



fact sheet

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Probity and legal process advice

Why seek such advice?

Attention to probity and legal process is integral to ensuring the defensibility, transparency and success of Government projects. Programs relating to procurement, outsourcing or privatisation and/or delivered through loans, grants, or other related funding arrangements, are under increasing scrutiny by the media, project participants, parliament, and mechanisms such as ANAO reviews.

What do probity and legal process advisers do?

Probity and legal process advisers help ensure that the processes, procedures and documentation used in implementing a Government program are robust, transparent and capable of external audit. They help you comply with accountability requirements such as guidelines on procurement, confidentiality, conflicts of interest and disclosure of contracts, as well as the 'Better Practice Guide on Fairness and Transparency in Purchasing Decisions' published by the ANAO in August 2007.

What does their advice cover?

Probity and legal process advice might include:

- project strategy to meet both project objectives and accountability requirements
- identifying key decision-making points and stakeholders, particularly those outside your agency, to ensure that the strategy reflects the need for all required approvals
- documents to be issued to tenderers or applicants for funding (EOIs, RFTs, requests for applications, requests for clarifications etc.)
- procedural fairness, confidentiality and conflict of interest
- compliance with Government policy and accountability requirements
- protocols for managing information, bidder communications, site visits and industry briefings
- evaluation plans, evaluation processes and evaluation reports
- tender evaluation and clarification processes, including attending and advising at key evaluation bodies (tender evaluation boards or committees, steering groups)
- process and protocols for best and final offers or requests for revised offers and protocols
- contract negotiation (or renegotiation) strategy and protocols (including conducting parallel negotiations)
- sign-offs at various stages of the project.

Do I need a separate probity/process adviser?

There is no Commonwealth-wide requirement that your probity or process adviser be independent from your legal adviser. The ANAO takes the view that in relation to very high risk purchases, a probity advisor should not be encumbered by any actual or perceived conflicts of interest that could

compromise his or her duty to give candid advice about the probity aspects of the project, such as simultaneously serving as legal adviser. In deciding whether separate advisers are necessary for a particular project, you should consider:

- whether your Accountable Authority Instructions or other internal procedures require an independent probity or process adviser for particular types of transactions
- whether the transaction is likely to be high profile, high value or controversial, making it prudent to have an independent probity/process adviser
- whether it would be more efficient and cost effective to have the same lawyers advising on both general legal and probity/process issues, as is typically the case for less complex projects
- whether the legal adviser has the necessary knowledge and understanding of public accountability requirements to advise on these issues.

If AGS is both legal and probity adviser, are there two separate teams?

When AGS is engaged to provide both general legal and probity/process advice, we may use a single team or two separate teams. We make that decision in conjunction with you, considering the size, complexity and timing of the project, the need for independence, and the expertise of our team members.

When two teams are involved, they work independently but brief each other on progress, discuss significant issues and exchange documents. We do not generally place formal Chinese walls between legal teams working on the same project, unless we have specifically agreed with you to do so.

If you require a probity/process adviser who is completely independent of the legal adviser, AGS recommends that you engage two separate firms.

Does probity/process advice attract legal professional privilege?

Non-lawyers cannot provide legal advice (on the legal defensibility of a particular course of action, for example), so no legal professional privilege would apply to their advice in the event of a challenge to the process. Advice from a lawyer in relation to probity/process would be covered by the same rules as other legal advice.

The basic requirements for a claim of legal professional privilege are:

- a solicitor–client relationship
- confidential communications
- communications whose dominant purpose is providing legal advice, or advice in the context of actual or anticipated legal proceedings
- no waiver of privilege through disclosure of the substance of the advice, or acts otherwise inconsistent with asserting privilege.

If the advice you are receiving satisfies these requirements then it is more likely to be privileged.

How can I avoid confusion about whether probity/legal process advice attracts LPP?

To limit disputes about whether advice is, or is intended to be, legal advice, we recommend that the terms of engagement to provide legal advice clearly specify in writing that:

- you are seeking advice from a legal perspective in relation to probity/process matters
- you expect the adviser to exercise legal professional skill and judgement
- you require that the advice be kept confidential unless you direct otherwise.

More information

If you require further information about AGS's probity and legal process services, please contact:

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