

**LEGISLATIVE COUNCIL GENERAL PURPOSE STANDING COMMITTEE No. 1  
INQUIRY INTO SERIOUS INJURY AND DEATH IN THE WORKPLACE**

Complete set of Questions on Notice and Answers

**Questions Taken on Notice on Monday, 15 March 2004**

3.1 Mr Clarke asked Mr Blackwell: Do you have a view on whether you wish to waive your claim of professional privilege so as to answer the question from Ms Rhiannon regarding the decision not to prosecute in the case of David Selinger? (Hansard, page 24)

**Answer:**

Following consultation with the Crown Solicitor Mr Blackwell has decided not to waive legal professional privilege in this instance.

3.2 Ms Rhiannon asked Ms Grant: Why was the decision taken not to prosecute in the case of David Selinger? (Hansard, page 25)

**Answer:**

Please see answer to question 3.1 above.

3.3 Ms Rhiannon asked Ms Grant: Are you aware if any part of the OH&S Act was breached when David Selinger died at Fox Studio? (Hansard, page 25)

**Answer:**

Following consultation with the Crown Solicitor WorkCover has decided that:

- it would be inappropriate for a solicitor in WorkCover's Legal Group to express an opinion whether the OHS Act had or had not been breached;
- WorkCover's task is to assess whether there is sufficient evidence to warrant the bringing of a prosecution; and
- it is the task of the Court to determine whether a breach has occurred.

3.4 Mr Clarke asked Ms Grant: What were the matters that WorkCover took into account when it initially decided not to prosecute the case of Mr Welch (Hansard, page 28)

**Answer:**

There was never any decision made not to prosecute this matter because WorkCover initially considered that the incident was a road safety matter, and that it should be investigated by the NSW Police, who were already conducting an investigation.

Following the receipt of additional information and after carrying out further investigations, WorkCover is prosecuting the controller and owner of the site, CJ & SJ O'Keefe Building Ltd and the proprietor, Mr O'Keefe. The matter is set down for hearing in the Industrial Relations Commission for 5 days in June 2004.

3.5 Ms Rhiannon asked Ms Panagoda: Why did WorkCover not do a brief on the Chun Lin case? (Hansard, page 30)

**Answer:**

WorkCover undertook preliminary investigations of the incident but when it was determined that the incident was not work related and was in fact a motor vehicle accident, WorkCover deferred to New South Wales Police as the lead investigative agency. At that stage, all relevant reports, notes and photographs were provided to Police. The Police provided a brief to the Coroner.

A subsequent inquest in July 2002 was terminated by the Coroner and papers forwarded to the Director of Public Prosecutions for consideration. The Coroner did not determine that WorkCover should take any greater role in the investigation of this incident. In February 2004 WorkCover was advised that no charges would be laid under the *Crimes Act 1900* in relation to this matter. WorkCover has received counsel's advice and is undertaking further investigations.

3.6 Mr Clarke asked Mr Reed: Could you provide a copy of the whole-of-government guidelines on outsourcing of legal services? (Hansard, page 53)

**Answer:**

At attachment A is a copy of the Attorney General's Department Guidelines for Outsourcing Government Legal Work.

3.7 Mr Clarke asked Ms Grant: Could you produce a list of firms to which WorkCover refers cases for prosecution? (Hansard, page 56)

**Answer:**

WorkCover currently refers cases for prosecution to the following members of the Legal Panel:

- Carroll & O'Dea
- Crown Solicitor's Office
- Dibbs Barker Gosling
- Moray & Agnew
- Phillips Fox
- Shaw McDonald.

3.8 Mr Clarke asked Mr Reed: Could you indicate the areas of law in which WorkCover was seeking expertise when it identified its list of outsourced legal firms? (Hansard, page 57)

**Answer:**

When appointing members of the Legal Panel, WorkCover sought expertise in the following areas of law:

- Corporate/commercial
- Insurance
- Real property
- Intellectual property
- Administrative law
- Taxation
- Industrial relations/employment
- Prosecutions
- Compensation Court (before the establishment of the Workers Compensation Commission).

3.9 Ms Cusack asked Ms Grant: Is there scope for a lesser set of penalties that could be used in those cases in which the DPP feels that manslaughter cannot be proven to the necessary standard? (Hansard, page 58)

**Answer:**

The introduction of any new offences is a significant policy matter that will need to be determined by the Government and the legislature.

3.10 The Chairman asked Ms Grant: In relation to WorkCover's answer to question 2.20, can you provide the Committee with the outcome of the cases listed? Was WorkCover successful in its appeals? (Hansard, page 58)

**Answer:**

As indicated in WorkCover's response to the Committee's previous question 2.20, it is a long-standing principle that the Crown's right of appeal is to be exercised with caution and restraint. Even so, WorkCover does consider the adequacy of a sentence in every matter. WorkCover has had considerable success on the occasions that it has considered it necessary and justified to exercise its right of appeal. The following table sets out the outcomes of the cases listed in question 2.20:

	Proceedings under	Sentence appealed against	Appeal Outcome
<i>Inspector Neil Buggy v WeatherTex Pty Limited</i> [2003] NSWIRComm 273	s 16 (1) OHS Act 1983	Fine \$18,750	New fine \$70,000
<i>Dowling v Bourneilis &amp; Bedrock Constructions (NSW) Pty Ltd</i> [2003] NSWIRComm 88	s 15 (1) OHS Act 1983 s 50 OHS Act 1983	Dismissal of charges	Costs awarded to WorkCover; court declined to impose fine
<i>Legge v Coffey Engineering Pty Ltd (No 3)</i> [2002] NSWIRComm 30	s 15 (1) OHS Act 1983	Dismissal of charges	New fine \$15,000 plus \$20,000 costs
<i>Vierow v Ridge Consolidated Pty Ltd (No.2)</i> [2002] NSWIRComm 254	s 15 (1) OHS Act 1983	Acquittal	New fine \$105,000 plus costs
<i>Batty v Graincorp Operations Limited</i> [2002] NSWIRComm 49	15 (1) OHS Act 1983	Fine \$26,000	New fine \$65,000
<i>Bullitude v Grice Constructions Pty Limited (No 2)</i> [2002] NSWIRComm 234; see also <i>Bullitude v Grice Constructions Pty Limited</i> [2002] NSWIRComm 20	s 16 (1) OHS Act 1983	Acquittal	New fine \$10,000 plus \$6,000 costs
<i>Inspector Ian Lancaster v Burnshaw Constructions Pty Ltd</i> [2002] NSWIRComm 319	s15 (1) OHS Act 1983	Fine \$13,000	New fine \$26,000
<i>Workcover Authority of New South Wales (Inspector Keenan) v. Technical &amp; Further Education Commission</i> [1999] NSWIRComm 489	s 16 (1) OHS Act 1983	Acquittal	Appeal dismissed (held accident did not occur at place of work)

