



Australian Government Solicitor

**Submission by the Australian Government Solicitor to the Joint Committee of Public Accounts and Audit Inquiry into probity and ethics in the Australian public sector**

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1. I am the Australian Government Solicitor appointed under s 55J of the *Judiciary Act 1903*. I am responsible for the work of the AGS lawyers and other staff who, together, comprise the legal service within the Attorney-General's Department known as the Australian Government Solicitor. I refer to that legal service as 'AGS'.
2. I make this submission to the Joint Committee of Public Accounts and Audit inquiry into probity and ethics in the Australian public sector in response to the letter from the Chair dated 10 October 2023 which seeks my views on the following four issues:
  - Issue 1: the AGS framework for legal advice, and rating system for legal risk
  - Issue 2: the precision and clarity with which the AGS provides legal advice
  - Issue 3: whether the AGS considers that entities should follow its advice, and
  - Issue 4: whether the likelihood a court will consider an action illegal is an appropriate measure.
3. I note the evidence and submissions the Committee has already received about legal advice on matters of 'constitutional and legislative risk' provided by AGS in relation to the Community Health and Hospitals Program.<sup>1</sup> That is a reference to a specific type of advice, known as a constitutional risk assessment (CRA),<sup>2</sup> that AGS provides when instructed to assess the constitutional and legislative authority risk of new policy proposals (NPPs) that involve spending proposals, prepared by the executive government.
4. This submission outlines the particular framework, context and purpose of the legal advice given by AGS when a CRA is undertaken. The Committee will appreciate that CRAs are one form of the full range of legal services that AGS provides to the Commonwealth and that this submission is not directed to addressing the balance of those services.

**PART I: CONSTITUTIONAL RISK ASSESSMENTS**

**Issue 1: Constitutional risk assessment (CRA) framework**

5. Since the High Court's decision in *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No 1)*), the government has required Commonwealth agencies to seek an

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<sup>1</sup> See Auditor-General Report No 31 of 2022–23, *Administration of the Community Health and Hospitals Program* at [2.90]–[2.95]; evidence to Joint Committee of Public Accounts and Audit, Canberra, 8 September 2023 (Proof Copy) at 18–20; and Australian National Audit Office, Submission No. 5 to Joint Committee of Public Accounts and Audit, *Inquiry into probity and ethics in the Australian public sector* (undated) at 18.

<sup>2</sup> These assessments (referred to throughout as CRAs) are also known in some contexts as 'constitutional and legislative authority risk assessments' (CLRAs).

assessment by AGS of the 'constitutional risk' of NPPs to be submitted to Cabinet for consideration that involve spending, and of whether there is legislation that would support that spending, if required ('legislative authority risk').

6. A CRA from AGS is required by the *Budget Process Operational Rules* (BPORs) issued by the Department of Finance. The December 2022 version of the BPORs is publicly available on the Finance website. Paragraph [1.14] of the BPORs presently provides:

All policy proposals that involve expenditure, including combined expenditure and savings policy proposals that produce net savings, must include the constitutional risk rating (i.e. 'high', 'medium' or 'low') for the expenditure as assessed by the Australian Government Solicitor (AGS) and the proposed legislative authority for the expenditure (if required), as informed by AGS advice.
7. A CRA addresses two things.
  - a. First, whether the Constitution would support legislation authorising the proposed expenditure, or whether the expenditure is within the scope of the Commonwealth's non-statutory executive power (and therefore does not require legislation beyond a valid appropriation). In accordance with the BPORs, AGS's assessment is expressed in terms of a standardised risk rating.<sup>3</sup>
  - b. Second, whether legislation is required to authorise the expenditure, and if so, whether there is existing legislation which would support the expenditure on the NPP. While the BPORs do not require it, AGS has adopted the practice of expressing our conclusions on this issue by reference to levels of risk.
8. Our instructions to undertake a CRA do not extend to considering whether there are any other legal issues raised by a NPP, beyond the question of constitutional risk and legislative authority for expenditure.
9. AGS's consideration of NPPs for the purposes of undertaking CRAs is usually done in the context of the engagement by our clients in the Budget or Mid-Year Economic and Fiscal Outlook (MYEFO) process.
10. In the context of the Budget, AGS considers a large number of NPPs between January and April. In the context of the MYEFO, AGS considers a smaller number of NPPs, usually between September and October. AGS also considers spending proposals outside the Budget or MYEFO process where new expenditure is proposed.

