



2 May 2019

Submission to the Independent Review of the Australian Public Service

The Attorney-General's Department (the department) welcomes the priorities for reform identified in the Review's *Priorities for Change*.

This submission will focus on areas in which the department has particular experience or expertise that may assist the Review. These areas include the department's experience in developing the Australian Government Legal Service professional network and the integrity functions of government. The submission also comments on policy capability, enabling services and the role of the Secretaries Board.

Professionalisation of functions

The department is strongly in favour of improving support for professionals across the APS. The department will establish the Australian Government Legal Service (AGLS) in late 2019 following the Secretary's Review of Commonwealth Legal Services (the Secretary's Review). The AGLS will build upon the work of the existing Australian Government Legal Network (AGLN) and its sub-committees. The AGLS will connect over 2,000 Commonwealth government lawyers working in over 90 entities across Australia. It will be an overarching professional network for government lawyers to support the delivery of high quality, consistent legal services across the Commonwealth and its entities. It will emphasise the role of government lawyers within the context of whole-of-government legal obligations.

The objectives of the AGLS would be to:

- support the delivery of high quality consistent and joined up legal services across the Commonwealth and its entities
- build and promote a professional identity for government lawyers that supports their unique role and cultivates recognition that, in addition to being employees of their entity, they belong to a professional cohort
- promote good practice in legal practice management
- facilitate more collegiate and collaborative arrangements across entities, and
- promote awareness of whole of government issues and draw a clear link between an entity's legal functions and the broader Commonwealth.

The AGLS would pursue its objectives by:

- providing a clear framework for the standards and responsibilities expected of government lawyers
- providing professional development and training products
- facilitating information sharing, collaboration and networking opportunities across Commonwealth entities
- developing information and guidance on legal and practice management issues, including engagement of external providers, and
- delivering an induction and core training program for government lawyers, building on a set of core competencies.

In parallel with work on the establishment of the AGLS, the Office of Legal Services Coordination (OLSC) in the department is progressing three key AGLS initiatives focused on building career pathways, developing expertise, acquiring new skills, building professional networks, sharing knowledge and developing foundational competencies for government lawyers.

First, the Pilot Reciprocal Secondment Program will allow government lawyers and lawyers in private practice to participate in short term reciprocal secondments for a period of 4-6 months. The first phase of this pilot program commenced in the second half of 2018. The second phase is underway with exchanges expected to commence in June or July 2019.

Secondly, a volunteer team of General Counsels and OLSC officers are developing a pilot program to provide consistent, professional, foundational legal training for in-house government lawyers. The training topics are based on the AGLN's existing core competencies for Government Law and are designed to provide comprehensive coverage of key topics which are relevant for government lawyers operating in an in-house environment.

Thirdly, work is underway in collaboration with the Australian Government Solicitor group of the department on the development of a Whole of Government Legal Advice Database to support the sharing of legal advice on key matters of broader relevance to the Commonwealth, as well as other information such as guidance material and templates. The database will reduce overlap and duplication of legal advice across the Commonwealth, to improve the management of Commonwealth risk and to promote greater consistency in Commonwealth entities' approach to similar legal issues.

The Review identifies professionalised functions across the APS through a 'professions model', encompassing 'delivery, regulation and policy' as well as key enabling functions. The Review suggests that the Head of Professions should be the APS Commissioner, with senior officers appointed to head each profession, supported by the APSC. The department's work in establishing the AGLS to develop competencies, training models and career pathways for the professionalisation of government lawyers within the APS could provide a useful model for other constituent professions.

Professions, such as lawyers, doctors, auditors and accountants, have traditionally had a number of features that could be integrated into an APS professions model. Two of these features are profession-specific ethical duties, and professional self-regulation. APS lawyers have both general ethical duties that apply to all lawyers (such as duties to the court, their client, and to uphold the rule of law), general APS ethical requirements under the APS Values and Code of Conduct, and additional model litigant obligations imposed by the Legal Services Directions. Similar ethical obligations apply to other professions. Any professional model should consider how these ethical obligations should apply to public servants.