3.11 Ms Burnswoods asked Ms Grant: In relation to WorkCover's answer to question 2.10, were the four fines issued in Arthur Street in Homebush paid? (Hansard, page 59)

**Answer:**

Fine payment falls under the administration of the Infringement Processing Bureau which advises that the fines have not been paid and have been referred to the State Debt Recovery Office for recovery action.

3.12 Ms Rhiannon asked Mr Blackwell: Do you believe that an audit and inspection power should be placed in the OH&S Act to enhance WorkCover's enforcement powers?

**Answer:**

WorkCover inspectors already have very broad powers under the OHS Act to enter premises and to carry out inspections. All inspectors' powers are backed up with offences of failure to comply. No circumstances have been identified in which inspectors have been unable to ensure the safety and security of workplaces because of shortcomings in the powers available to them. In carrying out an inspection, an inspector undertakes a systematic review of work systems with a focus on potential risks which is similar to an audit process.

The main powers of audit and inspection available to inspectors are as follows.

Section 50 – an inspector may enter any premises the inspector has reason to believe is a place of work.

Section 59 – after entering premises, an inspector may:

- make searches, inspections, examinations and tests (and take photographs and make video and audio recordings);
- take for analysis a sample of any substance or thing that the inspector considers may contain or be contaminated by a substance that is a risk to health;
- carry out medical examinations with the consent of the person to be examined, if the inspector is a medical practitioner
- carry out biological tests;
- require any person in or about the premises to answer questions or otherwise furnish information;

- require the occupier of the premises to provide the inspector with assistance and facilities reasonably necessary to enable the inspector to exercise the inspector's functions;
- require the production of, and inspect, any documents in or about those premises; and
- take copies of or extracts from documents.

Section 60 – after entering premises, an inspector may:

- dismantle any plant or thing on the premises for the purpose of examination, if the inspector reasonably believes the plant or thing has been used in the commission of an offence under OHS legislation
- take any plant, substance or thing from the premises, if the inspector reasonably believes it has been used in the commission of an offence against the OHS legislation
- keep any plant, substance, sample or thing taken under the section

Section 62 – an inspector who believes a person is capable of giving information, producing documents or giving evidence in relation to a possible contravention of the OHS legislation may serve a notice requiring the person:

- to give written information;
- to produce documents;
- to appear before an inspector and give oral or written evidence and produce documents.

Inspectors may also issue a range of notices:

- section 89 – investigation notices to stop plant or prevent disturbance of premises
- section 91 – improvement notices requiring a contravention of the OHS legislation to be remedied
- section 93 – prohibition notices prohibiting the carrying on of an activity giving rise to risk.

Supplementary powers (such as a power to demand a person's name and address) exist to make sure that inspectors are able to take effective action.

**Additional question placed on notice by Ms Burnswoods**

3.13 In respect to the years 2002 and 2003:

- a) How many employers have been 'caught' without a workers compensation policy?
- b) How many employers were subject to the maximum penalty of \$55,000 or six months imprisonment under Section 155 of the Act?
- c) If the maximum under Section 155 was not imposed, was any employer imprisoned and what was the maximum fine imposed under Section 155?
- d) How many employers were issued with the \$750 on the spot fine for not having a policy?
- e) Do certificates issued under Section 156 relate to employers without workers compensation policies?
- f) Does WorkCover recover in every case monies paid arising from claims under the Uninsured Liability and Indemnity Scheme?
- g) If some employers have not been successfully pursued, could you provide the names of those employers and what amount of revenue is outstanding for the last 3 years?

**Answer:**

- a) In the 2002/03 financial year, WorkCover issued penalties and/or prosecuted 73 employers for not having workers compensation insurance.
- b) None.
- c) None imprisoned. Maximum fine imposed by the Courts in 2002/03 financial year was \$5,000.
- d) In 2002/03, 65 fines were issued by WorkCover including 38 on the spot fines.
- e) Yes.
- f) No, but WorkCover seeks to recover all monies expended on claims made against ULIS.
- g) WorkCover cannot provide the names of employers due to privacy provisions in the *Workplace Injury Management and Workers Compensation Act 1998* and the *Privacy and Protection of Personal Information Act 1998*.

3.14 Have Eugene Benson and/or Columbus Property Developments PTY Limited been issued any fines, if yes, have they been paid?

**Answer:**

Columbus Property Developments Pty Limited has been issued with ten fines. Fine payment falls under the administration of the Infringement Processing Bureau which advises that the fines have not been paid and have been referred to the State Debt Recovery Office for recovery action.



**Additional question placed on notice by Ms Rhiannon**

3.15 What percentage of prosecutions that WorkCover has initiated each year for the past five years have been against a government department?

**Answer:**

On average four per cent of prosecutions per annum are against government departments.

