistent strategic view of legal issues.

90. Those practice skills do reside in many private sector providers, some agencies and in AGS, which is the only Commonwealth agency which practises across the full range of government legal services, including an extensive litigation practice.

91. Facilitating AGD's ability to access the skills of AGS on a basis other than an arms' length solicitor/client basis would be one way to address the gap in knowledge and skills which we have described and strengthen AGD as a result. It would significantly strengthen the support which AGD can provide to the Attorney-General. It would assist AGD in providing the leadership, coordination and facilitation role which we envisage is necessary to accelerate the professionalisation of in-house legal practices within Commonwealth agencies. Making the skill base of AGS more readily available to AGD would, however, inevitably affect the extent to which AGS's role remains that of a commercial player in a competitive market.

92. That said, there is a number of ways in which those resources can be provided. They range from direct recruitment to secondments from areas where relevant skills and experience already exist; for example, agencies and AGS. Wherever they come from, a challenge will be to ensure that both skills and experience remain current away from day-to-day practice. In order to achieve that currency, it may be necessary to devise a flexible structure that enables people to move in and out of the role.

93. There are already concerns among some private firms about the advantage they see as being enjoyed by AGS as a result of its monopoly on tied work. Any changes that would appear to add to those advantages, such as regular secondments of AGS officers to work on line functions within AGD, will almost certainly add to these concerns. In our view those concerns are no reason for not ensuring that AGS is enabled to provide full and effective legal services to government. For not entirely dissimilar reasons some agencies have indicated concerns about AGS becoming too closely involved in legal policy work. A concern is that legal advice could be used as a device to influence other than legal policy. In our view that is simply a management issue that may need to be resolved.

94. As has been indicated earlier, AGS was established to provide two different, and in some respects, competing roles. In terms of volume, its most significant role is to act as a general legal practice in competition with private legal practices but confined to doing work only for the

Commonwealth which, while it puts AGS at a disadvantage vis-à-vis other firms, is in our view appropriate. Its other role is related to tied work which cannot be done by private practices. It was also anticipated that AGS would be a cost moderator and its very existence may have had an effect in that regard.

95. There is a tension between those two roles of competitive service provider and exclusive service provider. One issue brought to our attention is that AGS even in its non-tied work is generally more sensitive to wider Commonwealth issues. It is also seen as more rigorous in its observance of the LSDs, particularly those relating to the Commonwealth as a model litigant. In our view those are desirable approaches to providing legal services generally but particularly so in relation to litigation matters. It is apparent however that not all agencies share those views and some do not appreciate being alerted to such matters if they are seen as inconsistent with a narrow agency interest.

96. Because the viability of AGS is dependent on its non-tied work it is placed in a difficult position. One example is an acceptance that acting for one Commonwealth agency may put it in a position of conflict vis-à-vis the interests of another Commonwealth agency.

97. While there are some agencies (for example, the Australian Securities and Investments Commission) which by their very nature must in some situations accept an adversarial position in relation to other agencies, in which situation issues of conflict may arise, generally as between Commonwealth agencies, the notion of conflicting views about legal positions would seem to demand the determination of the legal issues on the basis of advice from a body like AGS which can and should provide a whole-of-government perspective.

98. The role of AGS in relation to tied work continues to be challenged by private firms who argue that the extent of the work unnecessarily erodes their competitive position in that it gives AGS a favoured position which spills across into contestable work. It is also argued that private firms are as capable as AGS of providing advice in the tied areas.

99. It is not part of our terms of reference to advise on the future of AGS. But given the critical role of AGS in supporting the Attorney-General and the changing face of legal services, including in-house providers, it does seem that it is time for Government to re-assess the place of AGS within the overall Commonwealth legal services structure.

100. Critical to any such assessment is a decision on whether there is a continuing need for the Commonwealth to have a dedicated full-service legal practice with particular depth of experience in public law which is capable of advising on, and managing on its behalf, with a whole-of-government perspective, most matters that are of concern to government, or whether the Commonwealth is content for agencies to source their legal services on an individual basis, whether in-house or from any provider they choose.

101. One issue that we think should be considered is the expense involved in AGS tendering as it must for inclusion on all agency panels. In our view it is difficult to justify not only in principle but also having regard to the $6 million or so which AGS spends annually. As previously discussed, if Government wants an AGS it is presumably to serve a legitimate interest in having AGS available as an alternative to other legal services providers and to exploit the special advantages of having a government solicitor practice from the point of view of providing a whole-of-government approach. The best way of ensuring these interests are served is to ensure that AGS is qualified to provide these services to each agency. It would still be a matter for each agency exercising its role as an informed purchaser using an appropriate process to determine whether it would purchase the required services from AGS or some other service provider. AGS, as we envisage it, would provide each agency annually with a general 'prospectus' identifying such elements as the services it could provide and its hourly rates, and would be responsible for updating that information as appropriate but would automatically be included on the agency's panel. It would still be a matter for AGS to market its services to agencies as do other firms.

102. Whatever is decided about the future of AGS, in our view there needs to be a strategy to ensure that AGD has access to those resources required for it to realistically fulfil its developmental, monitoring and coordinating roles in relation to legal services and to assist agencies in implementing government policy with regard to those services.

4.3 The role of the Attorney-General

103. The Logan Review outlined three functions which comprise the role of Attorney-General as First Law Officer of the Commonwealth – legal policy, legal service, and public interest. It is from a combination of the legal policy and the legal service functions that the Attorney-General's position as First Law Officer is derived. As First Law Officer, the

Attorney-General is chief legal adviser to the Government, has general responsibility for Commonwealth legislation, and plays a significant role in Commonwealth litigation.

104. Traditionally, the Attorney-General is responsible for the legal advice given to Cabinet and to the Government.[19] In his role as legal adviser to the Government, the Attorney-General had responsibility for ensuring the Executive has appropriate legal advice, that the Government takes a consistent view on legal issues, and that a whole-of-government approach is taken in legal advice and litigation.

105. The Attorney-General has broad responsibility for Commonwealth legislation. That includes overseeing the Office of Parliamentary Counsel, which drafts all Commonwealth legislation, and it is the Attorney-General, as First Law Officer of the Commonwealth, by convention, who presents Bills approved by Parliament to the Governor-General for Royal Assent under section 58 of the Constitution.

106. The Attorney-General is also responsible for litigation involving the Commonwealth. For example, under section 78B of the Judiciary Act, a Court cannot proceed in a matter arising under, or involving the interpretation of, the Constitution until it is satisfied that the Attorney-General has been given notice of the case. The Attorney-General, when made aware of a case of constitutional significance, has the power under section 78A to intervene on behalf of the Commonwealth. If the Attorney-General decides to intervene, in theory he assumes broader responsibility for the case, on behalf of the Commonwealth. In practice, while the Attorney-General has responsibility for constitutional submissions, the Commonwealth's position may be determined after consultation with relevant Ministers or after discussion in Cabinet, as and when appropriate.

107. The process for intervention in constitutional litigation is coordinated by AGD involving the close cooperation of AGS and the Solicitor-General.

108. The ability of the Attorney-General to discharge his responsibility for litigation involving the Commonwealth effectively depends upon reliable notification systems, given that there is no single solicitor on the record in litigation to which the Commonwealth or its agencies are party. The LSDs have a role to play in ensuring that the Attorney-General is notified of significant litigation but compliance with the LSDs has been variable.

[19] This might be on the advice of the Solicitor-General; see sections 12(b) and 17(1) of the *Law Officers Act 1964.*

109. At the highest level it can be said that legal work carried out by or on behalf of the Commonwealth is ultimately the concern of the Attorney-General. In-house lawyers do not invariably recognise this special role of the Attorney-General. The devolution of responsibility and autonomy to individual agencies means that in-house lawyers frequently see themselves as working exclusively for the agency and resist any notion of the whole-of-government interests of the Commonwealth. Ultimately, however, in-house lawyers need to recognise the special role and responsibility of the Attorney-General as First Law Officer in relation to legal matters.

4.4 Legal Services Directions

110. In the course of our Review, concerns were raised by some agencies about the operation of the LSDs.

111. A particular concern related to the need for advice from a legal adviser external to the agency in order to settle claims in excess of $25,000. It was argued that the figure was too low and disproportionate to the costs and delay involved in obtaining that external advice. The figure was also seen as disproportionate with regard to other comparable authorities; for example, the levels of financial delegations to senior agency officials.

112. We have sympathy with those arguments. In terms of today's values, $25,000 seems unrealistically low and given our views about the developing nature of in-house practices and the increasing professionalism of in-house lawyers, we are of the view that the amount should be raised. It is of course a matter for judgement how far it should be raised, but in our view a doubling or even trebling would not be unreasonable. It would seem appropriate to require the decision to settle to be made by the agency head or their delegate on the advice of the agency's chief legal adviser. It would also seem appropriate that there be some mechanism, say by way of regular review, to ensure that the real value of any amount decided on be maintained.

113. Although not raised as an argument with us it would seem that increasing the authority of agencies to settle matters quickly is consistent with the encouragement given to ADR.

114. More generally some issues were raised about the limitation on FMA agencies using in-house lawyers to conduct litigation. Presently that can only be done with the approval of the Attorney-General. Approval with specified conditions has been given to some agencies.

115. It is argued that the limitation on litigation being conducted in-house should be relaxed more generally. We do not agree. Ensuring the proper management of litigation by the Commonwealth is central to the role of the Attorney-General as First Law Officer, and litigation is a highly specialised and technical area of the law. It is also the area in which whole-of-government issues are most likely to arise due to the fact that once the Commonwealth has publicly taken a position on a legal issue in litigation it may be restricted from taking a different position on a subsequent occasion. It is at the least embarrassing if the Commonwealth or its agencies take contradictory positions on important legal issues in different pieces of litigation, especially if this occurs because those with the conduct of each piece of litigation are simply unaware of the other.

116. Our consultations with counsel established that, with some notable exceptions, even where agencies do manage litigation (or even tribunal work), it was generally not well handled from a technical perspective with the consequence that counsel were required to fill the gaps at higher cost to the Commonwealth. More than one counsel made the observation that officers handling litigation in-house frequently appear to lack the experience to be effective and do not have the support and supervision of a lawyer with the requisite experience.

117. Some agencies do have sufficient litigation to justify developing and maintaining the requisite specialist skills. Where that is so the current system allows for them to be approved subject to any relevant conditions to conduct that litigation and for the approval to be reviewed at appropriate intervals. Those arrangements seem to us to be sensible and in our view they should not be changed. Developing the specialist skills to have the conduct of litigation involves a considerable investment which may be warranted where an agency has a predictable caseload from year to year.

118. In undertaking the cost-benefit analysis it is relevant, however, to be aware of the implications for a dedicated Commonwealth service provider such as AGS. When an agency wins approval to gear up for the in-house conduct of litigation, it is likely that the workload of a central provider such as AGS will diminish and its litigation resources and capacity will have to be adjusted. As to whether an amount of Commonwealth litigation or some kinds of Commonwealth litigation should always be provided centrally is a policy decision. If the decision is that they should then it is important to ensure that the workload of the central provider is sufficient to attract and support a critical mass of specialists and that they see a worthwhile career track in remaining with the central provider.

119. Another matter raised was the desirability of imposing a central regime, similar to that applied to counsel fees, on solicitor rates. We have very grave reservations about the practicability and also the practicality of attempting to impose such a regime for solicitor rates. Elsewhere in this report, we contend that the price for legal services should be a matter for negotiation between an informed purchaser acting on behalf of the agency and a legal service provider having regard to the nature of the service being purchased. Such an arrangement would or should in our view encourage the development of innovative pricing agreements such as capped rates and risk sharing arrangements. It does however depend upon in-house lawyers having, or developing, and exercising robust negotiating skills.

