To: Independent Review of the APS

Via: <https://contribute.apsreview.gov.au/>

Date: 180712

Dear Review Panel

Civil Liberties Australia thanks you for the opportunity to contribute to the discussion

about the future of the Australian Public Service. We wish to draw attention to four important issues:

1. the government’s non-adherence to Model Litigant Obligations (MLOs)
2. whistleblower protection
3. excessive hours expected of some staff, mostly females
4. public comment by public servants in their own time

**1. Model Litigant Obligations (MLOs).**

Responsibility for managing and monitoring the statutory obligation – to behave fairly in litigation – on the Commonwealth government, its departments and agencies lies with the Office of Legal Services Coordination in the Attorney-General’s department. AGD/OLSC is failing in its duty. For over a decade, Civil Liberties Australia has been raising the problems many citizens and small businesses have in dealing with government departments and agencies in the courts. This has a major impact on the experience of Australian citizens in dealing with government and the achievement of fair outcomes from those interactions (the fifth dot point in the scope of this Review).

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***CLA***

We deal with the MLO issues under two headings:

*a. What people can expect*

Nowhere is it spelled out in detail what the public can reasonably and legally expect in terms of the behaviour of Australian departments and agencies in legal dealings and court/tribunal cases.

It is important to ensure that citizens have appropriate access to information about

protection when dealing with the legal, fiscal and temporal might of the

Commonwealth.

The detail should include examples, both positive and negative, from a ‘consumer’ viewpoint.

*b. Breaches should be reported annually and transparently, as should remedies*

Any breach, by any department or agency, should be reported in its own annual report and on its own website, and in summary in the annual report of AGD, and on the AGD website. (Exemplary breaches used to be reported on the OLSC section of the AGD website: for an inexplicable reason, they were removed).

AGD itself actively breaches the MLO principles, and even admits to the breach in its annual report, while NOT reporting the breaches of the entities it is meant to monitor and report on. See p142 AGD Annual Report 2016-17. There, the ‘Quantifiable contingencies’ report indicates that AGD is withholding $534,000 of funds it should have paid out “based on precedent in such cases”.

AGD is defending the claims. Which it is entitled to do, if it thinks there’s a major principle that could be interpreted to the benefit of the government by a subsequent legal action.

However, the contingency provision in the annual report is AGD admitting that – despite settled case law – it will hold people to ransom by not paying them what AGD believes they are due in terms of damages/costs. The people will have decided on taking legal action based on a advice from a lawyer based on established case law.

AGD is a major government department which has, according to its annual report, $44 million cash on hand. In the contingency instances, it is withholding the payments of relatively minuscule sums to (probably) families and small businesses, who continue to go through the agony of not knowing how their case will turn out, or when they will get costs/damages. Even when AGD believes they, the little guys, are in the right, according to settled case law.

That’s a fair indication of the extent to which the MLOs need to be under the control of a different system than they are now: not even the department, AGD, which is responsible for their monitoring abides by the ethics/morals that lie behind the reasons for the MLOs.

Either the Public Service Commission or the Ombudsman should be empowered to do the job OLSC/AGD is not doing. We recommend that under a new system the Commission or the Ombudsman be empowered to order compensation be paid as one of the remedies where the MLOs have not been adhered to. *Note: there is a current Private Member’s Bill, in the name of Senator Leyonhjelm, being considered by the parliament in relation to the PSC/Ombudsman.*

Further to the inadvertent admission of failure in its own annual report, the secretary of AGD has clearly and distinctly admitted that there has been no active monitoring or auditing of PS-wide obligations for the Commonwealth to abide by model litigant obligations/principles. Without an active system to monitor and/or audit, any compliance that previously existed would undoubtedly decline over time. That is human nature.

*‘OLSC’s current compliance approach focuses on encouraging and supporting entities to comply with the Directions rather than a strict regulatory approach. The Directions Compliance Framework requires that entities notify OLSC as soon as they become aware of any possible or actual non-compliance with the Directions. Entities are expected to have arrangements in place to appropriately consider and respond to complaints or allegations of non-compliance with the Directions, including capability to self-assess compliance on some aspects of the Directions. The accountable authority of entities must also provide an annual certificate setting out the extent to which they believe the entity has complied with the Directions.’* (footnotes omitted).

– Secretary’s Review of Commonwealth Legal Services, Chris Moraitis PSM, 2016

<https://www.ag.gov.au/LegalSystem/Secretarys-Review/Documents/Secretarys-Review-of-Commonwealth-Legal-Services-Report.pdf>

To make the system work, there must be an active ‘policing’ of the requirement to abide

by the law. Self-reporting is completely inadequate. The current system is like the Australian banks being asked to self-report when they breached an ethical or moral obligation to a customer. In the case of the MLOs, the requirement is statutory.

For more than a decade, there has been no ‘policing’. No part of AGD has actively sought to undertake random inquiries within departments or agencies, or within the disparate legal firms servicing them. More importantly, there has been no attempt to find out how big a problem non-adherence to the MLOs is. There are simple ways to actively source information of possible breaches of MLP:

* + request or require a one-off, or annual, report by relevant magistrates, judges and tribunal members; and
  + advertise among the public, small law firms and law and bar bodies for examples.