3.16 Which government departments have been prosecuted by WorkCover in the past five years?

**Answer:**

WorkCover's previous convictions database records details of successful convictions and indicates that Government departments successfully prosecuted by WorkCover since 1 January 1999 are:

Department of Ageing, Disability and Home Care	8 prosecutions
Central Sydney Area Health Service	4 prosecutions
Department of Education and Training	16 prosecutions
NSW Health Department/Ambulance Service	2 prosecutions
Hunter Area Health Service	3 prosecutions
Illawarra Area Health Service	1 prosecutions
Maritime Services Board	1 prosecution
Mid Western Area Health Service	1 prosecution
National Parks and Wildlife Service	3 prosecution
NSW Police Service	3 prosecutions
Department of Public Works	1 prosecution
Roads and Traffic Authority	6 prosecutions
Department of Sport and Recreation	2 prosecutions
Rail Infrastructure Corporation	16 prosecutions
State Rail Authority	11 prosecutions
State Transit Authority	2 prosecutions
Technical and Further Education Commission	4 prosecutions
Urban Transit Authority	1 prosecution
Western Sydney Area Health Service	3 prosecutions

Total: 88 successful prosecutions

3.17 Where government departments have been prosecuted by WorkCover and how many times has each government department been charged?

**Answer:**

Please see answer to question 3.16 above.

3.18 Of the prosecutions of government departments over the past five years which were successful and which were not?

**Answer:**

As indicated in answer to question 3.16 above, WorkCover's previous convictions database records details of successful convictions. The database does not record details of unsuccessful prosecutions. To derive specifics concerning unsuccessful prosecutions would be an onerous exercise requiring a significant resource commitment. However, as a representative sample, as previously indicated to the Committee, WorkCover's prosecutions during 2002/03 had a 96% success rate.

3.19 Has WorkCover's Asbestos and Demolition Unit been disbanded?

- a) If it was disbanded when did this happen?
- b) If it was disbanded why was it?

**Answer:**

The functions of the asbestos and demolition unit were transferred to the Construction Industry Team and the State Coordinator, Asbestos and Demolition, in February 2001, as part of the implementation of the Demolition and Asbestos Strategy and the OHS Division's new Industry Team Structure.

The Strategy was implemented because:

- the retention of a specialised unit compartmentalised the inspectorate's functions, and reduced WorkCover's ability to allocate resources efficiently;
- the retention of a specialist unit de-skilled inspectors, particularly in country areas, who are not employed in the specialist unit; and
- the new Industry Team structure meant that more staff and other resources could be targeted to demolition and asbestos activity.

The Strategy involves targeted industry blitzes, additional compliance checks during and following the assessment of demolition permit applications and refresher training in demolition and asbestos issues for inspectors.

<p>3.20 If the Unit was disbanded and in light of the circumstances surrounding the death of Gregory John Reece would you see it appropriate to reinstitute this specialised unit?</p> <p>If not what improvements need to be made to WorkCover's coverage of demolition work?</p> <p><b>Answer:</b></p> <p>No. WorkCover will work with industry to improve outcomes in demolition by convening regular meetings of the Demolition and Asbestos Consultative Committee, which is used to identify and resolve issues associated with this sector.</p>
<p>3.21 How many female inspectors does WorkCover currently employ?</p> <p><b>Answer:</b></p> <p>67.</p>
<p>3.22 How many male inspectors does WorkCover currently employ?</p> <p><b>Answer:</b></p> <p>225.</p>
<p>3.23 How many female inspectors have resigned from WorkCover in the past five years for reasons other than retirement?</p> <p><b>Answer:</b></p> <p>17.</p>

3.24 How many male inspectors have resigned from WorkCover in the past five years for reasons other than retirement?

**Answer:**

41.

Death of Chun Lin at UNSW

3.25 Was this case reactivated in June 2002?

If so what new information did you receive or what circumstances changed that resulted in the case being reactivated in June 2002?

**Answer:**

The case was not reactivated. Please see answer to question 3.5 above.

3.26 Why did the police recommend that no charges be laid in the Chun Lin case?

**Answer:**

This question falls under the administration of the NSW Police. WorkCover has therefore referred to the question to the NSW Police.

3.27 Why did WorkCover not obtain statements from witnesses in the investigation into the death of Chun Lin?

**Answer:**

WorkCover inspectors undertook preliminary investigations of the incident but when it was determined that the incident was not work related and was in fact a motor vehicle accident, WorkCover deferred to New South Wales Police as the lead investigative agency. At that stage, all relevant reports, notes and photographs were provided to Police.

3.28 Was any part of the Occupational Health and Safety Act breached when Chun Lin died?

**Answer:**

As indicated in the answer to question 3. 3 above, the Crown Solicitor has advised WorkCover that:

- it would be inappropriate for a solicitor in WorkCover's Legal Group to assert that the OHS Act had been breached or not been breached;
- WorkCover's task is to assess whether there is sufficient evidence to warrant the bringing of a prosecution; and
- it is the task of the Court to determine whether a breach has occurred.

In the light of the Crown Solicitor's advice, it would be inappropriate to comment any further on this matter.

3.29 Did the State Coroner, Mr Abernethy, reopen the file on the death of Mrs Welch?

If this is the case why does WorkCover understand this decision was taken when WorkCover had recommended no prosecution?

**Answer:**

The Coroner initially dispensed with an inquest on 6 September 2001. The Coroner reviewed his previous decision on 11 December 2001 following receipt of additional submissions by Mrs Welch's husband. No inquest was held as a result of the review. Please see answer to question 3.4 above.

3.30 Was any part of the Occupational Health and Safety Act breached when Mrs Welch died?

**Answer:**

As indicated in the answer to question 3.3 above, the Crown Solicitor has advised WorkCover that:

- it would be inappropriate for a solicitor in WorkCover's Legal Group to assert that the OHS Act had been breached or not been breached;
- WorkCover's task is to assess whether there is sufficient evidence to warrant the bringing of a prosecution; and
- it is the task of the Court to determine whether a breach has occurred.

The Industrial Relations Commission will determine the answer to this question in Court Session. WorkCover is prosecuting the controller and owner of the site, CJ & SJ O'Keefe Building Ltd and the proprietor, Mr O'Keefe, for breaches of the OHS Act. The matter is set down for hearing in the Industrial Relations Commission for 5 days in June 2004.