The department suggests that any recommendations relating to the professionalisation of APS roles through a professions model include government lawyers as a 'constituent profession' and take into account the significant work already underway to professionalise government lawyers, as well as proposed and existing frameworks. The Secretary's Review recommended that the AGD Secretary, as the Secretary responsible for policy-setting on Commonwealth legal services, would set the direction for AGLS, in consultation with entity heads and General Counsel. This is consistent with the Review's suggestion that a senior officer be appointed to head each constituent profession and would develop competencies, standards and career pathways, separate to his or her role as an agency head. Leadership and expertise is required in setting competencies, standards and career pathway options within a particular 'profession' and the AGD Secretary is well-placed to oversee the government lawyer profession.

Although consistent approaches to greater professionalisation may be desirable, given the specific and often technical needs of professions, it is likely that most professions would be best supported by designating a lead agency for that function with a significant body of workers in the relevant professional field.

Integrity

As the ANZSOG research paper *Being a trusted and respected partner: the APS integrity framework* makes clear, integrity and accountability mechanisms are essential to a well-functioning public sector that acts in the public interest and has the confidence of the Australian public. The department is responsible for whole of government integrity policy and key frameworks, including in relation to fraud and anti-corruption, prosecutions, foreign influence transparency, administrative law, constitutional law, human rights, privacy, freedom of information, access to government records and public interest disclosures. This includes administration of the Foreign Influence Transparency Scheme (FITS), the Lobbying Code of Conduct and the Register of Lobbyists. The Attorney-General's portfolio also includes a number of agencies with integrity roles, including the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and the Australian Commission for Law Enforcement Integrity.

The department takes a systemic approach to integrity and corruption issues in relation to the public sector, but also more broadly including with respect to the private sector. For optimal effectiveness, integrity and corruption issues need to be situated in their broader context and this must include both public and private actors and include actions taken in Australia and offshore.

There is merit in examining further how existing integrity and accountability functions could be better coordinated and arranged and there may be opportunities to further consolidate integrity functions in the Attorney-General's portfolio. Any proposed reform to integrity arrangements requires careful consideration, particularly in light of the functions of existing bodies and any future anti-corruption agency. For example, the department does not see merit in the proposal in the ANZSOG paper to transfer the FITS to the APSC. The FITS regime goes to the integrity of our democratic institutions, having broad implications across nearly all sectors of the Australian economy and community. The *Foreign Influence Transparency Scheme Act 2018* was introduced to enhance Australia's security, and there are clear benefits to it being administered by a department with close ties to national security and integrity matters. This is an example of options that seem initially attractive that require more holistic consideration.

Finally, definitional uncertainty often clouds work on integrity. Corruption and integrity are amorphous and broad concepts, which can be challenging to define with consensus. It will be important to ensure there is clarity and certainty around the kinds of conduct to be investigated by a new anti-corruption agency or promoted as a broader concept of public sector integrity.

Policy development

The Review identifies that strengthening the APS's policy capacity, and the public's faith in it, is crucial to the future of the APS. The department has a significant stake in this issue as a major policy agency. The department has expertise in strategic thinking and problem solving across a wide range of policy areas affected by Australia's legal and policy frameworks. As legal policy often deals with frameworks that govern action, rather than being directed at specific policy outcomes, many of the department's policy responsibilities have a whole of government, or whole of community, impact. These frameworks include administrative law, constitutional law, international law, human rights, protective security, privacy, freedom of information, criminal law, Australia's court system and fraud and anti-corruption policy. These frameworks have integrity elements, such as establishing appropriate principles and boundaries for the use of government power and frameworks for government-citizen interaction. As a result, to maximise policy effectiveness, the department must work closely with other government agencies and the private sector to assist them to meet their needs within appropriate legal frameworks.

The Review notes the importance of developing policy advice that integrates social, economic, security and international perspectives. The department endorses the need for agencies to develop policy that integrates the full breadth of strategic inputs. These perspectives should also include ensuring policy and program design strengthens public trust in government and its institutions, including through robust integrity measures and a firm commitment to procedural fairness, transparency and the rule of law. Within the department itself, it has often been necessary to integrate the perspectives identified by the Review in order to produce optimal policy outcomes in areas of broad impact including national security or human rights. The department has also frequently used models of collaboration across government, including secondments, multi-agency purpose-specific taskforces, its legislative scrutiny role and the Cabinet process, to ensure that policy development across government is integrated.

