

Legal Bulletin

No.01

Updated and reissued: 6 July 2021

Engagement of external legal practitioners under Treasurer's Instruction 10

This Legal Bulletin applies to all public authorities in their engagement of external legal practitioners (solicitors and counsel) and sets out the process undertaken by the Crown Solicitor's Office (CSO) and the role and requirements of public authorities in relation to Treasurer's Instruction 10 (TI10).

The purpose of this document is to ensure that all public authorities are aware of and understand the process that they are required to comply with for the engagement of external legal practitioners.

Contents

Background	1
Requests for TI10 Approvals	3
Terms of Engagement	4
Rates for Legal Services	5
Selection of Firm or Practitioner	5
Equitable Briefing Policy	6
Certification of Invoices	6
Reporting and Review	7
Employment of Legal Officers by public authorities	8

Background

Section 41(1) of the *Public Finance and Audit Act 1987* grants the Treasurer the power to issue instructions to public authorities relating to the management of public finances and related matters. Section 41(2) makes it a criminal offence to fail to comply with an instruction issued by the Treasurer under that section.

Treasurer's Instruction 10 relates to the engagement of legal practitioners and requires that:

- 1) The Chief Executive of a public authority shall not use the services of a legal practitioner other than the Crown Solicitor without first seeking the advice of the Crown Solicitor on whether the use of such a practitioner is appropriate (Paragraph 10.3).
- 2) Subject to any direction which the Attorney-General may give, no costs or expenses relating to the engagement of a legal practitioner by a public authority either within or outside the State, are to be incurred unless the Crown Solicitor has certified that the engagement of such practitioner is necessary or that the agency's procedures and conditions for engagement of legal practitioners are appropriate (Paragraph 10.4).
- 3) Subject to any direction which the Attorney-General may give, no costs or expenses in respect of any service provided by a legal practitioner to a public authority are to be paid or reimbursed unless the Crown Solicitor or their delegate has certified that such costs or expenses are reasonable, or unless a court of competent jurisdiction has ordered payment or reimbursement of a specified sum (Paragraph 10.5).

The requirements in Paragraphs 10.3 and 10.4 of T110 is commonly referred to as a *T110 Approval*, and the requirement in Paragraph 10.5 of T110 is commonly referred to as *Certification of invoices*. The CSO has developed processes to manage T110 Approvals and Certification of invoices and the purpose of this Bulletin is to set out and confirm these processes in a single document to assist agencies to understand and comply with the processes, and ensure consistency of approach.

The CSO is the primary provider of legal services to Government and provides these legal services on behalf of the Attorney-General. Whilst it is necessary to engage external legal practitioners from time to time, this process is centrally managed so that broadly consistent terms and rates of engagement can be implemented and to allow oversight of external legal services provided. In addition, Paragraph 10.3 applies to both the engagement of external legal practitioners by agencies for advice and assistance from time to time, and instances where agencies are proposing to create a new internal legal officer position to employ a legal practitioner as a member of staff.

The effect of T110 is that public authorities must not engage external legal practitioners without the written approval of the Crown Solicitor. Importantly, T110 does not permit the granting of approval retrospectively so it is essential that agencies obtain such approval before engaging an external legal practitioner. This means that public authorities must not enter into any arrangement with an external legal practitioner or make any commitments around engagement of an external legal practitioner without T110 Approval.

TI10 Approval is required when an agency engages a legal practitioner even where that practitioner is not providing legal services. As a matter of practice the Crown Solicitor will defer to the views of the agency about whether engagement in such circumstances is appropriate, and therefore the terms and conditions which ought appropriately apply, and will often delegate the function of certifying invoices to the relevant agency.

The engagement of private legal practitioners to provide legal services pursuant to a TI10 Approval is exempt from the operation of Treasurer's Instruction 18 (Procurement).

While TI 18 does not apply to the engagement of legal practitioners to provide legal services, where the estimated value of the legal spend is significant and/or where the legal services are required for a significant and complex public sector initiative, the CSO will work with public authorities to ensure that the most appropriate legal practitioner is engaged; this may include an open market process and the preparation of a specification that is consistent with TI 10 requirements. Any such process must be made expressly subject to TI10 Approval being granted.

For the avoidance of doubt, TI 18 also does not apply to the engagement of an expert witness in the context of legal proceedings.

Requests for TI10 Approvals

A request for approval to engage an external legal practitioner can arise either through a direct request from a public authority or through a dialogue initiated by the CSO that a specific matter should be briefed out.

TI10 Approval is required for both the engagement of external solicitors and external counsel. A TI10 Approval to engage a solicitor does not extend to the engagement of counsel (unless expressly stated otherwise in the TI10 Approval). A further TI10 Approval is required for the engagement of counsel.