***Risk ratings used for the assessment of constitutional risk***

11. As the Committee is aware from evidence it has heard, CRAs are expressed in terms of constitutional and legislative authority 'risk'. The BPORs provide for AGS's

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<sup>3</sup> *Budget Process Operational Rules* (December 2022 version) at [1.14].

assessment of constitutional risk to be described in terms of 'low', 'medium', 'high' or 'high (particularly vulnerable)'.<sup>4</sup>

12. Where the Government has agreed to a policy proposal which was not informed by AGS advice, the BPORs require that the entity seek a risk assessment from AGS.<sup>5</sup>

**Assessment of legislative authority risk**

13. When reviewing each NPP, AGS will briefly search for any existing legislation that might provide authority for the proposed expenditure, unless AGS considers that legislation is unnecessary (because the NPP would be supported by the Commonwealth's non-statutory executive power). If legislation is necessary, but there is no existing legislation that would support the expenditure, AGS will identify options for enacting legislation to support the expenditure. This consideration results in an assessment of 'legislative authority risk'.
14. This assessment does not involve the provision of advice as to whether any aspect of the policy described in the NPP is unlawful or requires legislative amendment beyond our assessment of the constitutional risk of, and legislative authority required for, any proposed expenditure.
15. The ratings that AGS uses when assessing legislative authority risk are 'low', 'medium' and 'high'.

**Issue 2: Precision and clarity of CRA advice**

16. As noted, AGS's assessment in a CRA is confined solely to whether the expenditure proposed in a NPP is within the Commonwealth's constitutional power, whether legislation is required to support the expenditure and, if legislation is required, whether such legislation already exists. This assessment is based on the information contained in the NPP itself. And, as explained, the advice is expressed by reference to risk ratings, as reflected in the BPORs.
17. Officials involved in NPPs are taken to be familiar with, and understand, the limited nature of the assessment undertaken by AGS and the risk ratings it applies. Further, CRAs provided since approximately late January 2022 (when AGS adopted a new template for CRAs) will generally include words to the following effect:

This is a constitutional risk assessment of the [named] proposal. The assessment is high level and based on brief consideration of information contained in [NPP or similar].
18. Accordingly, persons involved in preparing NPPs should appreciate that:
  - a. the assessment in the CRA is strictly limited to the question of constitutional power and a legislative basis for expenditure and
  - b. the assessment is based upon the information in the NPP.

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<sup>4</sup> *Budget Process Operational Rules* (December 2022 version) at [1.14].

<sup>5</sup> *Budget Process Operational Rules* (December 2022 version) at [1.14].

19. It is relevant to note that the Royal Commission into the Robodebt Scheme considered aspects of the NPP processes and made recommendations concerning that process, including to ensure that legal advice was properly communicated. The relevant recommendations of the Royal Commission (Recommendations 15.1–15.4) are extracted at **Attachment A**. The Committee may be particularly interested in Recommendation 15.4, which is as follows:

**Recommendation 15.4: Standard, specific language on legal risks in the NPP**

The standard language used in the NPP Checklist should be sufficiently specific to make it obvious on the face of the document what advice is being provided, in respect of what legal risks and by whom it is being provided.

20. The high-level assessment of constitutional and legislative authority risk provided in a CRA differs from the kind of considered legal advice typically provided by AGS in other contexts, including on constitutional law issues that may arise in the course of policy development or the development of legislation. The provision of considered legal advice typically requires detailed legal research and analysis conducted over a period of time, and then the careful application of legal principles to the facts or circumstances in issue, all of which will be set out in a written advice of greater length than a typical CRA. In that respect, when AGS provides a CRA in relation to funding for a legislative development project, we typically state in the CRA that further constitutional advice will need to be sought as the legislation is developed.
21. The NPP process does not contemplate, or allow for, analysis of this kind. However, it is important to recognise that in many cases, the legal position will be clear without highly detailed analysis; and where it is not, the rating will reflect the best assessment able to be reached on the information, and in the time, available. Again, readers of CRAs are taken to be familiar with the NPP process and the purpose and limits of a CRA.