CLA believes the MLO system is purposely designed/interpreted, and is ‘managed’ within the AGD, to reduce the chances of poor litigant behaviour by the Commonwealth coming to light. We have been monitoring the MLP and OLSC for about 12 years. At the start of that period, the OLSC reported on its website cases that had breached the MLO rules. For a decade, there has been no such public reporting.

It has become impossible to find out whether the extensive anecdotal reports of MLO breaches are true, or not. There is an urgent need to bring the Commonwealth and the APS to account for suspected widespread misbehaviour in courts and tribunals, particularly with Comcare in relation to public servants themselves, and with Veterans Affairs in relation to former Defence people.

To do that, the first requirement is a reliable count, and actual cases. Civil Liberties Australia would be willing to take part in designing any surveys and/or research required to find out the real-life data that is required.

**2. Whistleblower protection for public servants**

CLA supports the right of people to make a public interest disclosure – ie be a whistleblower – for the good of the community, as a safeguard for potentially compromised individuals or groups, and/or to ensure that wrongs are corrected. People in authority should respect, not penalise, those who take a stand against corruption or complacency. The current protections are too weak, the processes are too convoluted, and the exemptions from protections are far too broad to be an effective pathway for wrongdoing to be brought to light quickly and easily, which is frequently what’s needed.

Making arrangements for public interest disclosures more efficient and effective will make it easier for public servants to do the right thing. Uncertain protections and convoluted processes will encourage public servants to turn a blind eye to wrongdoing. No doubt Panel Members were as disturbed as we were to see that

*The latest public service commission* [*State of the Service report*](https://stateoftheservice.apsc.gov.au/2018/01/aps-values-code-conduct-2/) *found 5 per cent or 4,900 surveyed government staff said they had seen corrupt behaviour, a rate that has risen steadily since a survey**in 2013-14 that found 2.6 per cent had witnessed it in their workplaces.*

*…*

*When asked if their senior leaders acted by APS values, only 66 per cent of the bureaucracy's mid-level staff said yes. The figure grew when they were asked about their supervisor (88 per cent) and colleagues in their immediate work group (86 per cent).*

*– Fairfax Online 9 January 2018*  
*https://www.smh.com.au/public-service/more-public-servants-are-seeing-corruption-in-agencies-aps-commission-survey-20180109-h0ffxo.html*

Even the latter figures indicate that more than 10% of APS staff – and possibly a third – do not abide by APS values. These are worrying findings.

The finding that 1 in 20 employees observe corruption is directly relevant to governing legislation of the APS, its culture, the integrity of its members, its ability to deliver quality regulatory oversight, programs and services, and the confidence citizens have in the APS. All these matters fall squarely within the scope of this Review.

We recommend the Review examine the effectiveness of the current Public Interest Disclosure laws and seek details about the number of times the processes have been engaged and the experience of public servants who have sought to follow these processes. The overall findings of the State of the Service report shows internal processes are inadequate and do not facilitate the exposure of wrongdoing.

We also recommend the Review promote adoption of Qui Tam arrangements. Qui Tam is basically a legal action which encourages whistleblowing around government waste and corruption. It works well in America, where individuals can earn large percentage payouts for reporting rip-offs. It should be introduced in Australia to minimise corruption and waste.

Governments in power appear reluctant to encourage whistleblowers, believing that the whistlers might lower the poll numbers for the ruling party. But, considered pragmatically, whistleblowers can be the saviours of governments.

A striking example of how governments could profit by listening to whistleblowers was provided by activities involving the NT Don Dale Detention Centre. Repeated warnings on the dire situation, including by whistleblowers, were ignored. Dramatic footage of a hooded youth and harsh treatment of children played a significant role in the extent of the government of the NT losing the election, on 27 August 2016.

*The CLP suffered the worst defeat of a sitting government in the history of the Territory, and one of the worst defeats of a sitting government in Australian history. It was the first time that a sitting Northern Territory government was defeated after only one term. From 11 seats at dissolution (and 16 at the* [*2012 election*](https://en.wikipedia.org/wiki/Northern_Territory_general_election,_2012)*), the CLP suffered the worst election performance in its history, winning only two seats…The Chief Minister lost his seat.*

<https://en.wikipedia.org/wiki/Northern_Territory_general_election,_2016>

While the CLP government was behind in the polls, it was unlikely to have suffered such a thrashing. However, on 25 July 2016, the *ABC* broadcast a [Four Corners](https://en.wikipedia.org/wiki/Four_Corners_(Australian_TV_program)) report that disclosed the abuse of youths in the NT corrections system (at Don Dale Detention Centre) which triggered the Royal Commission into Juvenile Detention in the NT.