A request for a TI10 Approval should be directed to an Executive Solicitor, Assistant Crown Solicitor, Senior Legal Counsel, Special Counsel to the Crown Solicitor or the Crown Solicitor (the primary CSO contact person for an agency can facilitate this).

Generally, TI10 Approval will be granted in circumstances where:

- 1) the CSO has insufficient capacity to perform the services;
 - 2) the services relate to a specialist area of law for which external resources are required;
- or

3) a conflict of interest precludes the CSO from acting.

In considering whether to grant a T110 Approval, the Crown Solicitor or their delegate will consider whether the relevant matter is likely to raise a Significant Issue. In some instances, T110 Approval may be granted in relation to requests of these kinds with conditions that ameliorate risks associated with briefing out such matters. In other instances, T110 Approval may be granted to facilitate the CSO working with an external legal provider to ensure that the CSO maintains direct legal control and oversight of the services provided.

For the purposes of this Legal Bulletin, a “**Significant Issue**” means an issue arising in the course of providing, or which relates to, legal services being provided which:

- raises whole of government concerns (for example an issue which impacts or is likely to impact on more than one South Australian Government Agency);
- requires advice to be provided or submissions to be made on a question of statutory construction, the constitution Acts of Australia or South Australia and/or the jurisdiction of a court or tribunal; or
- otherwise is of significant public interest (for example, an issue which has or is likely to have a significant financial or other impact on the State of South Australia or its citizens) or which raises or is likely to raise media interest.

Terms of Engagement

The CSO maintains standard Terms of Engagement for the engagement of external legal practitioners which are published at www.agd.sa.gov.au/justice-system/crown-solicitors-office.

Unless otherwise approved by the Crown Solicitor or their delegate, T110 approvals will be granted on standard Terms of Engagement. Standard terms maintain a high level of consistency across government for the engagement of external legal practitioners and avoid the significant cost to government that would result from having to negotiate separate terms of terms of engagement for individual engagements.

Variations to the standard Terms of Engagement will be considered in some instances, however such variations will be kept to a minimum and will only be approved in instances where the CSO is satisfied that the departure can be clearly justified.

Rates for Legal Services

Unless otherwise approved by the Crown Solicitor or their delegate, the fees payable to external legal practitioners engaged under T110 will be no higher than the standard hourly rates which can be found at www.agd.sa.gov.au/justice-system/crown-solicitors-office (which are indexed annually).

There are some limited instances where approvals will be granted for rates which exceed the standard hourly rates (for example in instances where a firm is selected because of special expertise).

Approval to engage a practitioner above the standard rates will only be granted where:

- consideration has been given to whether the services can be adequately provided by another practitioner who will agree to charge at the standard hourly rates;
- the higher rates are appropriate and necessary in the context of the special expertise required and the public authority's objectives, and the market in which the external legal practitioner operates; and
- the public authority receiving the services has expressly agreed to the higher rates.

Selection of Firm or Practitioner

The CSO maintains a register of firms and practitioners (including counsel) with experience to provide legal services to Government and who have expressly agreed to provide services on the standard Terms of Engagement (including the standard hourly rates).

The purpose of this register is to provide CSO staff with a guide as to which private South Australian legal practitioners have indicated that they are available for engagement by public authorities on the standard Terms of Engagement, along with their preferred areas of specialisation.

The register is open and practitioners may apply to the CSO for inclusion on the register at any time. A firm or practitioner must have experience in the relevant field to be accepted on the register as offering a preferred area of specialisation. In considering an application, the CSO will also have regard to any other factor the CSO deems relevant in determining the suitability of the firm or practitioner for inclusion on the register.

The register is not an exclusive panel arrangement. Inclusion on the register does not guarantee a firm or practitioner any level of engagement or restrict the engagement of firms or practitioners from time to time who are not members of the register.

The selection of appropriate private practitioners, firms or counsel for an individual engagement will depend on several factors including the specific circumstances of each engagement, the nature of the work required, and the experience and availability of practitioners.

Where public authorities seek approval for a specific firm or practitioner to be engaged, the CSO will consider whether the relevant firm or practitioner has the requisite experience to perform the services, whether there are any other firms or practitioners who would be more suitable or should be considered for the matter and any other factors the CSO deems appropriate in the circumstances.

When public authorities seek a recommendation for an external legal provider from the CSO, the CSO will consider and may make a recommendation to the public authority about a firm or practitioner (or a number of firms or practitioners) with the relevant experience to perform the services.

Equitable Briefing Policy

Consideration will be given to the principles of the Law Council of Australia's Equitable Briefing Policy when considering requests to engage external counsel under T110.

Certification of Invoices

Invoices issued under T110 Approved engagements are payable by the public authorities to which the services are being provided and should be issued in the name of those public authorities.