3.31 Was any part of the Occupational Health and Safety Act breached when David Selinger died?

**Answer:**

Please see answers to questions 3.1 to 3.3 above.

3.32 Did WorkCover initially decide not to proceed with this case as it was deemed that there was very little chance of obtaining a successful prosecution in this case?

**Answer:**

Please see answers to questions 3.1 to 3.3 above.



3.33 Have Eugene Benson and/or Columbus Property Developments Pty Limited been issued any fines, if yes, have they been paid?

**Answer:**

As indicated in the answer to question 3.14 above, Columbus Property Developments Pty Limited has been issued with ten fines. Fine payment falls under the administration of the Infringement Processing Bureau which advises that the fines have not been paid and have been referred to the State Debt Recovery Office for recovery action.

3.34 Reference has been made to previous fines being issued in 2001 at Arthur Street in Homebush. Have these fines been paid? If so, how much and when?

**Answer:**

As indicated in the answer to question 3.11 above, fine payment falls under the administration of the Infringement Processing Bureau which advises that the fines have not been paid and have been referred to the State Debt Recovery Office for recovery action.

Attachment "A" to Committee's questions on notice dated 15 March 2004:

Attorney Generals Department Guidelines for Outsourcing Government Legal Work

1. Justification
2. Planning of the Process
3. Design of Tender Documentation
4. Design Evaluation Process
5. Comparative Evaluation of Tender Bids
6. Contracting with Successful Tenderer
7. Management of the Ongoing Relationship
8. Evaluating performance.

The term "Legal service providers" has been used throughout. It refers to private legal firms, the Crown Solicitor's Office and in certain circumstances will include use of barristers.

**PROBITY ISSUES**

There are four fundamental probity issues which must inform the entire process of locating suitable external legal service providers. The process itself should be transparent, value must be obtained on behalf of the agency, there must be accountability for the work, and any potential or actual conflicts of interest must be addressed.

**TRANSPARENCY OF PROCESS**

Legal service providers responding to publicly advertised tender invitations or selective tender invitations may invest considerable time and resources in the preparation of those tender documents. It is essential that the process itself is open and that tenderers have confidence in that process. The documentation should outline the procedures which will be followed, the opportunities for briefing and information sessions and the steps which will be undertaken in evaluating the tender bids should all be set down. If fairness and impartiality are not apparent, and tenderers perceive that there may be a problem with procedures, they may be reluctant about making a bid. In that case, competition is likely to be lessened and the best value for money may not be achieved. Transparency in the entire contracting out process is essential so that legal service providers and members of the public can have confidence in the outcomes.

**OBTAINING VALUE**

Obtaining value for money means ensuring that the benefits received equate with costs paid. Determining what constitutes value for money will require a range of evaluation criteria. These may include factors such as:

- experience;
- reliability;
- knowledge of agency's needs;
- continuity in the legal services provider's team;
- qualifications and experience of lawyers providing the legal services;
- reliability;
- timeliness in the provision of services.

## ACCOUNTABILITY ISSUES

Public sector accountability to the community is an essential and reasonable requirement. Such accountability requirements are designed to save money, resources and time in the long term and prevent allegations of corruption, maladministration and the wastage of public resources. Accountability means that those involved in the contracting out process and ultimately the agency chief executive are held to account for each stage of the process. The process must therefore be well-documented, consistent and able to be held up to the most intense scrutiny. Agencies should be aware that the Independent Commission Against Corruption has also prepared a document "*Contracting for Services: The Probity Perspective*" which should be reviewed alongside these guidelines.

## DEALING WITH CONFLICTS

The contracting out of legal services must be conducted with a high degree of impartiality and integrity. Conflicts of interest may arise where those in decision making processes are influenced or appear to be influenced by any personal interests when they are carrying out their responsibilities. It is therefore essential that those involved in the decision making process are not placed in a position where they make decisions that they might personally benefit from. Where any financial gain is or may be involved then a decision maker must withdraw from the process and not be involved in determinations to award contracts to a particular tenderer.

Potential conflicts of interest should be prevented by ensuring that all involved in the contracting out process understand their obligations to disclose any potential or actual conflicts and ensuring that the process itself invites tenderers to address any potential conflicts.

It may be particularly relevant for some particular agencies to address the question of legal firms currently acting for non-government clients who may be in an existing conflict situation with another government agency. The tender specification should include coverage of potential and actual conflicts of interest. The conflict of interest probity factors involve both the detection of conflicts of interest and the resolution of those conflicts.

The Independent Commission Against Corruption guidelines on *Contracting for Services* addresses these issues in some detail.

### 1 JUSTIFICATION

#### 1 . 1 DESIRED OUTCOMES?

Prior to determining to use external legal service providers, the agency should review the nature of the legal services which are required and the specific outcomes which are sought. Agency legal departments will already have identified routine work which is completed within the department or core work which is referred to the Crown Solicitor's Office. A necessary starting point is to ask why external legal service providers should be considered. Desired outcomes should be documented. Use of the Bar for specialist advice should not necessarily be automatic. Other legal service providers should be considered.

#### 1 . 2 INTERNAL REVIEW CAPACITY

The internal legal department capacity should be reviewed and consideration given to the nature of any specialist expertise which might be required, whether it is available in-house, whether there is sufficient information technology to support the particular legal services required, or whether there is sufficient objectivity to allow the best outcome. Where there are uncertainties about the internal capacity to complete the legal work in question, agencies are referred to the separate guidelines on reviewing internal legal services.

#### 1 . 3 TYPE OF LEGAL WORK

The legal work may be either routine institutional work, or legal assignments on a one-off project basis. Under some circumstances, agencies may also consider advertising a standard offer for legal services to support the agency or to support a particular programme of the agency for a given period of time. Routine institutional work generally requires expertise at a lower level, and is more likely to be systems-based. More resources may be required and this sort of work is highly suitable for greater use of technology. This work is generally ongoing and is not often urgent. Its timing is longer term rather than immediate. Objectivity is not usually a critical issue, and it may be cost-effective under certain circumstances to at least test the external legal service market through a competitive tender to establish whether routine institutional work could better be completed by an external legal service provider. Routine institutional work may be cost effectively completed by firms which can use technology and use relatively junior or paralegal staff to complete the work. In other circumstances, the agency may determine that it is appropriate to complete routine institutional work in-house. This may be determined by the size of the in-house legal department and the extent of the routine institutional work which is required.