120. We accept that hourly rates will remain as an indicator of comparative value in any selection process and while it may be possible to impose a generally applying ceiling through that process it seems to us, in part, having regard to the problems experienced in relation to the counsel fee regime, neither sensible nor desirable in what is effectively a market-driven sector. In our view, a much more productive development would be to make the hourly rates and billing practices of service providers visible to purchasers in all agencies via a web-based Commonwealth legal services interface as outlined in Part 5 below. The dissemination of comparative billing information in conjunction with strengthened informed purchaser skills in the agencies is more likely to drive the cost of outsourced legal services down than a capped hourly rate which tends to generate dysfunctional practices as it becomes further and further removed from the market.

121. Finally, another matter raised was the variability among Commonwealth agencies in complying with the LSDs in notifying AGD of significant litigation to which the Commonwealth or its agencies are party. Our response to this is two-fold. First, we expect that the professionalisation of in-house lawyers will strengthen compliance with the LSDs by strengthening the whole-of-government perspective which the LSDs seek to support. Second, we suggest that the service of court documents on the Commonwealth or its agencies be notified via the web-based Commonwealth legal services interface which is discussed in Part 5.5 below to enable the nature and scope of litigation to be monitored in real time, and for the Attorney-General to intervene in matters as appropriate.

4.5 The role of the informed purchaser

122. The role of in-house lawyers includes the procurement of services from external service providers when required and the management of those external service providers. To do this

effectively, in-house lawyers must be able to define the needs of the agency, scope the services to be bought and have a well-informed view of what those services are worth. In other words, in-house lawyers must be what are now commonly known as informed purchasers.

123. Generally agencies with in-house capacity seek external legal services where:

- they have no option but to do so (for example, tied work, litigation)
- they have too much work to do in-house
- they recognise that they do not have the appropriate expertise
- for appearances or for other reasons they want the authority of an outside provider, and
- there is volume work that is more effectively done under contract.

124. Despite the ANAO's report in 2005 (outlined in Appendix B), there is still a lack of understanding in many agencies as to the role and importance of the role of the informed purchaser. As a result, there is a tendency to rely on process rather than professional judgement in managing the needs of agencies for legal services. This is particularly so in the purchase of external legal services through the tendering process and in the subsequent administration of panels.

125. We are of the view that AGD should take a leadership role, and provide advice and guidance to assist agencies to:

- develop a better understanding of the legal services market
- promote knowledge management practices to avoid duplication of advice
- promote understanding that 'price' does not equate to 'value', and
- promote a whole-of-government perspective in the provision legal services.

126. We have identified a small number of general counsel in Commonwealth agencies who exemplify the informed purchaser, and a number of in-house legal teams which are structured and managed to high standards of professionalism. However, it is apparent that whether an informed purchaser of legal services or a professional in-house legal practice exists within an agency depends on the skill and experience of the individual recruited into the role, rather than on any development of the informed purchaser skill by either the agency or the Commonwealth

more broadly. There is within government no formal mechanism to assist in the development of these skills.

127. The lack of a clear role and purpose for in-house lawyers in some agencies has hampered the development of a professional ethos. By professional ethos we mean a recognition on the part of in-house lawyers that, in addition to being employees of an agency and owing the agency loyalty, they are also professionals. Professionalism brings with it obligations to be objective and independent, and to recognise obligations to uphold the rule of law and the interests of the Commonwealth as a whole.

128. The ANAO report clearly sets out the advantages of having an informed purchaser. Without the informed purchaser, agencies are unable to assess the value for money received from the legal work undertaken by providers on an ongoing basis during the life of the panel arrangement. Agency purchasers increasingly use cost-based methods to select providers, which does not necessarily equate to value for money. Numerous service providers commented that while requests for tender are cast in terms of value for money, ultimately price is treated as the determining factor.

129. The experience of both corporate and private sector in-house lawyers suggests that, at least on occasion, the discipline of time recording is required to make an informed choice between carrying out work in-house or outsourcing it from external providers.

130. In many cases, decisions about the use of external service providers appear to be influenced by assumptions about relative costs; namely, that in-house resources are invariably less costly, because there is no profit element. However, those assumptions appear to vary considerably from agency to agency.

131. Many agencies do not have in place effective cost analysis tools. Some do not appear to recognise that it may still be more efficient for an external provider to do certain work, even when factoring in the profit element, because they have the most appropriate expertise, experience, or have more efficient systems in place to undertake the work in shorter time.

4.6 Issues relating to the development of in-house legal teams

132. The key elements of a best practice in-house team include:

- a clear understanding of the legal risks faced by an agency, the legal needs of the agency and where the team fits:
    - having a clear mission statement defining the services they are there to provide, and
    - flowing from that clear mission statement, understanding what is best done by others
- an understanding by both the in-house lawyers and the senior leadership, that the team is there to provide a professional service, in a similar way to external legal services providers, with, for example:
    - a focus on the client
    - responsiveness
    - recognition of their role as problem solvers, not just problem identifiers, and
    - the need for ongoing professional development
- reporting to and through a lawyer at a sufficiently senior level in the agency who is involved in the major decision-making process or body of the agency – highly effective general counsel identified by the Review are generally at the SES Band 2 level, reporting directly to the agency head.

133. Some agencies fail to effectively integrate the legal service function into the executive decision-making function. Where the legal unit was distanced from the senior leadership, it was less effective. In those cases, the legal unit was often headed by a SES Band 1 officer (at times only by an Executive Level 2 officer), reporting through a Band 2 officer who was not a lawyer and usually had other corporate responsibilities.

134. In these circumstances, there was often an accompanying lack of clarity about the role of the in-house team. Those agencies usually presented a more ad hoc approach to personal development of the lawyers, leaving more to the individual, rather than there being a structured agency approach to ongoing legal and professional development. In some cases, but not always, these problems clearly related to questions of size. We accept that is a relevant consideration. However, that seems to us to require that such agencies be given more assistance. Sometimes that may be achieved by 'piggy-backing' on the services of larger agencies.

135. There is no Commonwealth service-wide approach to professional development such as continuing legal education or to the training of non-legal staff, particularly SES officers, the 'users', on the role and most effective use of legal services. As a result, in some agencies there is no clear understanding of the role of the in-house lawyers, and no clear understanding of which services can best be delivered in-house. Well-managed in-house legal teams, although clearly meeting appropriate standards in these areas, identified that they could be assisted with coordinated skill development. It was felt that agencies were very much 'on their own', and had no-one to go to within government for assistance.

136. In relation to ongoing training, some government lawyers hold practising certificates, involving a minimum number of hours of continuing legal education (CLE), however, many do not. Because of the operation of most state and territory legal profession Acts, which relieve government lawyers of the need for practising certificates, there is no professional requirement for those lawyers to participate in ongoing training.[20] Even for those that do hold practising certificates, depending on the areas in which they practise, and where they practise, the courses available that provide the necessary CLE points for practising certificates are often of questionable relevance.

137. There is a need for agency lawyers to maintain and update their professional skills, but also to retain or develop those skills peculiar to working within government and those relevant to the work of their employing agency. Some agencies have programs to achieve those outcomes, but there is clearly scope for common training programs to be provided in a coordinated manner. There is also scope for coordinated training of non-lawyer officers in basic aspects of requesting and using legal services. Finally, there is scope to better inform senior officers within agencies (up to and including agency heads) of the legal risks faced by the agency and of the best ways for the agency to address those risks.

[20] For example, see section 82 of the *Legal Profession Act 2006 (ACT)* in relation to Commonwealth Government lawyers located in the ACT. Section 55E of the *Judiciary Act 1903* relieves AGD lawyers from the requirement to have a practising certificate for the purposes of their employment. There are also specific statutory provisions allowing lawyers working for AGS, the Commonwealth Director of Public Prosecutions and the Solicitor-General to practise in these capacities, whether or not they are otherwise entitled to practise. These provisions are found in Division 3 of Part VIIIB of the Judiciary Act, section 16 of the *Director of Public Prosecutions Act 1983*, and section 13 of the *Law Officers Act 1964* respectively.

5 Possible solutions

5.1 Background

138. This chapter sets out a four part approach to achieving more efficient and effective provision of legal services for the Commonwealth, namely:

- a significant professionalisation of Commonwealth in-house legal practices, to strengthen their skill base both in the direct delivery of legal services and in acting as the informed purchaser in the acquisition of external legal services
- a significant strengthening of the centralised support function provided by AGD to facilitate the process of professionalisation of Commonwealth in-house legal practices and to provide on-going leadership in relation to legal services
- a suggested approach to coordinated tendering in order to shorten current processes for the procurement of external legal services, to reduce costs and to better leverage the purchasing power of the Commonwealth, and
- the development of a web-based Commonwealth legal services interface, which would act as a central entry and data collection point for all aspects of a coordinated legal services structure and procurement process.

5.2 Professionalisation of Commonwealth in-house legal practices

139. Some legal service units within Commonwealth agencies are by any measure large legal practices and yet they are not necessarily organised or managed as in-house legal practices. A well-organised and well-managed in-house legal practice has a number of important features:

- A well-defined mission or purpose within the organisation which gives the practice a focus and facilitates decisions about services to be delivered internally and those to be out-sourced.
- Clarity around what is to be done in-house and what is to be outsourced which gives focus to the hiring and training of new lawyers.
- Systems for decision-making about what is to be done in-house supported by rigorous analysis of the internal skill base and the areas where in-house lawyers can best add value. Similarly, systems for decision-making about what is to be outsourced are

supported by strong informed purchaser skills to ensure that the organisation can scope and price services which it purchases in the commercial market and does not become captive to external service providers.

140. In-house lawyers should be trained, supervised and mentored to develop and broaden their skills and ensure that their responsiveness, relevance and productivity are high. They need to be closely integrated into the strategic decision-making body of the organisation to ensure that they are aligned with and relevant to the organisation's plans and strategies. They should also be trained to be professionals – to understand that they have obligations of independence and objectivity which go beyond the ordinary duties of employees. This involves an understanding that they have obligations to uphold the rule of law, to ensure that the Commonwealth acts lawfully, that the interests of the Commonwealth as a whole are taken into account appropriately, and to understand the special role of the Attorney-General as First Law Officer of the Commonwealth. In our view it would be desirable that they also contribute to achieving the Government's social justice initiatives; for example, carrying out pro bono work as do external services providers.

141. As previously identified, while some in-house practices appear to be organised and managed to a very high standard, this is not universally the case. In-house legal practices which are not well-managed exhibit a range of needs which can have substantial cost consequences for the Commonwealth. Based on our consultation with stakeholders, they include the need for:

- clarity around the function being carried out by in-house lawyers to avoid duplication and delay, and to assist in determining the appropriate size of in-house practices
- systematic training and well-defined career paths for in-house lawyers
- systematic supervision and training of in-house lawyers to ensure that they have the experience both to deliver services and to productively manage the agency's legal risks and need for legal services
- the collection and use of data, particularly data required to accurately cost work, and
- experience and skills required to brief, manage and control external service providers.

142. The issues faced by the Commonwealth in this respect are not new. Many of the very same issues have been faced by in-house legal practices in private sector organisations. For largely historical reasons, the private sector has dealt with these issues over a longer period than

Commonwealth in-house lawyers and a number of useful learnings can be derived from their experience.