No radical changes to operating models are required to improve policy development. Nevertheless, the department would welcome further efforts to ensure holistic policy development from initial planning through to implementation. These could include greater use of existing collaborative techniques (such as secondments and multi-agency taskforces), greater mobility of staff across the APS, development of professional networks of policy specialists to help break down siloed thinking and share expertise, and enhancements to government policy processes, including the Cabinet process and legislative scrutiny.

Some departments and agencies have scope to develop greater specialist expertise in related disciplines, and it may make more sense at times for smaller departments to buy in this expertise rather than seeking to develop and maintain their own in-house capability. The department has had very positive experiences of using the expertise of the Department of Human Services Design Hub, for example, to test and contribute to the development of policy. It may similarly be appropriate on particular policy projects for smaller departments or agencies to occasionally buy in specialist data skills from larger social policy departments.

The department welcomes the Review's focus on investment in capability and talent development. The Review notes a perception that the APS's capability and specialist expertise has diminished over time, and a need for more empowered people, an APS-wide workforce strategy and integrated policy approaches. The department's experience has reinforced the importance of a combination of on-the-job learning, formal and informal mentoring, and training in building the capability of junior officers in policy development. For these strategies to be most effective, the APS must invest in providing officers with a career path that develops them as valued policy officers.

Policy projects come in a range of different scopes and complexities, ranging from once-in-a-generation reforms to a sector, which require the full policy process for success, through to regular minor maintenance of policy, programs or legislation, which often does not require a full policy process, but does require a ready pool of expertise in existing policy areas in order to be undertaken accurately and expeditiously. There must be scope to foster a long-term view of policy, to ensure that short-term decision making does not lead to poor long-term outcomes. For example, within the department, the Office of Constitutional Law has a critical stewardship role in ensuring the development of constitutional law on a pathway that supports good governance. Consideration of improvements to APS policy should consider improvements to capability across the full range of policy projects undertaken by the APS.

In relation to strategic recruitment and staff development, there are also behavioural supports for good policy development that buttress specific policy skills such as data analytics, critical thinking and evaluation. For example, openness to new ideas, curiosity, a genuine commitment to inclusiveness and emotional intelligence enhance the effectiveness of consultation and collaboration. Finally, the department notes that there must be some consideration of the integrity implications of mobility between the APS and the bodies it regulates. It is critical to public faith in the APS, and to avoid regulatory capture, that direct movement between a regulator and the sector it regulates, is carefully scrutinised.

Role of the Secretaries Board

Secretaries Board is an important body for driving whole of government policy across the APS. Given the department's experience of administering policy areas with whole of government implications, the department would welcome the enhanced use of Secretaries Board to consider and mandate outcomes on policy issues that affect the whole public sector. For example, Secretaries Board is a natural forum for ensuring buy-in across government for implementation of the Protective Security Policy Framework.

Networked enabling systems and common processes across the APS

The department is supportive of initiatives towards networked and common arrangements for enabling services, where the enhancement of the efficiency or effectiveness of services can be demonstrated, while noting that the theoretical efficiencies from mandated common arrangements have not necessarily been realised in practice.

The department sees merit in moves towards common pay and conditions. Disparity of pay and conditions has a substantial impact in discouragement of mobility across the APS. It also complicates the provision of enabling services, particularly where there have been complex machinery of government changes.

Greater commonality of pay and conditions needs to be recognised as a long-term project. It could be undertaken in conjunction with the proposed development of professional models, incorporating consideration of whether the existing APS classification structure and work level standards are fit for purpose under the proposed future state. This would ensure that employee compensation structures meet the business needs of organisations and, to the greatest possible extent, result in equal pay for work of equal value on an APS-wide basis.

Diversity

The department strongly supports the focus of the Review on diversity. This has been a core focus of the department, with significant work being undertaken on gender equality, and inclusion of people with disability, people from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait

Islander peoples. The department supports the development of specific mechanisms to attract, retain and progress an inclusive and diverse workforce, including targets. For example, within the department, an 'if not, why not' approach has been taken to consideration of requests for flexible work arrangements, in recognition of the importance of flexible work to promoting an inclusive and supportive environment. Cultural change of this kind is a critical element to the success of such strategies. In addition to specific mechanisms, the Review should consider strategies to produce attitudinal change that recognises the benefits of inclusive workplaces.