In some circumstances, external legal service providers will be invited when there is a one-off project or legal assignment which needs to be completed. This may be litigious or transactional work but it will generally require expertise which is specialist and at a high level. Such assignments are more likely to require project management skills, and timing may be a critical issue with tight deadlines being common. Whilst expertise may exist in-house it may not be available due to other commitments. Objectivity may be a critical issue, and it may be cost-effective to use external services through a selective tendering process or through a full competitive tendering process.

In some circumstances, agencies may determine that a cost-effective option is to invite offers for the provision of legal services to support an entire agency, or to support an entire programme within an agency. In these circumstances, the legal services manager will be responsible for the management of the legal function, ensuring that legal work is completed to a high standard, in a timely manner and in a cost-effective manner. In some circumstances, agencies may determine that all legal work of a particular kind; for example environmental, employment and industrial, trade practices, will be tendered out due to the absence of specific specialist expertise within the legal department.

Under certain circumstances, legal officers will brief counsel directly. The same rigorous considerations should apply before counsel are briefed. In other words, there should be a review of the nature of the legal work and the expertise required and the justification for the use of the bar should be prepared for the justification statement. The Attorney-General currently requires that the Crown Solicitor's Office provide details of counsel who are briefed.

To date, only use of Senior Counsel requires formal notification by all agencies to the Attorney-General. However, as part of the review by the Attorney-General's Department, it is clear that a number of agencies are currently briefing counsel where work might be more effectively competed, either by private legal firms, the Crown Solicitor's Office or legal officers within the agency itself.

With recent changes to the Legal Profession Act and changes in respect of Bar rules, increasing recognition of the advocacy skills of solicitors and the emergence of specialist legal firms, the use of the private bar by agencies should be re-evaluated.

There will remain many circumstances in which expert counsel assistance will be essential, either in the conduct of litigious matters, or in the provision of specialist advice. However, agencies should be mindful of the cost constraints and ensure that use of counsel is appropriate to the task, to the specific outcomes sought and is the most cost-effective way of obtaining the legal services in question. Barristers should not be used automatically simply because this was past practice.

#### 1.4 JUSTIFICATION STATEMENT

The justification statement will indicate the circumstances which justify the decision to seek an external legal service provider and will document the relevant factors.

#### 1.5 APPROVAL TO PROCEED

In most circumstances, the justification statement will be submitted to the approving officer and approval will need to be granted before proceeding.

### 2 PLAN TENDER PROCESS

#### 2.1 WHO MANAGES THE PROCESS?

Having determined that external legal service providers are necessary, a project co-ordinator or liaison officer should be appointed to oversee the process from this point. Ideally, this will be someone from within the legal department of the agency, perhaps assisted by those with expertise in contracting out of other goods and services on behalf of the agency. It is particularly important that if lawyers are not directly involved in the management of the contracting out process, that they are consulted at each step of the process to ensure that the particular requirements of legal services will be effectively met. It should be acknowledged that contracting out of legal services is somewhat different to contracting for other goods and services. However the same probity issues must inform the process.

It is recommended that a small evaluation panel which is consistent in membership throughout the process will assist the manager.

## 2.2 SELECTIVE OR FULL TENDERING?

### *Selective tendering*

Selective tendering has advantages in possible time savings. The work in question may commence earlier and this may be a major determining factor with genuinely urgent work. Selective tendering may be cost-effective due to the significant deployment of resources required in full public tendering. Fewer internal resources will be required in selective tendering. Selective tendering may allow the continuation of existing excellent working relationships. There are also disadvantages associated with selective tendering. These include the fact that the market might not be fully tested, there may be a perception problem that probity factors are not being considered and followed. There may be a perceived absence of transparency in the process. Some excellent legal service providers may be overlooked with selective tendering.

### *Full public tendering*

Full public tendering may involve two stages where expressions of interest ("EOI's") are called for, and then shortlisted tenderers are invited to submit full tender bids. The advantages of this process are that the full market can be tested through public advertisement, unknown and as yet untested suppliers may emerge and this may be a cost-effective way of obtaining legal services. The public perception is likely to be positive, with government agencies being seen to invite competition from the full legal service market.

### *Disadvantages*

The disadvantages of full public tendering are that it may be very time-consuming, significant resources may be required to assess both expressions of interest and full tenders where large numbers may be received. This may translate into significant cost and may not result in an efficient and effective legal solution. The full public tendering, whether through a two-stage process of expressions of interest followed by full tenders requires rigorous selection procedures.

## 2.3 DETERMINE EVALUATION

It is recommended that the evaluation criteria be quite specific and not generalised. The tender selection group should discuss in detail what they seek from the external legal service provider. The specific nature of the legal work required should be detailed.

The nature of an anticipated advising should be set out in full. For example:

- business law
- commercial and business strategies
- general commercial advice
- corporations law
- trade practices law
- contracts
- formulation and use of documentation
- drafting of contracts
- advice during contract negotiation
- representation of the agency's interests
- interpretation of obligations
- leases and agreements
- specific clauses
- liability
- warranty
- insurance
- liquidated damages
- indemnity

In addition, the tender selection team should document other expectations of external legal service providers such as the following:

- (a) commitment to client service and provision of commercially useful advice;
- (b) firm expertise;
- (c) client recognition;
- (d) periodic services audit;
- (e) costs and billing agreements;
- (f) management of instructions;
- (g) value-added services;
- (h) client knowledge;
- (i) capacity to serve over fixed period of time.