5.3 Centralised support and a Commonwealth-wide professional network

143. The fragmentation of Commonwealth legal services across agencies is in contrast to the situation in many countries with comparable legal systems. In the United Kingdom, all central government lawyers, although they work within agencies, are responsible to the Attorney-General through the Office of the Treasury Solicitor. In Canada, with few exceptions, federal government legal services are provided through a central Department of Justice. Appendix D provides more detail about the UK and Canadian models.

144. The arrangements in these countries provide for a central and consistent strategic focus for the provision of legal services. That focus is lacking in Australian Government legal services, with in-house practices providing services to agencies in a largely autonomous manner.

145. In our view it is not realistic or even necessarily desirable to contemplate the re-centralisation of Commonwealth legal services. We do, however, consider that in terms of achieving better cooperation and consistency, and therefore greater efficiency, there would be considerable advantage in fostering a shared sense of purpose and professional commitment among and between in-house lawyers in different agencies. We think that could be achieved through developing the concept of a shared obligation to the concept of the rule of law and to the Attorney-General as the First Law Officer and therefore as the Minister responsible within government for the observance of that rule.

146. What we propose is the development of an Australian Government legal service network based on better coordination of and cooperation between in-house practices. While we see AGD taking the leadership role it would be important to involve selected representatives of in-house lawyers in the development and management of such a network.

147. In our view, the development of an Australian Government legal service network would provide a platform for information and experience sharing. It would also serve an important symbolic role in the professionalisation of in-house legal practices within Commonwealth agencies by giving their lawyers a sense of belonging to a professional network extending in the breadth of its vision beyond the individual across the Commonwealth as a whole.

148. The concrete advantages we see as occurring from such an initiative are identified throughout this report, but include training and common user forms. Any such initiative would need to recognise and accommodate the roles and responsibilities of Portfolio Ministers and agency heads.

5.4 Selecting external providers – coordinated tendering

149. As has been discussed previously, individual tender processes used by agencies to select legal service providers have proved to be administratively burdensome and costly for many agencies and prospective providers. More generally, the benefits derived from these costly processes are questionable, particularly as the hourly rates usually set as part of the tender process do not ensure that work is subsequently carried out efficiently and cannot ensure that the Commonwealth receives value for the money it pays. The keys to ensuring value are - as discussed above - the professionalisation of in-house lawyers in Commonwealth agencies and the significant strengthening of informed purchaser skills, including the skills to manage external service providers after their engagement.

150. Consultation has shown that the relatively high cost of these tender processes can to some extent be attributed to the perception that the CPGs require at least each major agency to go through an extensive process, usually an open tender. Agencies set out very detailed requirements in requests for tender, which in turn means the tendering firms spend large amounts of time addressing these requirements. In some instances, the detailed listing of requirements and the division of panels into sub-panels for specialised areas of work has had the unintended consequence of fragmenting the work without commensurate benefit; for example, where different firms are required for different aspects of the same matter whereas in fact a single firm could and should have handled the entire matter.

151. Although this is now changing and there is some 'piggy-backing' between agencies, general practice has been for Commonwealth agencies to establish their own panel arrangements without reference to each other. Where this is the case, requests for tender issued by different agencies can fall due at about the same time requiring substantial resources to be used by the providers to meet the deadlines and making it virtually impossible for smaller firms to participate in more than one tender.

152. Service providers have told us that the costs of Commonwealth tenders are high. Perhaps the most extreme example is AGS which is required to tender for most of its work as the

Commonwealth and its agencies account for almost all AGS work. AGS estimates that the cost of responding to requests for tender and subsequent tendering for individual items of work costs it approximately $6 million per annum.

153. Those processes appear to have reflected a widespread understanding that they are necessary to meet the requirements of the CPGs. From our discussions with Finance it seems that this is not the case. It appears that an agency need only to be able to demonstrate that it has satisfied itself that a provider can perform the services required and deliver value for money. In addition, there is a requirement that any procurement process used be transparent and accountable.

154. Views as to the merits of the current tender system vary widely. Some agencies consider it to be so costly and onerous that they will almost inevitably exercise options in favour of extending current arrangements rather than repeat the process when the initial term expires and would welcome any way to avoid tendering. Other agencies accepted the tender process as the price for autonomy and are concerned that they may not end up with their preferred service providers or would be more exposed to criticism if the current de-centralised procurement system were to become more centralised.

155. In our view there is scope for a more coordinated approach to the selection of external legal service providers. We considered three possibilities for the establishment of a more centralised selection process:

- a single Commonwealth panel selected through a centralised tender process
- a multi-use list, and
- a hybrid of both.

Single Commonwealth panel

156. The establishment of a single Commonwealth panel selected through a centralised tender process would allow agencies to select appropriate external legal service providers from that panel based on the work to be done and negotiate a price having regard to conditions established through the tender process (for example, maximum hourly fee rates and caps on annual percentage increases to these rates). Such a process would be similar to that used by Victoria under its 'single panel' arrangement. The Victorian model is described in detail at Appendix D.

157. The Victorian arrangements are effectively exclusive in the sense that leave is required to source outside the panel and leave is rarely, if ever, granted. Because the legal services needs of the Commonwealth are greater and more diverse than those of any single state, the flexibility to source outside a Commonwealth central panel would need to be commensurately greater. We envisage, however, that there would be an approval process for any departure from centralised panel arrangements for the types of legal work covered by panel firms.

158. Agencies opposed to a centralised qualifying process considered that to avoid allegations of bias or favouritism, in order to appoint a particular firm or sub-panel they would need to run a tender process in addition to any centralised process and this would represent a net addition to current procurement costs.

159. It is not clear to us how, objectively, an agency tender process is any less open to allegations of favouritism or bias than a process involving a wider centrally managed tender. In both cases, in the final analysis, the employment of the successful providers will be made by the agency on the basis of its assessment of capacity and price. That said, if enough agencies were not prepared to adopt a single Commonwealth panel or decided to run supplementary open or select tender processes, the viability and credibility of a single panel would almost certainly be compromised to the point where it would be uneconomical.

160. A second objection raised against the concept of a centralised panel was that Commonwealth agencies have widely differing needs and that firms they currently use with specialised skills may not be willing or able to qualify for a Commonwealth-wide panel. For example, a firm might willingly tender to provide climate change advice but not wish to act in tax matters because of a perceived conflict with an established private sector client. The agencies in question were concerned that they would lose the assistance of such firms altogether.

161. Currently across the Commonwealth almost every agency that has a panel will have one of the top law firms on its panel. Most have more than one. There is no suggestion that those firms agree to divide up the business when tendering. Many tender for work from a number of agencies. None of that is surprising. The top firms all have the capacity to do almost any work that may be required of them by the Commonwealth.

162. That said, there are good reasons for ensuring that other firms are eligible to do work for the Commonwealth. Some smaller firms have developed specialist expertise in particular areas of the law, provide particular locational advantage or are able to do particular work more cheaply.

Indeed, there is a strong case for encouraging developing firms and 'boutique' firms to tender for Commonwealth work.

163. Objections to a single Commonwealth panel and the limitations of such an arrangement are among the reasons why we also considered the development of a multi-use list. As we are informed, a multi-use list is a list of pre-qualified potential suppliers that have satisfied set conditions for inclusion on the list. The conditions for participation may vary from list to list, depending on the nature of the industry and the type of work agencies might be wishing to source. Examples may be found on the Commonwealth's AusTender site.[21]

Multi-use list

164. Conditions for participation for inclusion on a multi-use list are usually limited to quite basic requirements concerning business structure, registration or licence to provide professional services, ability to contract with the Commonwealth, and so on. What is not undertaken at this stage is an evaluation of value for money, so businesses seeking to register on a multi-use list are not asked to provide details of pricing for any particular type of job.

165. After the establishment of a multi-use list, agencies can then invite pre-qualified providers to participate in a 'procurement process';[22] that is, select tender, three quotes or direct source, depending on the value of the work, the agency's requirements, its knowledge of the legal services market, the agency's chief executive instructions, and an assessment of the most cost efficient and timely way of getting the services it needs. Each procurement process, however, would still need to comply with the CPGs in relation to establishing value for money in a transparent and accountable way. In other words, agencies can only direct source, or obtain quotes rather than conduct a select tender, if the CPGs treat that as an acceptable procurement process in the circumstances.[23]

166. The usefulness of a multi-use list depends heavily on the nature of the procurement process which must be used in conjunction with it. For example, if in relation to a particular service, an agency were required to conduct an open tender to engage providers from a multi-use list, that would offer no real advantages over the current system of open tenders conducted by individual

[21] See the AusTender Homepage at www.tenders.gov.au.
[22] The establishment of a multi-use list is not a procurement process for the purposes of the CPGs.
[23] This will depend on whether the procurement is a 'covered procurement' under the CPGs.

agencies. If a select tender were sufficient that would (assuming strong informed purchaser skills) be less costly and more efficient than an open tender.

Hybrid model

167. It was suggested to us that the single panel model is too inflexible and that a multi-use list does not offer sufficient efficiency improvements, and that the needs of the Commonwealth would best be served by a hybrid model.

168. Under such a model for legal services procurement, a panel made up of first and second tier firms that can provide most services to the Commonwealth could be established by open tender. A multi-use list could then be set up to pre-qualify the smaller firms providing specialist and regional services. There was wide agreement among stakeholders that a single panel would, by its nature, end up dominated by first and second tier firms which could cover full-service requirements across Australia, and that a more flexible process was required for niche providers. At the same time it was recognised that it is in the interests of the Commonwealth to be able to access niche firms.

169. The hybrid model has some attractions. It would by a single centralised process establish a panel identifying the main service providers, most of which currently appear on the panels of individual agencies arrived at by individual open tenders. We expect that this would result in significant savings both for the agencies and for the service providers who currently incur the costs of multiple tenders. In our view, the aim would be to establish and collate the legal service needs of Commonwealth agencies and to qualify through an appropriate process a broad range of firms which have the capacity to meet those needs. As part of the process standard terms and conditions would be agreed with all potential service providers. They would include reporting obligations, ownership of intellectual property, agreement to standard performance KPIs, agreement to sharing performance data among Commonwealth agencies, and agreement on any social justice objectives such as pro bono work. As part of the process, firms would be required to identify the maximum hourly billing rates they propose and maximum annual increases to those rates.

170. The multi-use list would supplement the main panel by providing access to specialist and niche service providers at a lower procurement cost than an open tender. Agencies would then identify and engage a firm, or firms, to meet their individual needs, using a combination of select tender (or other procurement process where permissible), in-house informed purchaser

skills, and support and advice as required from AGD and Finance. AGD would be able to seek input from leading agency representatives or a similar body. Individual agencies would be responsible for negotiating pricing arrangements based on their needs, and their obligation to deliver maximum value to the Commonwealth.

171. Agencies would still have the choice of 'piggy-backing' on arrangements made by larger agencies or seeking advice and support from AGD to make their own arrangements.

172. Before adopting any of these models, we recommend that AGD, with advice from Finance, consider whether the CPGs at least in their present form should continue to apply to legal services, because, for the reasons discussed throughout this report, we are not convinced that the CPGs currently serve a strongly positive role in the procurement of legal services or do much to ensure that the Commonwealth obtains value for money.