The standard Terms of Engagement require that all invoices issued by private legal practitioners comply with strict requirements necessary to enable the CSO to provide appropriate oversight as part of the certification process. A failure to comply with these requirements may result in the engagement being reviewed, and in some circumstances, termination of the engagement and suspension or removal of the firm or practitioner from the register.

The Certification of invoices under T110 does not in any way derogate from public authorities' responsibility to review and approve invoices from external legal practitioners for payment or their responsibility for ensuring payment in accordance with any mandated statutory timeframes.

Public authorities should ensure that all invoices received from external legal practitioners are reviewed for accuracy, including to ensure that the correct rate has been charged and that the invoice reflects the services provided.

Where a public authority identifies an issue with, or has concern about, an invoice issued by an external legal practitioner, they should raise this as soon as possible directly with the legal practitioner concerned. If the legal practitioner does not address the matter to the public authority's satisfaction, the public authority may escalate the matter to the Crown Solicitor's Office by email to the relevant CSO matter manager identified in the T110 engagement documentation, attaching a copy of the invoice and setting out the issue.

Public authorities remain responsible for ensuring invoices issued by external legal practitioners are paid within any mandated statutory timeframes and for raising disputes within the Basware system for any invoices over which an issue or error has been identified by the public authority or the CSO. Public authorities should contact the CSO (via the dedicated inbox: CSOTI10Admin@sa.gov.au) about any invoices which require urgent Certification in order to be paid in accordance with a mandated statutory timeframe.

Public authorities remain responsible for keeping appropriate records of invoices issued by external legal practitioners and associated expenditure under T110.

In some cases the Crown Solicitor will authorise a non-CSO officer to certify invoices under T110 where it is appropriate to do so. This includes where a conflict exists which prevents a CSO officer from certifying invoices.

Certification may not be provided for invoices raised in matters where a public authority has failed to obtain T110 Approval, or where the scope of work pre-dates approval or the work undertaken exceeds that approved. However, a public authority may still have a contractual obligation to pay such invoices notwithstanding that the engagement has not received T110 Approval.

Reporting and Review

It is essential that public authorities understand that even where services provided by external legal practitioners relate to the operations of that specific public authority, the legal services can still impact on other public authorities or the State more broadly.

Public authorities must therefore at all times when engaging external legal practitioners consider whether the services could raise Significant Issues and immediately report to the CSO any Significant Issues which arise so that consideration can be given to the Significant Issue from a whole of government perspective, a consistent position can be applied across government, and relevant public authorities can be informed of this position.

In addition, the Standard Terms of Engagement include a mandatory monthly reporting process whereby external legal practitioners are required to provide a report to the CSO as part of the monthly invoicing process, detailing any Significant Issues arising in that month.

In some large projects the CSO will remain involved in the matter and lead a joint legal team comprising of CSO and external legal practitioners. In those cases the CSO will maintain oversight over the work of the external legal practitioners.

Public authorities must report to the CSO immediately any failure by an external legal practitioner to comply with the standard Terms of Engagement or any other concerns which a public authority has in relation to the conduct of an external legal practitioner including a failure to report a Significant Issue to the Crown Solicitor's Office in accordance with the standard Terms of Engagement.

If during the course of an engagement the CSO identifies non-compliance with the Terms of Engagement, including non-compliance with monthly reporting obligations, the CSO will consider what appropriate action should be taken which may result in that firm's engagement being reviewed, and in some circumstances, termination of the engagement and suspension or removal from the register.

Employment of Legal Officers by public authorities

Paragraph 10.3 of TI10 requires that before using the services of a legal practitioner other than the Crown Solicitor a Chief Executive of a public authority must seek the advice of the Crown Solicitor on whether the use of such a practitioner is appropriate. This requirement to seek the Crown Solicitor's advice applies to both the engagement of external legal practitioners (in which case it is addressed through the TI10 Approval process) and also to the employment of legal practitioners by public authorities in internal legal officer roles.

Public authorities are required to obtain such advice where they are proposing to create a new internal legal officer position (but not where they are filling an existing legal officer position).

This requirement allows public authorities and the Crown Solicitor to consider the appropriateness of creating a new legal officer position when compared to other options, such as provision of legal services by CSO, (either on a matter by matter basis or through the provision of an outposted solicitor to the public authority), to ensure that the creation of an internal legal officer role will best serve the objectives of the public authority and government as a whole.

It is important to ensure that public authorities and any internal legal officers employed by public authorities are aware that section 51 of the *Legal Practitioners Act 1981* confers a right of audience before courts and tribunals only to limited classes of legal practitioners, which generally does not extend to internal legal officers.

This Legal Bulletin was published by the Crown Solicitor's Office on 7 July 2021. This bulletin provides general guidance only and does not constitute legal advice of the CSO. It may not therefore be applicable in the particular circumstances of a case. Should you have any queries or require legal advice you should contact the Crown Solicitor's Office.

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