Specific evaluation criteria might also include:

- Engagement management
- Technical expertise including the expertise of the named tender team personnel
- Track record in area
- Knowledge of agency legal requirements
- Commitment of resources
- Commitment to alternative dispute resolution.

## 2.4 REVIEW AND EVALUATE CURRENT RELATIONSHIPS WITH LEGAL SERVICE PROVIDERS

During the planning process, it is important to revisit existing relationships and to ensure that existing providers who have provided satisfactory service to the agency are not overlooked or disadvantaged. A systematic review of recent existing relationships with private legal firms, the Crown Solicitor's Office and, where appropriate, individual Counsel should be conducted at this stage.

## 2.5 LEGAL SERVICES BUDGET

The amount of money spent on the provision of legal services should be reviewed. Having determined the extent of contracting out of legal services, the tender selection team should determine to what extent the range of recent legal fees should be made available as part of the tender documentation. In some cases, it has been common practice to indicate to potential tenderers the extent of the legal budgets which is likely to be available. In other circumstances, tenderers are simply invited to provide their standard hourly rates for the delivery of legal services. In any case the tender selection team should be familiar with the costs of legal services within the agency in the recent past and should be conscious of any aberrant situations that might account for a significant increase or decrease in the legal budget.

## 2.6 CRITICAL PATH PLAN

A critical path plan of the contracting out process should be prepared, indicating the various steps along the way. Should it be determined that an initial expression of interest is to be called for, then the process should be documented through the review of the expressions of interest into the tender programme.

## 3 DESIGN DOCUMENTATION

### 3.1 SETTLE SPECIFICATION DETAILS

Following identification of desired outcomes and evaluation criteria, the content of the tender specification document should be determined. Tender specifications vary widely. In some cases extremely detailed documents are prepared. The following topics might be considered for inclusion in a tender specification:

- tender information;
- acceptance of tender;
- pre-lodgement briefing sessions;
- tender evaluation criteria;
- security;
- insurance;
- lodgement of tenders;
- other relevant government policies;
- retention of tender documents;
- obligations of tenderers;
- disclaimer;

- inquiries.

### 3.2 DOCUMENTS

The tender selection group should determine which documents are going to be released to prospective tenderers. In some cases a two-stage process involves the public advertising of a call for expressions of interest. In this case the basic objective is to shortlist prospective full tenderers from expressions of interest received. In this case, the advertisement would set down the basic evaluation criteria. In other circumstances a full tender is advertised in the first instance. Whichever course is followed, a series of documents should be prepared in advance of any public advertisement. These documents will include:

**The tender specification** which sets out in full the nature of the legal work to be completed and the evaluation criteria which will be used. As indicated above, it is essential that probity issues inform the whole process, including the process of designing documentation. It is essential that there be transparency of process, that the government obtains value for money, that there is accountability and that there are provisions for dealing with any potential conflicts of interest.

**An information kit on the agency** will assist potential tenderers to address central issues and to appreciate the overall context in which they might operate.

**Draft contract** - it is helpful if a draft contract is prepared and included with the tender documentation.

**Letters** - should be prepared in advance where there is to be selective tendering. The letter should get out the selection criteria and procedural details and may be accompanied by a full specification.

**The advertisement itself should be prepared** - it should ensure that the process of selection is broadly outlined, that the selection criteria to be followed are indicated and that timing details are set down. Where the request is for firms to be considered as part of a panel of legal advisers, this should be stated as well. The advertisement should make the whole process as clear as possible.

**Guideline notes for telephone inquires** should also be prepared - it is essential that the named inquiry officer shares consistent information with all who respond by telephone to the advertisement.

**Pre-tender briefing notes** - it is preferable for a formal pre-tender briefing to be given where a significant amount of work is involved. This may take the form of an advertised pre-tender briefing information session, or specific arrangements may be made for firms to send representatives to meet with an appropriately briefed inquiry officer.

All the above documentation should be concluded before the advertisement is lodged.

### 3.3 PUBLICITY

Normal government provisions for advertising of tenders will apply.

### 3.4 RELEASE INFORMATION KITS

Arrangements should be made for those responding to the advertisement to receive the information kits including the documentation listed above.

### 3.5 DRAFT CONTRACT

(See step 6.)

### 3.6 PRE-TENDER INFORMATION SESSIONS

The quality of these pretender briefing sessions will significantly influence the quality of the bids. It is in the interests of the best possible provision of legal services to encourage openness and full disclosure in respect of the work of the agency, its likely legal service needs, existing legal personnel, the nature of working relationship envisaged between the external legal service provider and the in-house lawyers and the general history of past relationships with external legal service providers. The pretender information sessions should be well-planned, with consideration

being given to the following matters:

- Who will deliver the briefing sessions?
- When will they be held?
- Where will they be held?
- How will they be conducted?
- What visual aids might be required (overheads).

- Coverage to include nature of legal services required.

Information provided should be consistent for all potential tenderers.

It is helpful for private legal firms to be briefed on the agency itself including its programme areas, any geographical considerations, likely major matters, whether these are able to be discussed. As some private legal firms have had limited experience in working with government, it is helpful for the briefing session to include a general statement about the way in which legal services are provided within government, the policy issues, delegations and procedures and practices.

Liaison people - the person conducting the briefing session should indicate how the relationship will be managed, including indicating who the legal service manager is and backgrounding that person. Questions should be invited and encouraged.

### 3.7 OPPORTUNITIES FOR TOURS

In some cases, it may be appropriate for potential tenderers to meet with legal officers to tour the agency and to learn more of the work of the agency. If opportunities for tours are to be granted, they should be offered to all potential tenderers and during the pretender information sessions.

## 4 EVALUATION PROCESS

### 4.1 APPLY EVALUATION CRITERIA

See steps 2 and 5.

### 4.2 REVIEW RESPONSES

Tender responses should be reviewed, listed and an initial consideration given to short-listing of tender responses. Care should be taken to ensure that the selection criteria as advertised are strictly followed. Assuming that a two-stage process is being followed with expressions of interest and final full tenders with presentations, it is important to ensure that this process is conducted promptly.