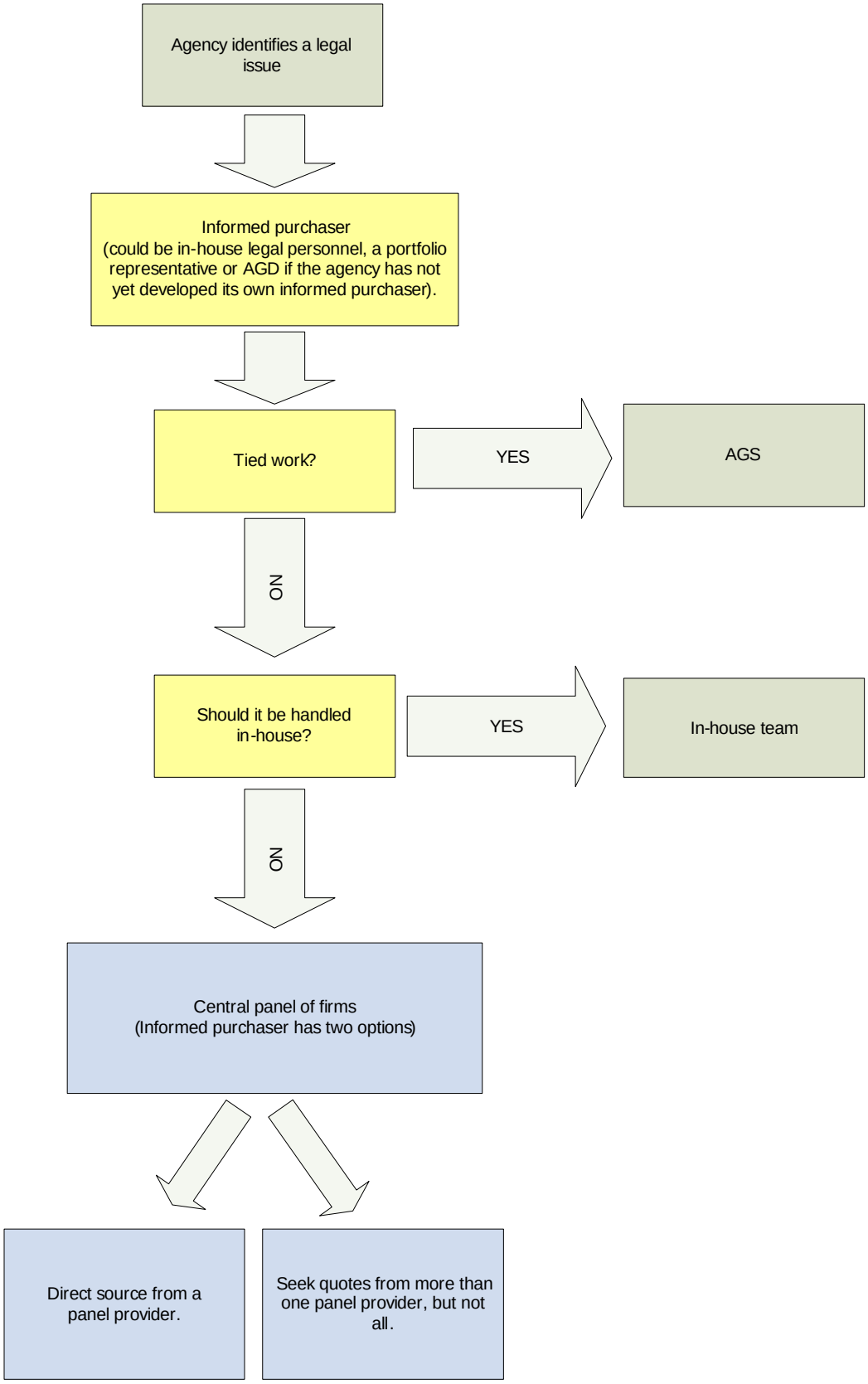
173. We should note in passing that a legacy of current arrangements would be that the panel terms of individual agencies are not coordinated and, accordingly, are not due to expire at the same time. The ability of agencies to terminate their current arrangements in favour of a more centralised arrangement would require consideration.

174. Whichever process is ultimately chosen, it could also be used to collate and disseminate information concerning the experience and expertise of tendering firms, possibly through the web-based Commonwealth legal services procurement interface described below.

175. Unless there are good reasons why they should not do so and they are exempted by the Attorney-General, both CAC agencies and FMA agencies should participate in these arrangements, although in the case of GBEs and Corporations Act companies controlled by the Commonwealth, it should be a matter for the governing body whether to opt in.

176. Whatever method is ultimately used, the interests of the Commonwealth would most efficiently be served if service providers for particular agency needs were identified and engaged using less reliance on elaborate process and more reliance on informed purchaser skills including knowledge of the market. Figure 5 below demonstrates how a centralised procurement model could work in practice.

FIGURE 5 – ENGAGEMENT OF EXTERNAL PROVIDERS FROM A CENTRAL PANEL



5.5 Web-based Commonwealth legal services interface

177. In the course of the Review, we examined the potential for web-based interfaces to satisfy several of the key issues identified by us as areas for improvement. One such tool is the Victorian Government's Legal Panel Gateway (LPG), which has been used by agencies and panel firms in Victoria since 1 July 2009. The LPG tracks the procurement of legal services from the point at which it is identified that there is a legal issue, to the identification of the expertise required and selection of a provider, through to scoping the services required and providing the deliverables and final invoice. It should be noted that the LPG is not a matter or case management system, nor are we proposing such a system for the Commonwealth. More information about the LPG is outlined from paragraph 31 in Appendix D.

178. We identified six main areas where we consider that the reforms identified in this report would be assisted by a web-based interface similar to that used by the Victorian Government. They are:

- supporting the more centralised tendering approach discussed above
- supporting agencies seeking services from external service providers
- enabling efficient and ongoing data collection
- providing access to an in-house costing tool
- maintaining a searchable advice database, and
- monitoring of litigation to which the Commonwealth or its agencies are party.

179. The LPG in use by the Victorian Government currently performs all of these functions, except for a fully searchable advice database. In that regard, what the LPG does have at the moment is the capacity for a summary of the legal work to be provided (for example, a summary of the advice in headnote form) as part of the final deliverable from the legal service provider to the agency. This summary is only viewable by the individual client agency and the provider. However, broader access to this and other information could be enabled, as the LPG is capable of modification and further development.

180. A central entry point, similar to the LPG, could be used by Commonwealth agencies and external legal service providers to register their documentation as part of any reformed procurement process canvassed in this report.

The sort of documentation which the Commonwealth might require as part of the registration process could include:

- a description of the legal service provider and the services it offers
- evidence of expertise in specific areas of law
- profiles of relevant key personnel
- indicative proposed maximum hourly rates, and
- details of in-house training programs, pro bono work record and other relevant information.

181. Once provided, this information would remain in the system (including any updates made by the legal service providers through the system) and the information would be available to informed purchasers within agencies to consider when choosing the most appropriate legal service provider for their needs. This should result in some streamlining of the procurement process and has the potential to reduce costs for providers.

182. The second major use for the central entry point would be to provide support for agencies when they seek legal services, whether from AGS or other external legal service providers. As a first step in the process of deciding to procure legal services, the informed purchaser in an agency could log in to the system and fill out a template form detailing the:

- area of legal expertise required
- start date and deadline for deliverable, and
- matter file or reference title.

183. After inputting these basic fields, the system would then generate a list of legal service providers with the requisite skills and experience relevant to the provision of the services. The list could include:

- links to the information provided through any centralised procurement registration process, including the names of key personnel within each firm that have the necessary legal expertise and experience to deliver the services
- an indication of the number of matters each firm is currently working on and value of services provided to the agency to date

- an indication of any conflicts of interest, and
- a ‘star rating’ for the firm based on satisfaction surveys completed using the system by agencies which had used the firm (see paragraph 186 below).

184. At this point, if the more centralised procurement reforms canvassed in this report have been implemented, the informed purchaser might choose to request a quote from a particular external legal service provider, directly engage a provider from the list, or request a quote from more than one provider. To facilitate this process, the LPG, for example, uses a template form with drop-down fields where purchasers can choose to specify the number and level of lawyers who it is thought should work on the job. The hourly rates identified during any centralised procurement process would be visible in relation to each lawyer along with other prices, and an estimate according to the agency’s request would be generated. After an assessment by the informed purchaser a detailed request would then be sent through the system to the external provider or providers as a basis for negotiation.

185. Such a system would be able to complement the skills of the informed purchasers within the agencies. Once the request is sent by the agency, it provides a prompt for discussions and negotiation between external legal service providers and agencies. In addition, the system may be set to send reminder emails to agencies and providers when a matter is, for example, two weeks from its deadline, or 50% invoiced. The informed purchaser would be able to record their own estimate of the work sought in a field which would only be viewable by the agency. This figure could then be compared against the provider’s offer and later agreed price. These features could help purchasers to develop their abilities in managing legal services procurement, including in relation to timeliness and preventing over-servicing.

186. In addition to encouraging informed purchasing, such a system has the potential to assist the Commonwealth in administering and reporting on client satisfaction. The system could administer a client satisfaction survey based on any key performance and compliance indicators outlined in the Deed of standing offer, such as timeliness and compliance with the LSDs. The system would have the capability to require a client satisfaction survey to be completed by agencies before the agency could close a matter. These surveys would inform the ‘star rating’ viewable at the scoping stage, which would be updated regularly based on the legal service provider’s survey results over the previous six months. This regular real time feedback would be valuable for firms and assist in increasing and maintaining value for money over the life of

the standing offer. The system could also generate reports on the survey results over any periods of time and this would be useful in future tendering processes.

187. As previously identified, in preparing this report, we are keenly aware of the lack of consistent, comparable data, particularly in relation to internal expenditure. Although expenditure and counsel briefing data is now reported to AGD in a standard template, considerable resources are required to collate and analyse the data, and there are still considerable inconsistencies in the way that agencies calculate their internal legal services expenditure for inclusion in the standard template.

188. A web-based Commonwealth legal services interface would assist in this process by enabling agencies and external legal service providers to generate comparable reports on demand, either annually or even monthly as appropriate. The system would also assist in the management of legal costs and inform budget processes in a more accurate and timely manner.

189. The system could also be used as an in-house costing tool. An agency could set up its in-house team as a provider, just like any other provider in the system, with hourly rates and prices for other services. This has the potential to facilitate more accurate, comparable and consistent data on reported annual internal legal services expenditure. All the information about the in-house team's matters on hand, value of services provided to date, and key personnel and expertise could be compared alongside that of other providers. Such a feature would assist informed purchasers when making a decision about whether to keep a matter in-house or to brief it out.

190. Our consultations identified there is both a need and a demand for a central legal advice database accessible to agencies to help prevent duplication and over-servicing. A web-based interface such as that discussed above has the capability to capture advices at the time they are delivered. These advices could then be searchable via subject, title, or other references, and made available to agencies to download where necessary. Access controls could be used to ensure any security concerns are managed appropriately.

191. Finally, in our view a web-based Commonwealth legal services interface could play a useful role in the monitoring of litigation to which the Commonwealth or its agencies are party. As an adjunct to service of process on the Commonwealth, litigants could be required to post a copy electronically via the web-based interface. AGD could, by risk-based search and selective review of incoming material be in a better position to have early warning of litigation raising

issues of whole-of-government significance. AGD would then be in a better position to support the Attorney-General in discharging his role as First Law Officer of the Commonwealth.

Appendix A – Terms of reference

Following reforms to Australian Government legal services arrangements introduced last year, the Government will conduct a review to achieve further efficiencies and to maximise value for taxpayers' money in the procurement of legal services.