**3. Excessively long working hours expected of some staff, mostly females**

Quite contrary to an anachronistic public image, long working hours in the PS is a quite commonplace happening, and very counterproductive. It is a particular problem at the middle to lower upper level of the PS, we believe. Because women have advanced strongly over the past two decades at that level of the PS, females may be affected far more adversely than men.

The problem stems from a hierarchical, ‘bridal veil waterfall’ effect. The most senior employees – the top two SES levels – are very well paid and are expected to work very long hours, which they do. At the two or three levels below that, aspiring employees who are not so well paid, model their behaviour on that of their bosses. Therefore, middle-level employees get to work early and won’t leave until the boss leaves so that they are seen to be diligent and hard-working when the next performance review, or interview for a higher position, comes around.

Generally, there is a contractual agreement for staff to work a normal number of around 38 hours a week. We stress that this is a two-way agreement: that is, the staff are responsible for working the number of hours required, and so is the management responsible for ensuring that staff work no less, **and no more** (without appropriate compensation), than around this number of hours.

In exceptional circumstances, when long hours are suddenly but absolutely necessary, staff (including very senior staff - see Budget, below) should be compensated with double or triple or quadruple time. Where no compensation is paid, the practice of expecting middle-level staff to work longer and longer hours simply becomes entrenched and customary.

Where many of those staff are women in their 20s and 30s, the effect on life, lifestyle, socialising, partnering and having children can be profound. We believe that the Review Panel should recommend an immediate and a long-term study into such behaviours and effects in the APS. A comparison study in the private sector, say for lawyers and public relations practitioners, would provide useful “man”power planning information.

An ongoing culture of working additional, unremunerated hours is a poor ‘model’ and staff cannot be expected to be “innovative” and “creative” in work terms under those conditions. That is a readily understandable paradigm: what we don’t know, and can’t understand until the research is done, is what this ‘model’ imposes on lives away from work or even on longevity of work, and life.

We are suggesting the APS acts to anticipate what the outcome might be if a current employee mounts a compensation case for the attitudes, practices and behaviours mentioned above in relation to extended working hours in ‘normal’ circumstances.

**Annual Budget:** It is not uncommon for departmental staff to work 18-20 hours a day for 3-5 days in a row, including over a weekend, at Budget time. They do so in trying to keep pace with changes of direction by government ministers and their frequently inexperienced and not-necessarily-competent staff. In the handful of departments and agencies which are to be the central focus of any particular Budget, it is quote common for many middle and senior level staff to spend two or three “all-nighters” in the office. They take changes of clothing to the office for the purpose, as they abandon their family or relationship for the duration.

This unacceptable and unsustainable behaviour may be getting worse with staff cuts and the imposition of efficiency dividends. It is detrimental to the immediate and long term health of the employee. It severely impacts on the quality of home life and relationships of public servants, including having a bad effect on children. It does nothing to enhance performance by the public servant or the government of the day.

The APS is meant to be a model employer. Sometimes it sets is an appalling example.

Department secretaries and agency CEOs should be strong enough to tell their Ministers and the Ministers’ minders that such demands on staff can not be accommodated in the next Budget cycle. It is understandably difficult for the PS bosses to do so. However, some circuit-breaking mechanism is urgently required.

One way might be for the combined council of department secretaries to take the matter up. Another might be to ensure widespread external publicity occurs about the untimely vacillations that accompany the Budget process by whichever of the two major entities are in power.

Where staff are required to work to the hours and under the pressure of the annual Budget “emergencies”, severe penalties should be paid. We believe it would be ideal if these penalties were paid out of the after-pay salaries of the Ministers and their minders who create the chaos.

We recommend that the management of the APS be made to be accountable for the compliance by departments and agencies with both extremes of the working hours issue in relation to employment contracts.

**4. Public comment curtailment**

There is a need to wind back the over-reach in recent years into controlling the social media and other public comment by public servants (the recent Michaela Banerji case is a good example). This kind of thought-control is not only contrary to freedom of speech and political opinion but also creates a climate of fear, of toeing the party line and of group-think. The approach stifles creativity and the willingness to take risks in considering innovative policies.

As public servants are free to vote as they wish, they should be free to speak or write as they wish in their own time. Social media and public comment is how people today engage with their community and the concerns and the priorities of the broader society. Any public servant who is prohibited from doing this or feels constrained from doing so will be less responsive to the public they serve and the quality and creativity of their policy advice will suffer.

The Public Service Commission should be an active promoter of the PS and should not stand idly by, without supporting public servants, when they are erroneously and improperly criticised by ignorant MPs and commentators with a personal and/or commercial axe to grind. Positive image advertising and public relations campaigns of success and achievement by the APS should be mounted regularly.

The management of the APS has a tendency to see itself as an entity above the tens of thousands of mere mortals it is “responsible” for. But the APS management should have a similar role to the management of any corporate entity: educational, encouraging, monitoring and supporting. There has been little evidence in recent times that the management of the APS is supportive of its people.

ENDS

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Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australia has traditionally enjoyed and continues to aspire to. We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from ‘authority’. Our civil liberties are all about balancing rights and responsibilities, and ensuring a ‘fair go’ for all Australians.