### 4.3 DEVELOP SPECIFIC TASKS FOR SHORT-LISTED TENDERERS

After the tender selection committee has met and reviewed responses against agreed selection criteria, short-listed tenderers may be invited to deliver presentations. It is recommended that specific evidence is sought from each of the short-listed tenderers in respect of their capability. Step 5 below details methods for evaluation. In planning the evaluation process, consideration should be given to methods of comparative evaluation which involve practical tasks for shortlisted tenderers. Some examples of tasks which might be allocated to short-listed tenderers are as follows:

- Opportunities to review a mock file and suggest a strategy for the conduct of the matter.
- Supply of a case study and invitations to recommend the next course of action.
- Drafting of specific legal documents.
- Negotiation of settlements - short-listed tenderers may be invited to do a negotiation in front of the selection panel.

It should be remembered that the written tender document is only one part of the process. These practical tasks combined with an opportunity to present and respond to specific questions provide important additional means of comparative evaluation.

### 4.4 SETTLE PRESENTATION DETAILS

Presentations by short-listed tenderers should be well planned with consideration being given to the following matters:

- Who is to attend?
- Where and what facilities will be required?
- How specific tasks might be handled?
- How long short-listed tenderers are to present for?



**Note.** There must be consistent questioning of short-listed tenderers. Many of these questions will be alike and should be prepared in advance.

#### 4.5 EVIDENCE OF SUCCESS

It is important that specific evidence be adduced in respect of the claims made in the tender document. In step 5, there are guidelines on referee checking. In planning the evaluation process the emphasis should be on ensuring that the agency has excellent information on who will actually do the legal work, what performance measures are envisaged, what costing regime will apply, who will have overall co-ordination responsibility, and what reporting means are suggested.

#### 4.6 PRESENTATIONS BY TENDERERS

Short-listed tenderers should provide evidence that they can meet specific requirements. Evidence should be required, perhaps using some of the tasks listed above (Section 4.3). Presentations should be scheduled with adequate time for questioning on:

- the level of understanding of the agencies' objectives and proformas,
- structure,
- personnel; and
- stakeholders.

Agencies are encouraged to use innovative approaches in the provision of their legal services and to look to their external legal service providers to work with them in doing this.

### 5 COMPARATIVE EVALUATION OF TENDER BIDS

#### 5.1 APPLY EVALUATION CRITERIA DETERMINED AT STEP 2

The evaluation criteria will already have been determined and referred to in the advertisement and in any pre-lodgment briefing sessions which have been held. The evaluation criteria will generally have been organised under various headings such as:

- Technical expertise
- Continuous improvement programmes
- Consistency of management
- Evidence of resources
- Knowledge of agency
- EEO compliance

Additional criteria must not be added once the advertisement has been lodged. A matrix listing the criteria may assist.

#### 5.2 EVALUATION

It is important to avoid mechanistic scoring. A major difficulty in assessing legal service tenders, is that some tenderers make claims which remain unsubstantiated. In evaluating the various tender bids, it is important to look for evidence to support claims. The written proposal should not be relied upon solely.

In most cases, short-listed tenderers should be invited to give presentations. These presentations should be focussed rather than generalised and specific questions should be prepared in advance. All short-listed tenderers invited to give presentations should be allocated the same amount of time and whilst there will be validation questions particular to each individual proposal, content and methodological questions should generally be consistent across all tender teams. Consideration should be given to imaginatively testing the claims of the various tenderers. For example:

- prospective tenderers could be given a mock file and asked to comment on how they would run the matter;

- case studies and hypotheticals could be used as a means of evaluating the prospective claims of the tenderers; and
- documentation (cleansed of confidential details) could be shared with tenderers and they could be asked to critically evaluate how past transactions or litigation could have been handled differently.

The emphasis should be on inviting prospective legal service providers to be as creative as possible in the delivery of legal services.

It is particularly important that opportunities be considered for resolution of disputes through alternative dispute resolution means rather than litigation.

### *Professional Costs and Disbursements*

There should be clarification of the means of charging for legal services including reference to agreed fees for particular assignments rather than straight hourly charge-out rates. Where professional costs are detailed in tenders, care should be taken to ensure that all aspects including disbursements are also covered. Throughout the world, lawyers are re-examining the way in which they charge their legal services.

There have been many recent changes in billing arrangements in the private legal profession, including:

- the setting of agreed performance indicators for particular transactional work;
- litigious work and the determination of premium billing arrangements where work produced results in significant savings for the client.

Costs Agreements are now required in respect of all legal work and formatting of Agreements should be discussed as part of the evaluation process.

### *Referees*

The advertisement and tender specification documentation should indicate details of required referees. The referees should be contacted carefully with an agreed set of questions to be put to each nominated referee. There are many circumstances in which referees are not appropriately questioned in respect of the particular expertise of tenderers. It is essential that the questioning cover the selection criteria and that the person doing the referee checking has a very good understanding of the legal services required, the content in the tender itself and the selection criteria. The referees should be questioned in respect of performance in some detail. In particular, they should be asked about how performance was measured in respect of their contact with that particular tenderer. Nominated referees should be reviewed in relation to their relevance to government work; however, it should be noted that the overall value of the referee will be in identifying the technical skill, the engagement management aspects, the responsiveness, the innovativeness and the creativity of particular teams of lawyers. When questioning referees, it is essential that the nominated personnel within the respective tender bid is referred to. Where a referee is given, that referee should be familiar with at least some of the individual members of the tender team rather than with the general capability of the firm in question. There is no doubt that as the provision of legal services is essentially a matter which goes to the skill of an individual and of a team of individuals, the particular knowledge of those individuals will be highly relevant.

## 5.3 NOTIFICATION

Tenderers should be kept well informed at each stage of the tendering process. For example, where there is a call for expressions of interest followed by selective tendering, all tenderers should be notified as soon as possible as to their status in the process. Notification to those who have been unsuccessful should follow promptly.