The Review will examine current practices and advise whether another model (for example, a more centralised model) of legal services procurement should be adopted, taking into account:

- the reforms already implemented, in particular the release of a standard form request for tender and deed of standing offer for legal services
- the nature of the market for Commonwealth legal services, including the operation of the *Legal Services Directions 2005*
- Commonwealth procurement policy
- the range and type of legal services required by Commonwealth agencies, including the need for services that are of high quality, efficient, independent, confidential, consistent and coordinated, and range in complexity from routine to highly specialised
- the costs and benefits to the Commonwealth of implementing any proposed new arrangements
- appropriate arrangements for bodies regulated by the *Commonwealth Authorities and Companies Act 1997*, and
- the views of stakeholders.

The Review will also examine how the Commonwealth can best make use of in-house legal services.

Appendix B – Historical overview

1. As part of the process of considering current arrangements for Commonwealth legal services procurement, it is useful to review the historical context from which the current arrangements evolved.

2. For most of the 20th century, legal services to the Commonwealth were provided by one entity, AGD. The Commonwealth's chief lawyer and first head of AGD from its establishment in 1901 was Robert Garran, and he was joined in 1903 by Charles Powers, who was appointed as the first Commonwealth Crown Solicitor. Charles Powers had responsibility for some of the parts of AGD which provided legal services to the Government. Over time, offices of the Crown Solicitor were established in all capital cities.

3. In 1984, the Crown Solicitor's Office was transformed into the AGS. Its officers, like those under the Crown Solicitor's Office title, were public servants, and it was given a budget allocation to provide the Commonwealth with legal services.[24]

4. The system by which AGD provided legal advice, litigation and other legal services to agencies changed significantly during the 1990s. In August 1989, the Government made an in-principle commitment to AGD moving towards charging agencies for legal services. This commitment was confirmed in February 1991, when agencies began receiving budget allocations to purchase legal services from AGD on a user-pays basis.

5. On 1 July 1992, the Government established the AGLP as a partly commercial unit within AGD, to provide:

    - legal services to agencies on a commercial basis and some legal services to the Attorney-General or agencies on a Budget-funded basis, and
    - policy services on a Budget-funded basis.

6. The AGLP comprised:

    - the AGS
    - the Chief General Counsel

[24] Attorney-General's Department, *100 years: Achieving a just and secure society*, 2001, pp 118-119.

- the Central Practice, which provided business, commercial, litigation, general counsel, international law, and legislative drafting services
- offices of AGS in each capital city and Townsville
- three policy divisions, which performed mainly Budget-funded work, but also some work on a billable basis, and
- a support services group.

7. Guidelines for the Provision of Government Legal Services set out this user-pays (and user-choice from 1 July 1995) regime.

Earlier reviews of Commonwealth legal services procurement

8. The user-pays system was reviewed in 1994, resulting in further areas of legal services opening up to competition. The 1994 review also led to the creation of three categories of legal services:
    - no charge/no external choice Budget-funded work tied to the AGLP, including all litigation
    - charge/no external choice work tied to the AGLP but for which client agencies were billed on a commercial basis, and
    - charge/choice work open to full competition with private sector (for which clients were billed on a commercial basis) and in-house lawyers.

These categories were set out in the Directions for the Provision of Legal Services to Government Departments and Agencies. The Directions did not apply to independent agencies and GBEs, which had been free to choose between their in-house units, the AGLP and private sector providers since the 1970s.

9. This regime, with its mixture of tied work, user-pays and some contestability, was in place in June 1996 when the Government received the Report of the National Commission of Audit on the financial position of the Australian Government. The Committee concluded that there appeared 'to be no continuing need for the Commonwealth to be involved in this area as a service provider'[25] and recommended that the AGLP be reviewed.

[25] *Report of the National Commission of Audit*, June 1996, Chapter 3.4, available at <http://www.finance.gov.au/publications/archive-of-publications/ncoa/coaintro.htm>.

10. In November 1996, the then Attorney-General commissioned a review of the AGLP, chaired by Mr Basil Logan.

11. The objectives of the Logan Review were to:

    - examine the Commonwealth's legal services needs and how these might best be met
    - seek views of key stakeholders and have regard to competitive neutrality, best practice and privatisation principles
    - assess the business performance of the AGLP since it began charging on a user-pays basis on 1 July 1992 and its likely future performance
    - consider any need for changes to the 1994 Directions especially regarding whether any work should, or should not, be tied to the AGLP
    - make recommendations on the future arrangements for the delivery of legal services to the Commonwealth having regard to relevant public interest functions and considerations, such as:
        - the requirements of government policy administration
        - Commonwealth model litigant obligations, and
        - the role, operating and employment arrangements of the AGLP.

12. In addition to meeting with key leaders and senior members of private law firms, in-house areas, selected major Australian corporations and government departments, the Logan Review established a Consultative Committee of key stakeholder representatives, which met four times. The Review received and considered 67 submissions, and Ernst and Young provided a business performance report on the AGLP to the Logan Review. The Review commissioned a private consulting firm to undertake an extensive survey of 188 Commonwealth organisations. Responses, of which there were 101, were followed up in small focus groups of people from the AGLP's top 30 clients.

13. Using the surveys and consultations, the Logan Review calculated the 1995-96 Commonwealth legal services market at $198 million, comprising:

    - AGLP (billed) - $80 million (40.4% of total market share)
    - AGLP (Budget funded) – $13 million (6.6%)

- private counsel - $20 million (10.1%)
- private firms - $20 million (10.1%), and
- in-house lawyers - $65 million (32.8%).

14. 42 of the 101 organisations which responded to the survey had in-house lawyers in 1996-97. 34 of those 42 indicated that their in-house lawyers managed the purchase of legal services from external providers.

15. In 1995-96, contestable work (work for which agencies could choose the provider – namely, the AGLP, in-house lawyers, private firms and/or private counsel) comprised some 82% of the estimated total Commonwealth legal services expenditure. The remaining 18% of expenditure was attributable to work tied to the AGLP, including all litigation.[26] Other comparable governments around the world had responsibility for their core legal services. Consultations with stakeholders revealed that agencies wanted continued access to the AGLP and private lawyers. In particular, agencies wanted access to the AGLP for specialist legal needs and to moderate legal costs. However, agencies wanted more choice in the selection of legal advisers and to be able to choose providers for litigation.

16. The Logan Review determined that, in principle, the Government should not be in the business of providing legal services unless there was a clear public interest in doing so. The Review found there was a strong and necessary public interest in maintaining a central legal services provider, to:

- provide for the particular legal service needs of the Commonwealth, in particular public law services which are often on issues of high risk to the Commonwealth
- satisfy the legitimate other needs of agencies, including the need for a whole-of-government approach and understanding in some matters, and
- support the unique role of the Attorney-General, whose specialist legal service needs are core to government.

17. The Review made 16 recommendations, including that:

- the legal service elements of the AGLP be retained as a separate central legal service provider (AGS), with the policy elements of the AGLP remaining within AGD

[26] Logan et al, *Report of the Review of the Attorney-General's Legal Practice*, March 1997, pp 61 and 69.

- AGS be established so as to ensure competitive neutrality to enable it to compete effectively with the private sector and to be transparent and accountable
- there be contestability to the fullest extent possible, particularly in litigation, such that agencies would be free to manage their own legal services and be accountable for this
- only in matters of high risk or those matters which are considered core executive activity of government should agencies use AGS, and new legal services directions should be made to reflect this, and
- OLSC be established in AGD to:
  - implement the new legal services directions and oversee compliance with them
  - help other agencies manage their legal purchasing decisions
  - issue guidelines for the public sector to maintain the Commonwealth's purchasing power for counsel services, and
  - manage risks to the Commonwealth with minimal intervention.

18. In response to the recommendations of the Logan Review, the Government passed the *Judiciary Amendment Act 1999*, which commenced on 1 September 1999. The Act established AGS as a separate statutory authority and empowered the Attorney-General to issue Legal Services Directions. The LSDs reinforced the decentralised approach to legal services procurement, with heads of agencies responsible for their procurement decisions. Agencies were, and remain today, free to choose the type of legal services they require, and the method of procurement for those services, subject to the limitations regarding tied work, model litigant obligations and other requirements set out in the LSDs.

19. The Government also established OLSC to implement and administer the LSDs, and to assist agencies to manage their legal purchasing decisions, including their compliance with the LSDs.

20. In the parliamentary debate when the Judiciary Amendment Bill 1999 was introduced to the House, the Government undertook to conduct an independent review of the operation of the proposed amendments and the resources allocated to the new OLSC.

21. In April 2003 Ms Sue Tongue was commissioned to examine the impact of changes made to the purchasing of legal services brought about by the Logan Review. She was asked to determine the impact of the passage of the Judiciary Amendment Act on the Commonwealth's ability to

obtain legal services, and also to assess the operation of OLSC. The *Report of a Review of the impact of the Judiciary Amendment Act on the capacity of Government departments and agencies to obtain Legal Services and on the Office of Legal Services Coordination* (Tongue Report) was released in June 2003.

22. 170 agencies were surveyed on their use of internal and external legal services, the amount they spent on legal services, and what kind of legal services they needed (for example commercial advice, tied work). While the quality of the data precluded detailed comparisons, it nonetheless established a picture of trends in the legal services market from 1998-99 to 2001-02.

23. Agencies were asked to provide data on their expenditure on legal services. A number of factors limited the reliability of the data obtained, including:

    - not all agencies completed the survey in full
    - not all responses broke down the figures into subject areas
    - some merely provided estimates of costs
    - methods for calculating 'internal' costs varied (when accounting for in-house expenditure, some agencies simply reported wages/salaries, while others included an 'on-cost' or overhead amount), and
    - inconsistent approaches to inclusion of GST.

24. Despite these shortcomings, Tongue commented that the data provided a snapshot of the type of work agencies handled internally, and what tasks were more likely to be briefed out to external legal service providers.

25. External providers were more likely to be used for litigation and commercial advice and drafting. Commercial advice and drafting attracted the most use of external providers and highest expenditure on external providers.

26. The development of legislative proposals was found to be more likely to be done internally. Tongue attributed this to agencies counting staff seconded from AGS as in-house lawyers for the purposes of the survey. Advice on legislation administered was even between both internal and external providers, with general legislation advice more often sought from external providers. There was a rise in the amount of non-litigation work going to external providers over the four years surveyed.

27. Only 24 agencies reported having a panel in place, while several others responded that they relied on their portfolio department's panel. Tongue noted that all firms represented on panels were large national law firms. AGS was the legal services provider most likely to be on a government panel, with Blake Dawson Waldron, Minter Ellison, Clayton Utz and Phillips Fox appearing frequently as well.

28. While the survey did not specifically ask why agencies did not pursue a panel arrangement, answers indicated that many agencies recognised that organising a panel was expensive and time consuming, while the amount of legal work required was relatively small.

29. Tongue concluded that agencies had few difficulties in meeting their legal service needs noting that agencies were generally satisfied with the quality, timeliness and cost effectiveness of legal services. Tongue also found that OLSC was performing well, but the majority of the recommendations focused on OLSC's potential to expand its role to fulfill an educational function promoting best practice, compliance with the LSDs and its own responsibilities in relation to legal services procurement.

30. On 20 June 2005, the Australian National Audit Office released its report *Legal Services Arrangements in the Australian Public Service* (ANAO report).

31. At the time of the review being undertaken (from 2004, and into 2005), there were 84 FMA agencies, and 106 other bodies, administering over 1,000 pieces of legislation. The arrangements as had flowed from the recommendations of the Logan Review had been in place for some five years.

32. The objectives of the ANAO report 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.[27]

[27] Auditor General, *Legal services arrangements in the Australian Public Service*, Performance Audit, Audit Report No. 52, 2004-05, p 13.