**Issue 3: Whether the AGS considers that entities should follow its advice**

22. It is important to be clear about AGS's role as legal *adviser*. AGS is the Government's central legal service. It operates pursuant to the provisions of Part VIII B of the *Judiciary Act 1903*. As noted in my introduction, the office of the Australian Government Solicitor is created by s 55J of the *Judiciary Act*.
23. AGS is accountable to the Attorney-General as First Law Officer and works closely with the Solicitor-General. Additionally, certain categories of legal work, including constitutional and Cabinet work, are tied to AGS under the *Legal Services Directions 2017* and cannot normally be undertaken by other legal providers. Consistent with this role, AGS seeks to provide expert and accurate legal advice to government. However, compliance with the law is ultimately a matter for government, informed by the legal advice it receives, including advice from AGS.

**Issue 4: whether the likelihood a court will consider an action illegal is an appropriate measure**

24. When assessing a NPP, AGS may do so in terms of what a court would likely decide. That is a normal mode of conducting and expressing legal analysis as to a legal position – because ultimately only a court can authoritatively determine what the law is and how it applies in any given circumstance.
25. However, expressing a view about the law in this way is different from assessing the prospects of a court actually becoming seized of the issue and making a particular decision. Such an assessment would also involve considering the likelihood that an interested party would commence proceedings, the strength of the likely evidence and arguments able to be raised in the proceedings, and the ruling that would be made by a court in that particular case. AGS's assessment of constitutional and legislative risk does not consider, and is not influenced by, the practical likelihood that a particular activity might be the subject of legal challenge by a person with standing to bring proceedings. That is an entirely separate question, which AGS does not typically address in the context of NPPs.

**CONTACT**

26. This submission has been prepared with the assistance of lawyers at AGS.
27. AGS would be pleased to provide further assistance to the Committee. For further information, please contact Matthew Blunn, the Australian Government Solicitor, on [REDACTED] or Andrew Buckland, Chief General Counsel, on [REDACTED]

1 November 2023

**Submission by the Australian Government Solicitor to the Joint Committee of Public Accounts and Audit Inquiry into probity and ethics in the Australian public sector: Attachment A – Recommendations of the Royal Commission into the Robodebt Scheme concerning New Policy Proposals**

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28. The Royal Commission into the Robodebt Scheme made the following recommendations concerning New Policy Proposals and the Budget process:

**Recommendation 15.1: Legislative change better defined in New Policy Proposals**

The Budget Process Operational Rules should include a requirement that all New Policy Proposals contain a statement as to whether the proposal requires legislative change in order to be lawfully implemented, as distinct from legislative change to authorise expenditure.

**Recommendation 15.2: Include legal advices with New Policy Proposals**

The Budget Process Operational Rules should include a requirement that any legal advice (either internal or external) relating to whether the proposal requires legislative change in order to be implemented be included with the New Policy Proposal in any versions of the Portfolio Budget Submission circulated to other agencies or Cabinet ministers.

**Recommendation 15.3: Australian Government Solicitor statement in the NPP**

The Budget Process Operational Rules should include a requirement that where legal advice has been given in relation to whether the proposal requires legislative change in order to be implemented, the New Policy Proposal includes a statement as to whether the Australian Government Solicitor has reviewed and agreed with the advice.

**Recommendation 15.4: Standard, specific language on legal risks in the NPP**

The standard language used in the NPP Checklist should be sufficiently specific to make it obvious on the face of the document what advice is being provided, in respect of what legal risks and by whom it is being provided.<sup>6</sup>

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<sup>6</sup> Royal Commission into the Robodebt Scheme, *Report* (7 July 2023) at xv.