## 5.4 FEEDBACK TO ALL TENDERERS

Given the resources required to prepare effective tenders for legal work, it is essential that all tenderers be treated with courtesy and be assisted to understand where they failed to meet the selection criteria. Ideally, some feedback should be offered to those who inquire.

## 6 CONTRACT

### 6.1 DRAFT CONTRACT

There are a number of ways in which the draft contract might be prepared. It is not the purpose of these guidelines to set out all aspects associated with government contracting, nor to provide a sample contract as such. These guidelines should be read in association with other New South Wales government guidelines on contracting out of goods and services.

There is also a very detailed publication (titled Government Contracts: Federal, State, Local, (Federation Press 1995) by Mr Nicholas Seddon which may be of assistance in respect of some aspects of the law and provides a very thorough guide in respect of government contracts, administrative law, authority to contract, Crown immunities and privileges, estoppel, the Hilmer Report, trade practices and fair trading legislation, termination and other topics in relation to government contracts. The contract for the provision of legal services may be set out as follows:

- Title Page;
- Table of Contents;
- Interpretation - Definitions;
- Provision of Legal Services - Contracted Requirements;
- Period of Contract;
- Tasking Procedures;
- Reporting Requirements;
- Fees;
- Terms of Payment;
- Price Variations;
- Verification of Costs;
- Claims for Payment;
- Right of Agency to Recover Money;
- Compliance with Laws;
- Classified Information;
- Compliance with EEO Requirements;
- Confidentiality of Commercial Information;
- Entry to Agency Premises;
- Variations of this Contract;
- Termination;
- Prohibition of Advertising;
- Subcontracting;
- Specified Personnel,
- Intellectual Property;
- Disclosure of Information/Privacy;
- Conflict of Interest;

- Compliance with Regulations;
- Unavoidable Delay;
- Waiver;
- Schedules.

## 6.2 PREPARE ANY NECESSARY SCHEDULES

In some cases it will be necessary to append schedules which detail some particular aspects of the legal work to be carried out or detail of any standing offer in respect of the provision of legal services.

## 6.3 NEGOTIATE CONTRACT WITH SELECTED FIRM

The draft contract should have been provided with the initial information pack provided to prospective tenderers. After selection of the successful tenderer, the contract should be negotiated and signed.

## 7 MANAGEMENT OF ONGOING RELATIONSHIP

### 7.1 MANAGING THE RELATIONSHIP

It is essential that once a legal service provider has been selected or a panel of firms has been selected, the relationship itself should be managed carefully. A significant cause of difficulties within the legal profession and indeed a significant cause underlying legal professional negligence claims is the basic professional attitude of solicitors to the process of providing the legal service, as opposed to providing the legal (product) itself. This process has been called "engagement management". It is important that the relationship between agency legal staff and managers providing instructions and the successful tenderer is well managed from the outset. Some essential elements of good engagement management are:

- Setting up the engagement;
- Managing expectations - client and lawyer;
- Regular Reporting;
- Varying terms of engagement;
- Correspondence between client & lawyer;
- Closing the engagement.

To ensure that the relationship between the external legal service provider and the agency is a positive relationship, clear contact personnel should be identified at the outset. The legal firm in question should nominate a senior liaison contact and the agency should do likewise. Regular team meetings will be held to review current matters, the performance to date and possible future requirements. Where legal service providers have changing personnel within teams, it is important that each of those people are well versed in the agency's requirements. The format for the presentation of bills should already have been determined and any necessary refinements should be discussed as required.

### 7.2 REPORTING

The reporting arrangements should have been discussed during the tendering process and should be finalised and agreed as part of the contracting stage. Regular reporting is essential and the timing of such reports and to whom they are sent and the format, timing and distribution of such reports should be resolved.

### 7.3 PERFORMANCE INDICATORS

It is in the interests of a positive ongoing relationship between the agency and its external legal service provider that clear performance indicators are set for each new matter.

## 7.4 MILESTONES

In some circumstances, it will be appropriate to set milestones when the relationship between the agency and its legal service provider will be reviewed. This may take place at six monthly intervals or on an annual basis. Where a firm (or a panel of firms) has been contracted to provide legal services over for example a two to three year period, it is essential that there be a review mechanism. Whatever the duration of the relationship, there should be a mechanism for reviewing the quality of work and the nature of the relationship. During the review, it is ideal if a senior member of the firm who is not directly delivering the legal services be involved and work with the agency representative to receive an objective analysis of the performance of the firm to date.

## 7.5 HANDLING DISSATISFACTION

In the best working relationships, lawyers and agency representatives will be speaking directly about any areas of concern and this will alleviate the need for legal redress for perceived contractual breaches. It is recommended that areas of dissatisfaction be anticipated, whether these relate to fees, timeliness, changes in personnel delivering the services, or significantly increased requirements. The mediation of any disputes should be discussed openly and regularly and a strategy put in place to ensure that problems can be addressed early.

## 8 EVALUATING PERFORMANCE

### 8.1 POST-ASSIGNMENT EVALUATION

It is recommended that the internal team review the nature of the relationship at least on a six-monthly basis, if not following each major matter. The internal review should follow an agreed pro-forma and then representatives of the contracted firms should meet with the representatives and should discuss the quality of the work performed.

### 8.2 FEEDBACK

Regular feedback should be provided verbally and in some circumstances in writing. This will promote a positive working relationship between the agency and the firm in question.

### 8.3 PROJECT LESSONS DEBRIEF

Where a legal firm is contracted, for a fixed period, the whole relationship from the initial determination of selection criteria, through the tendering and selection process, to the delivery of legal services, should be reviewed in the month prior to the conclusion of that contract. Those who have been instructing the external firm, together with at least a representative of the tender selection team, should meet and review the whole relationship. Ideally, notes should be prepared on the process whilst it is occurring and then at the review point, to ensure that where a further tendering process is commenced, lessons learnt will be acted upon. These guidelines provide assistance for agencies in reviewing their legal service needs and in the development of options for the provisions of legal services.

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