33. The ANAO surveyed 40 agencies, and audited 16 agencies and OLSC.

34. The ANAO found that growth in external legal services expenditure across the 40 agencies surveyed had increased by 23% in real terms between 1999-00 and 2003-04. This was predominantly attributed to the increasing volume of legal work being done and, to a lesser extent, to the improved capture and reporting of internal expenditure and periodic increases in charge-out rates. For the same period, the ANAO found that it could not reliably measure the increase in internal expenditure on legal services. However, the survey results did show decreasing external expenditure, with increasing internal expenditure.

35. On expenditure, the ANAO also commented that from 2001-02, this was shared between internal and external legal service providers. From the survey responses, the estimated total legal services expenditure as at June 2004 was $446 million, with $216.2 million for external expenditure, and $229.8 million for internal expenditure.

36. At the time, there were a small number of agencies with high demand for legal services, with many agencies only having low demand. There were only four agencies with annual expenditure of more than $40 million, and three agencies with between $10 million and $40 million.

37. The model used for provision of legal services was a matter for each agency, as it remains at the time of writing this report.

38. The ANAO found that agencies needed an informed purchaser to be able to decide on the best model:

    - some agencies had an informed purchaser, but a number required improvement in this area
    - there was generally scope to improve internal communication and systems for monitoring and reviewing legal purchasing decisions
    - there was a need to improve systems to monitor workload and expenditure in order for agencies to recognise and respond to change in their legal services needs, and
    - there was a need to improve in areas of risk management relating to the provision of legal services, such as identifying and responding to risks to agency ability to purchase legal services, and the legal risks in agency ability to deliver programs and services.

39. The ANAO also identified the need for agencies to regularly review their legal services model, including a full-cost comparison between internal and external legal services provision.

40. On whether agencies were achieving value in the provision of their legal services, the ANAO found that this was more likely to occur when:

    - agencies had appropriate systems in place to effectively distribute work among internal and external providers
    - agencies had matter and knowledge management systems in place that were kept up-to-date, and were usable
    - the lawyers had a strong focus on client service
    - service standards were set and monitored
    - clearly understood protocols for interaction between the lawyers and the clients were maintained, and
    - the provision of legal services was actively managed as an integral part of the agency's operations.

41. In relation to OLSC, the ANAO found that:

    - OLSC had found a number of breaches over time, but was sometimes unaware of breaches and/or possible breaches, and so there was a need for OLSC to review its processes to monitor breaches more effectively
    - OLSC provided some general guidance on purchasing of legal services, but there was a need for practical insights as well; for example, how to manage risks rather than just identifying the risk
    - there was an opportunity for OLSC to build coordination and leadership in sharing information and better practice strategies, and
    - to assist agencies to actively monitor their legal services expenditure, OLSC could provide guidance on the measurement and reporting of agency legal services expenditure.

42. Overall, the ANAO found that the quality of agency management of legal services was variable, and made recommendations flowing from the findings summarised above to assist agencies to achieve greater cost effectiveness. The ANAO also made recommendations in relation to the

additional work that OLSC could do to assist agencies to better manage the provision of legal services.

43. The ANAO summarised the key features of better practice, and in August 2006 produced *Legal Services Arrangements in Australian Government Agencies – Better Practice*.

Appendix C - Government legal services providers and framework

1. This appendix provides an overview of the main government providers of legal services and the LSDs.

Government legal services providers

Australian Government Solicitor

2. The AGS formerly held a monopoly on providing legal services to the Commonwealth. It has been operating as a GBE in a competitive market since 1999. As a GBE, AGS is subject to the reporting and accountability requirements of the CAC Act. The shareholder Ministers of AGS are the Attorney-General and the Minister for Finance and Deregulation.

3. Despite opening most of the government legal services market to competition in 1999, certain areas of legal work were 'tied', such that they can only be done by certain government legal services providers; that is, AGS, AGD, OPC, or DFAT (unless other arrangements are approved by the Attorney-General).

4. The categories of tied work are listed in Appendix A to the LSDs. Categories tied to AGS and AGD are constitutional law, national security, international law, and cabinet work (such as legal advice to be considered by or relied on by Cabinet, or legal advice to Cabinet on the effect of legislation). AGS may be one of the providers eligible to provide advice in relation to public international law work (along with the Office of International Law (OIL) and DFAT), depending on the nature of the matter.

5. While AGS competes with other law firms for Commonwealth legal work, it is limited in the other types of work for which it may compete – its sole focus is Commonwealth legal services. AGS can work for Commonwealth-owned businesses, as well as state and territory government organisations where the Australian Government has an interest.

6. AGS also has arrangements to provide on-site lawyers to a number of agencies. These lawyers may work there full-time, or for a lesser period, depending on the arrangements. These agencies view this arrangement as highly advantageous as it allows them to access high quality legal advice on-site by a lawyer who understands the agency, without having to set up their own in-house legal section or provide training, CLE or other staff development opportunities.

7. It was noted in submissions that agencies value the experience in legislation and government processes that AGS possesses, and its whole-of-government perspective. As mentioned above, however, some in-house lawyers avoid AGS for the same reason, and will opt for an external provider that will view the agency as the client rather than the Commonwealth. There is also a perception that AGS has been slower to embrace ADR techniques than external providers, and agencies are therefore more likely to brief a private sector law firm if they are looking for lawyers who will actively seek methods other than litigation to resolve a dispute.

8. The bulk of the 370 lawyers employed by AGS are located in Canberra, but there are offices in every capital city. The Canberra office also contains the Office of General Counsel, which is largely advice-focused, although it does also handle constitutional litigation. Litigation work is of considerably more significance for the offices in the other state and territory capitals, particularly for Sydney and Melbourne.

Attorney-General's Department

9. AGD has a large number of legal officers, most of whom are engaged in providing legal policy advice. However, some areas of AGD, such as OIL, provide legal advice to other Commonwealth agencies. OIL charges for advice on the implementation of international law in Australia.

10. The Office of Legislative Drafting and Publishing, a division within AGD, is directly funded to draft all Commonwealth Regulations, Proclamations and Rules of Court. Other legislative and non-legislative instruments are drafted on a fee-for-service basis. Some drafting of legislation for other countries is also done, usually as part of an aid package arranged by AusAID.

11. OLDP is also responsible for:
    - managing the Federal Register of Legislative Instruments
    - registering legislative instruments and delivering them to Parliament for tabling
    - compiling Commonwealth legislation and publishing it on the ComLaw database
    - arranging for Commonwealth legislation to be printed and made available for sale, and
    - publishing the Government Notices Gazette.

12. OLSC is a branch within AGD. OLSC was established in July 1997 as part of the then Government's response to the Logan Review (see Appendix B above) and the decision to establish AGS as a separate entity.

13. OLSC provides advice to other Commonwealth agencies on Commonwealth litigation policy, legal services expenditure reporting requirements, and compliance with the LSDs. OLSC also takes a proactive role in legal issues of significance for the Commonwealth, and provides a whole-of-government focus in how these issues should be approached. When litigation is involved, this may involve guidance and direction to agencies on the litigation strategy to be used by the Commonwealth. OLSC may give legal advice, although it mainly gives advice on the effect of government policy in relation to legal services.

14. A major role of OLSC is to monitor agency compliance with the LSDs. OLSC issues guidance notes on various topics to assist agencies to comply with their legal services obligations. These notes are accessible via AGD's website, www.ag.gov.au/olsc. OLSC also provides general guidance on some of the issues relevant to the acquisition or provision of legal services, particularly through competitive tendering and contracting processes.

Other providers

15. A number of other agencies provide legal services to the Commonwealth.

16. The Office of Parliamentary Counsel is responsible for drafting all Commonwealth legislation, from entirely new Bills to amendments to current Acts. OPC is budget-funded, and does not charge agencies for its services. The role of OPC is to draft Bills for introduction into Parliament. In general, this is done on instructions from agencies. It is not the role of OPC to provide advice on the operation of an Act.

17. OPC has a staff of approximately 45 people, consisting of three statutory officers - the First Parliamentary Counsel and two Second Parliamentary Counsel - and staff employed under the *Public Service Act 1999*. This staffing covers approximately 25 legal positions and 20 support positions comprising executive assistants, legislation officers, administrative officers, a librarian, and IT staff.

18. As the Commonwealth Director of Public Prosecutions prosecutes breaches of Commonwealth criminal law, it can be considered a Commonwealth legal services provider. The CDPP is within the portfolio of the Attorney-General, but operates independently of the Attorney-General and the political process. As First Law Officer, the Attorney-General is responsible for the Commonwealth criminal justice system and remains accountable to Parliament for decisions made in the prosecution process, even though those decisions are now made by the Director and lawyers of the CDPP.

19. The LSDs are not intended to cover criminal prosecutions. However, the CDPP is still bound to comply with the LSDs to the extent that it is involved in other types of legal services. For example, like any other Commonwealth agency, the CDPP may obtain legal advice on employment issues, procurement, or other commercial matters.

20. The Solicitor-General is the Second Law Officer of the Commonwealth under section 5 of the *Law Officers Act 1964*. His role, set out at section 12, is to act for the Commonwealth or its representatives, to advise the Attorney-General on questions of law referred to him by the Attorney-General, and to carry out functions ordinarily performed by counsel as the Attorney-General requests. Generally, he provides advice on matters of significance to the Government and appears as counsel in cases with constitutional significance, international cases, and other cases of significant interest to the Government.

21. DFAT may give legal advice to other government agencies on matters arising under public international law. DFAT collaborates with OIL on major pieces of advice to ensure consistency in approach. However, DFAT does not charge agencies for providing advice, while OIL does charge for some of the work it does for agencies.

22. A small number of agencies have received the Attorney-General's approval under paragraph 5 of the LSDs for their own in-house lawyers to appear on behalf of that agency in court proceedings. Factors relevant to whether approval will be given include whether the agency can conduct the litigation properly and efficiently, whether they have the capacity to conduct litigation at a lower cost than an external firm, and whether the agency has a statutory charter which gives it an operation independent of government. Due to this last factor, the agencies that have received approval are usually regulatory bodies, such as ASIC and the Fair Work Ombudsman.

23. The paragraph 5 approval can be for a specific matter, or a general approval for the agency's in-house lawyers to appear in a certain category of matters. The Attorney-General may choose to place some conditions or restrictions on a general approval. For example, ASIC and APRA may only use in-house lawyers for litigation involving their regulatory and enforcement activities.

Commonwealth legal services framework

24. The LSDs are made under section 55ZF of the Judiciary Act. The LSDs form the framework for the delivery of Commonwealth legal services, and apply to all FMA agencies, and to a lesser

extent to a majority of CAC agencies.[28] The intent of the LSDs is to ensure coordination and consistency of Commonwealth legal advice, through advice on issues such as:

- significant issues reporting (paragraph 3 of the LSDs)
- consultation between agencies (paragraph 10)
- tied work (Appendix A)
- the obligation to act as a model litigant (Appendix B)
- settlement of monetary claims against the Commonwealth (Appendix C), and
- engagement of counsel (Appendix D).

25. The publication of FMA agencies' legal services expenditure was first required through the 2005 amendments to the LSDs (paragraph 11.1(ba)). This was to enhance the transparency of legal services expenditure recording and reporting in line with the findings of the ANAO Report (see Appendix B above).

26. Paragraph 11.1(da) of the LSDs, which commenced on 1 July 2008, requires FMA agencies to report to OLSC on their legal services expenditure in a template approved by OLSC. Paragraph 12.3A of the LSDs extends the legal services expenditure reporting requirements to CAC agencies. This new reporting obligation has for the first time introduced a requirement that agencies report their internal legal services expenditure.

Recent reforms

27. The LSDs were amended in September 2008 to introduce a new Appendix F which mandates the use of a common form tender package by all FMA agencies and most CAC agencies. The common form tender documents include a request for tender and deed of standing offer. The package is intended to streamline the process for purchasing legal services. The common form request for tender documents comply with the current CPGs introduced on 1 December 2008.

28. The deed of standing offer requires legal services providers to report to OLSC in relation to the pro bono work that they aspire to do, and that they have done, within 30 days after the end of each financial year in a standard pro bono reporting template approved by OLSC. The pro bono reporting template was designed following consultation with Commonwealth legal

[28] Paragraph 12 of the LSDs deals with the application of the LSDs to non-FMA agencies. Generally, the application of the LSDs is only extended to CAC agencies that are not GBEs or Corporations Act companies controlled by the

services stakeholders. The template aims to be both user-friendly and an effective mechanism for the Government to collate data on the amount and type of pro bono work (including pro bono legal work) being carried out by legal services providers performing work on behalf of the Commonwealth.

Commonwealth.

Appendix D - Legal services procurement in other jurisdictions

1. The Review examined legal services procurement models in comparable jurisdictions and in three major corporations to assist in reaching conclusions about best practice for the Commonwealth.

United Kingdom

Role of the Attorney General

2. In the United Kingdom, the Attorney General and Solicitor General (the Law Officers) are the chief legal advisers to the Government and are responsible for all crown litigation, regardless of whether it falls under the civil or criminal jurisdiction.

3. The Law Officers act as the Government's legal advisers in relation to Bills and legal policy issues. As legal advisers, they also monitor decisions at domestic, European or international levels that may affect the Government or government policy. Where there is no issue of conflict arising, they may also be called upon to give advice to Parliament on procedural questions, matters of standards and privileges, and on the meaning and effect of proposed legislation.[29]

4. The key difference between the office of Attorney General in the UK and Australia is in the different emphasis placed on the legal and political aspects of the First Law Officer role.[30]

5. The UK Parliament recently concluded an extensive review of the role of the Attorney General. The UK Government's response to the Constitutional Affairs Select Committee *Report on the Constitutional Role of the Attorney General* can be found at http://www.attorneygeneral.gov.uk/attachments/Government%20Response%20to%20Report%20on%20Role%20of%20Attorney%20General.pdf.

6. It was determined that the Attorney General should retain the roles of legal adviser to the Government and independent guardian of the public interest. The Committee suggested having a Minister exercise the functions required of the Attorney General in her role as

[29] 'The Work of the Office' http://www.attorneygeneral.gov.uk/sub_our_role_work.htm accessed on 10 August 2009.

[30] Heraghty, B, "Defender of the Faith? The Role of the Attorney-General in Defending the High Court" (2002) 28:2 Mon LR 211; McCarthey A, "Evolution of the Role of Attorney-General" (2004) Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia (2-4th July, 2004). Available online at: http://www.murdoch.edu.au/elaw/issues/v11n4/mccarthy114.html.

Justice Minister, while an independent, unelected person with appropriate legal qualifications held the role of First Law Officer. The Government rejected this proposal, arguing that there were benefits from having both roles filled by an elected Member of Parliament who, by convention, is also a qualified lawyer. The Government also felt the Attorney General should retain responsibility for prosecuting authorities, and issue guidance to prosecutors in her independent capacity as a Law Officer.

7. The tradition of the Attorney General not being a member of Cabinet was maintained. The Attorney General is invited to attend Cabinet by the Prime Minister when issues under her responsibility are on the agenda.[31]

Legal Services to the Government

8. The Government obtains legal advice and services from a number of sources. It uses both private sector solicitors and barristers and its own in-house lawyers.

9. The Attorney General has issued guidelines on the type of work which must be done by in-house solicitors. 'Core' work is work which should be carried out by the Government's in-house lawyers. Core work includes work that involves:

    - national security or other sensitive implications
    - major policy or constitutional issues
    - government-to-government and other international non-commercial work
    - the long-term interests of more than one department, or
    - Cabinet Office coordination.

10. Government departments must consider these restrictions when considering whether to use internal or external legal service providers.

11. The Government's in-house legal service providers are made up of:

    - Parliamentary Counsel (primary legislation draftsman)
    - Foreign Office Legal Advisers (international law)

[31] 'The Government's response to the Constitutional Affairs Select Committee Report on the *Constitutional Role of the Attorney General*' April 2008 http://www.attorneygeneral.gov.uk/attachments/Government%20Response%20to%20Report%20on%20Role%20of%20Attorney%20General.pdf.

- Crown Prosecution Service (which handles about 95% of prosecutions in the UK)
- legal advisers of the departments and agencies, and
- the Government Legal Service (GLS).

12. The GLS has overall responsibility for the in-house lawyers serving the Government. There are 1,904 GLS lawyers providing legal services across the entire spectrum of government activities. The lawyers work as employees of individual government departments, but career development opportunities, training, networking and so on is coordinated and provided by the umbrella organisation GLS. The Treasury Solicitor is the Head of GLS.

13. The Treasury Solicitor (TSol) is the main provider of legal services to government. TSol is one of the largest legal organisations in the UK, employing approximately 800 staff; 461 are lawyers. TSol provides legal services to 180 central government agencies and other publicly funded bodies on a repayment basis. They also have lawyers co-located with clients in a number of departments.

14. TSol's litigation group acts for 800 clients across 180 government departments and public bodies, handling around 20,000 cases a year and representing their clients in a wide range of courts and tribunals.

15. TSol also administers the Attorney General's Panel of Counsel. There are four panels of junior barristers who will undertake European Union and civil law work. There are currently around 354 members of the Attorney General's civil panels, and four panels:

    - The 'A' panel is for experienced junior barristers of ten years or more advocacy experience. These barristers deal with the most complex cases and will be appearing against Queens Counsel (QC).
    - The 'B' panel is composed of middle juniors with between five and ten years advocacy experience. B panel barristers undertake significant cases, but generally are not as complex as matters dealt with by the A panel.
    - 'C' panel appointees will usually have between two and five years advocacy experience. Those appointed to the C Panel will often provide (but not exclusively) the A and B panel members of the future and so will be expected to show the potential to join the A panel.

- The Regional Panel, used for work which must be undertaken outside of London. The Regional Panel is not divided into A, B and C panels. However selection is based on three bands - senior juniors, middle juniors and junior juniors.

16. Use of non-panel counsel by agencies is not permitted unless personally approved by the Attorney General or the Solicitor General, who grants a 'nomination' following a request from the instructing department, which must explain why panel counsel are not being used.

17. Although appointment to any of the panels cannot be a guarantee that work will be available, it is intended that each advocate appointed should be given at least a minimum amount of work, and a monitoring process is in place for this purpose. The fair distribution of work is monitored by examining the financial value of instructions. The total value of work received by the Attorney General's Panel of Counsel is approximately £15 million per annum.

18. TSol also maintains a list of QCs who have previously been instructed by departments or who have expressed an interest in receiving instructions. A nomination from the Attorney General or Solicitor General is always required before a QC is instructed; a rate is always agreed in advance of a nomination being approved. When seeking a nomination for a QC, the Attorney General must firstly be satisfied that counsel on the A panel cannot undertake the work, and then should be presented with a list of three candidates capable of undertaking the work. There is no requirement that any of the QCs put forward have to be on TSol's list.

19. Some departments maintain a list of Standing Counsel. These senior advocates lead in some of the most difficult cases, and provide a source of subject matter expertise, training and strategic advice to panel counsel.

Victoria

20. As a result of an interdepartmental inquiry, the Victorian Government set up a model for the provision of legal services whereby external legal services were to be sourced through a central panel. The objectives of the model were to:

    - ensure cost-competitive, high quality and consistent legal services and advice, and
    - to promote social justice outcomes, including increasing pro bono work, briefing more women barristers, and improving equal opportunity in law firms.

21. The Legal Services to Government Panel Contract (the panel) commenced on 1 July 2002 for an initial period of three years, with two two-year options to extend. Both options were exercised, meaning this initial contract ran for seven years, ceasing on 30 June 2009.

22. At the time of setting up the panel, nine departments were required to use the panel, because it was a 'State purchase contract'. Statutory authorities could opt in. As at 2006, when Beaton Consulting was commissioned to report on the panel, 10 departments and 15 statutory authorities were utilising the panel. It is possible for agencies to use non-panel firms through an exemptions process. Exemptions are infrequently sought, and rarely granted.

23. The panel covered nine component areas of law, with 44 sub-components. A total of 35 law firms provided legal services, with 10 on the general panel, and 25 across a number of specialist panels. The panel is managed by a small group of people in the Department of Justice known as the Government Legal Services Unit. However, it is the client agencies that buy and monitor legal services.

24. Victorian agencies have a choice of legal services providers:

    - in-house lawyers
    - Victorian Government Solicitor's Office (VGSO)
    - panel firms
    - the private bar, and
    - non-panel firms (through the exemptions process).

25. Like the Commonwealth, there are a range of approaches to legal procurement across the Victorian agencies. Legal services in Victoria are divided into 'core' and 'non-core' areas of work. Core work must be done by the VGSO, and non-core work may be done by any of the providers, including the VGSO. The VGSO is entirely owned by the State and does not tender to be on the panel. It has no private sector clients, and exists to serve the whole-of-government interests of the State.

26. As mentioned above, Beaton Consulting was commissioned to conduct a review into the panel, and this Review has had the benefit of reading Beaton's report.

27. Overall, Beaton found that the panel has been a success, and had achieved its objectives. However, the State's leverage could be improved; the panel's systems could be improved

around the exemptions process and the reporting requirements. Beaton considered the two most important improvements would be:

- aligning and improving client procurement practices, and
- enhancing panel administration.

28. Key recommendations of Beaton are identified below.

- Implement an informed purchaser model:
  - For larger agencies, the panel administrators could assist to develop core informed purchaser competencies.
  - For agencies with smaller legal services needs, the panel administrators could become the informed purchasers and assist these agencies.
  - The panel administrators would need to be equipped with legal practice expertise, and therefore this responsibility should be allocated to the VGSO.
- Move the Government Legal Services Unit to the VGSO:
  - Administer the panel contract.
  - Co-develop the informed purchaser model with clients and provide the service to smaller agencies.
  - Create and maintain a matter management system.
  - Develop a system of 'invited-audits' to assist clients to review cost competitiveness and quality.

29. The Victorian Government approached the market in late 2008 for a new panel arrangement to commence 1 July 2009, implementing the recommendations of Beaton. The new arrangements were intended to be simpler and more focused, with a better balance between large and smaller firms. There are now fewer firms across a smaller number of panels and law areas. The panel areas now are:

- General Panel – covering administrative law and government, commercial law, employment and industrial law, and litigation. Each firm on this panel must cover the four main areas of law.

- Commercial projects panel – Firms show satisfactory capability in the four mandated areas of law plus have additional capabilities and expertise in law in relation to large or complex projects; for example, infrastructure.
- Specialist panels – property, intellectual property and technology law, personal injury, coronial inquests, prosecutions, FOI and privacy, and resources. These panels have a limited number of firms, and no more than two general panel firms may be on any one specialist panel.

30. In total, there are now 20 firms – three firms are just on the general panel or the commercial projects panel, eight firms are on either the general panel or the commercial projects panel and one of the specialist panels, and nine firms are just on specialist panels. Only one of the firms on the specialist panels is on more than one of these.

31. For the new panel arrangements, the Legal Panel Gateway was introduced. This is a web-based tool that standardises and streamlines client access to legal services, improves matching of clients' legal needs to firms, and enhances access to statistical and financial information for reporting purposes. The system is also designed to be able to add more functionality, particularly in the area of matter management, and to provide an advice database for users. The social justice obligations in relation to pro bono and equal opportunity continue as they were under the first panel.

Canada

32. The Department of Justice Canada is the central supplier of legal services to more than 40 government departments and agencies. Justice Canada is known as Canada's largest law firm, with over 4,500 staff, approximately half of whom are lawyers.

33. In addition to these lawyers who are employed as in-house counsel in regional offices or legal services units and litigation branches in agencies across Canada, Justice Canada engages private sector counsel to provide litigation services as 'Legal Agents' in limited circumstances. Legal Agent appointments are contracts that may be entered into only by or under the authority of the Minister of Justice (who is also the Attorney General), and are subject to Justice Canada policies, but not subject to government procurement regulations. Legal Agents are used in approximately 1% of all cases, at a cost of approximately C$25-30 million per year.

34. Where there is a need for legal services, a Justice Canada manager decides, in consultation with the client department, whether to assign work to in-house counsel or to contract it to the private sector. Justice Canada's in-house resources are the preferred means of delivering legal services. However, a senior department official may decide to outsource legal services after consideration of certain factors, including:

    - capacity to perform the work within Justice Canada
    - urgency of the work
    - level and impact of risk assessment
    - geographic considerations
    - security considerations
    - conflict of interest concerns, and
    - public interest considerations.

35. External providers are then sourced from a pool of law firms and legal practitioners who have registered their interest in being contracted. Registering involves the firms or practitioners complying with forms available on the Justice Canada website, including detailing compliance with workplace equity policy, security clearance and other requirements. For areas of expertise or geographic locations where there is sufficient recurring demand, Justice Canada periodically pre-qualifies law firms and practitioners from the register who meet those requirements. Justice Canada may then select from the pre-qualified list as appropriate, and recommend those firms or practitioners for appointment by the Minister of Justice, who has the final approval. Pre-qualification does not provide any guarantee of work.

36. If no pre-qualified list exists for a particular area of expertise or location, or if those on the list are inappropriate or unavailable, Justice Canada may also contract on a case-by-case basis in accordance with considerations listed above. Certain cases, such as those involving national security, international relations or matters of public confidence, may be considered by Justice Canada senior officials of such importance or sensitivity that the Minister of Justice's confidence and trust in the law firm or law practitioner are the overriding consideration for appointment selection. These cases are referred to the Minister for selection and approval directly by the Minister.

37. Justice Canada's involvement after appointment and initial instruction ranges from a general overview of the work performed to close monitoring of each stage, depending on the case and contract.[32] All outsourcing appointments are subject to the final approval of the Minister of Justice, and may be terminated at any time without prior notice. Justice Canada generally shares the cost of work with client departments, through dozens of different cost recovery arrangements. Justice Canada examines all invoices associated with external appointments before the client department which used the services proceeds with payment. In 2007 Justice Canada estimated the cost of departmental staff involved in administering these agreements at over C$2 million per year. This excludes the costs incurred by each client department.[33] Justice Canada has since made efforts to implement more uniform agreements.

38. The Auditor General of Canada reviewed Justice Canada's delivery of legal services to government and released its report in May 2007.[34] The report examined whether Justice Canada:

- effectively manages the delivery of legal services to meet the needs of government
- takes appropriate steps to ensure the quality of its legal services, and
- delivers legal services in a cost-effective manner.

39. The Auditor General also found that the government's demand for legal services had grown considerably since the 1980s and attributed this to:

- growing complexity and volume of litigation
- the introduction of the 1982 Canadian Charter of Rights and Freedoms, and
- growth in areas such as Indigenous affairs, taxation and immigration.

40. In relation to Justice Canada's in-house services, the Auditor General found that there was insufficient information available on the volume of work, number of training days taken, use of staff and services standards. Although there were information and advice management systems in place, including desktop access to legal precedents and advice, these were not always up to date or easily accessible by staff outposted in client departments. Similarly, despite Justice

[32] Agent Affairs Program information pack, accessed at <http://canada.justice.gc.ca/eng/dept-min/la-man/about-aprop.html> on 14 July 2009.

[33] *Report of the Auditor General of Canada to the House of Commons*, Chapter 5: Managing the Delivery of Legal Services to Government—Department of Justice Canada, Office of the Auditor General of Canada, May 2007, p 25.

Canada having drafted or implemented service standards in areas such as responsiveness, clarity of legal advice and use of plain language, the practice of using service standards in discussion with clients was not consistent across departments. The Auditor General considered that these were factors which needed to be addressed in order for Justice Canada to better understand and control its costs.

41. At the time of the Auditor General's report, Justice Canada did not have a system in place to 'provide senior management with ongoing and reliable assurance that all services meet minimum quality standards'.[35] Although Justice Canada conducted satisfaction surveys of client departments on an ad hoc basis, the surveys were inconsistent and irregular, such that the results were not comparable across all client departments. Further, the Auditor General was concerned that Justice Canada lacked a clear, consistent definition of 'quality' in relation to legal services. This was found to be contributing to difficulties in assessing whether the department was meeting its objectives of providing efficient and effective legal services to government. The Auditor General recommended that Justice Canada establish written agreements with each client department on the quality of legal services to be provided. It was considered that setting out a shared understanding of expectations with each client department regarding quality of services, as part of a broader system of consistent quality assurance, would assist with measuring whether Justice Canada is meeting its objective of delivering effective and efficient legal services across government.

42. The Auditor General also expressed concerns about the ability of client departments and Justice Canada to control the costs of legal services provided to client departments. The Auditor General was concerned that cost estimates were not regularly provided at the beginning of, nor throughout, cases. Justice Canada had little incentive to control its costs of providing the legal services required by the client departments because any unanticipated overspend is borne by the client department. Similarly, the client departments were found to have little incentive to actively manage the costs of the legal services they sought, because:

    - for many departments, legal services comprises such a small percentage of overall budgets, and

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[34] *Report of the Auditor General of Canada to the House of Commons*, Chapter 5: Managing the Delivery of Legal Services to Government—Department of Justice Canada, Office of the Auditor General of Canada, May 2007.

[35] *Report of the Auditor General of Canada to the House of Commons*, Chapter 5: Managing the Delivery of Legal Services to Government—Department of Justice Canada, Office of the Auditor General of Canada, May 2007, p 14.

- departments may seek additional funds from a special fund for any significant legal costs related to unanticipated significant issues.

43. It was found that such joint responsibility for costs was not enough to moderate demand and control costs. In addition, the Auditor General found that many managers had little understanding of the overall cost of legal services provided to their departments. This was in part due to the fact that while staff signed off on individual invoices for cases, Justice Canada was not able to provide client departments with overall cost information for a whole department.[36]

44. Justice Canada received positive feedback from the Auditor General for its assessment and management of risk in relation to litigation conducted in-house. Justice Canada's lead counsel use the following matrix, reproduced from the Auditor General's report at Figure 6 below,[37] to assess the risk level and impact on government policies, law, programs and budget, and territory/federal relations and international relations.

FIGURE 6 – JUSTICE CANADA LITIGATION RISK MATRIX

Risk Level (Risk Management Actions)

Impact				
	Significant	Considerable management required **Risk Level 7**	Must manage and monitor risks **Risk Level 8**	Extensive management essential **Risk Level 9**
	Moderate	Risks may be worth accepting, with monitoring **Risk Level 4**	Management effort worthwhile **Risk Level 5**	Management effort required **Risk Level 6**
	Minor	Accept risks **Risk Level 1**	Accept, but monitor risks **Risk Level 2**	Manage and monitor risks **Risk Level 3**
		Low	**Medium**	**High**

Likelihood of adverse outcome

[36] Canadian Auditor General Report, p 26.
[37] Canadian Auditor General Report, p 16.

The matrix is used to determine the level of resources to be allocated to each case, and is updated throughout the case as required. Files determined to have a higher risk receive particular attention from senior management as appropriate. The Auditor General suggested that the matrix, or a version of it, be used to assess and manage risk associated with Justice Canada's advisory services.

45. In relation to Justice Canada's use of external legal service providers, the Auditor General identified several weaknesses, including:

    - no documentation of any in-house search for appropriately qualified counsel prior to seeking external counsel
    - lack of documentation regarding why external legal agents were required rather than Justice Canada staff
    - lack of information about why agents were selected, and
    - few performance assessments were undertaken after services were provided, unless negative feedback was received by Justice Canada.

46. The Auditor General was keen to ensure that these and the other weaknesses identified above were corrected as part of wider improvements to Justice Canada's management of legal services. While the provision of legal services for the Canadian Government is very different to that in Australia, in particular given that Justice Canada is not required to follow government procurement policies when procuring legal services, it is nonetheless useful to consider the Auditor General's observations.

Appendix E – Submissions received by the Review

1. Australian Competition and Consumer Commission
2. Australian Government Solicitor
3. Australian Securities and Investments Commission
4. Australian Taxation Office
5. Blake Dawson
6. Clayton Utz
7. Deacons
8. Defence Materiel Organisation
9. Department of Broadband, Communications and the Digital Economy
10. Department of Climate Change
11. Department of Defence
12. Department of Education, Employment and Workplace Relations
13. Department of Families, Housing, Community Services and Indigenous Affairs
14. Department of Finance and Deregulation
15. Department of Foreign Affairs and Trade
16. Department of Heath and Ageing
17. Department of Human Services
18. Department of Immigration and Citizenship
19. Department of Innovation, Industry, Science and Research
20. Department of Resources, Energy and Tourism
21. Department of the Prime Minister and Cabinet
22. Department of Veterans' Affairs
23. Harwood Andrews Lawyers
24. Minter Ellison Lawyers
25. New South Wales Bar Association

26. Office of Parliamentary Counsel

27. Office of the Aged Care Commissioner

28. Office of the Registrar of Indigenous Corporations

29. Private Health Insurance Administration Council

30. Queensland Law Society

31. Sage Legal Services Pty Ltd

32. The Treasury

Appendix F – Consultation meeting attendees

1. ANZ
2. Attorney-General's Department
3. Australian Customs and Border Protection Service
4. Australian Government Solicitor
5. Australian National Audit Office
6. Australian Securities and Investments Commission
7. Australian Taxation Office
8. Blake Dawson
9. Civil Liberties Australia
10. Clayton Utz
11. ComCare
12. Commonwealth Bank
13. Commonwealth Solicitor-General
14. Defence Materiel Organisation
15. Department of Broadband, Communications and the Digital Economy
16. Department of Defence
17. Department of Education, Employment and Workplace Relations
18. Department of Families, Housing, Community Services and Indigenous Affairs
19. Department of Finance and Deregulation
20. Department of Foreign Affairs and Trade

21. Department of Health and Ageing

22. Department of Human Services

23. Department of Immigration and Citizenship

24. DLA Phillips Fox

25. Federal Court of Australia

26. Holding Redlich

27. Mallesons

28. Minter Ellison

29. Mr Alan Robertson SC

30. Mr Neil Williams SC

31. Mr Norman O'Bryan AM SC

32. Mr Peter Hanks QC

33. Mr Stephen Lloyd SC

34. Office of Parliamentary Counsel

35. Russell Kennedy Pty Ltd

36. Telstra

37. The Treasury

38. Victorian Department of Justice

39. Victorian Government Solicitor's Office