

Joint Committee of Public Accounts and Audit

N/A

Attorney-General's Department

Hearing date: 20 November 2023

Hansard page: 19, 20, 23-24, 25

Mr HILL asked the following questions:

Question 1

CHAIR: That health and hospitals program had 20 or more individual things in it; it was kind of a grab bag of little and big, and apples and pears and oranges, which was put together under a program. My understanding of the audit report is that there were some individual sets of grants in there, which the AGS pointed to and said, 'We can't identify any legislative authority.' I appreciate that you say it's in a CRA frame. That's not, I suppose, in some ways, the lens that we were looking at it through, but there were some grants in there for which the AGS said: 'You don't appear to have any legislative or legal authority.' Now, if that implies a lack of constitutional authority sitting behind that, that may be, but that's not actually the bit that we were looking at. It was more the fairly clear advice that, 'You want to give away this money, folks. There doesn't seem to be any legal basis to do it.'

Mr Blunn: I'll perhaps take on notice to confirm, but I do understand that the only legal advice we gave in the context of that particular program was a constitutional risk assessment, with the attendant observations that I've just made to the committee.

Question 2

CHAIR: I think that's the bit that I'm looking at. If we are talking about NPPs for a moment, an agency must get your advice, at least as a time-compressed, first-pass NPP CRA thing. There's a lot of acronyms there! That's for the secretariat. And you provide a risk based assessment with your five levels of risk. Then the agency does something with that—hopefully, accurately represents it into the process. But there are theoretically two points of failure there. One is in the draft and the advice that the agency then distils up to a cabinet minister. The other, ultimately, is in what a cabinet minister decides to leave in, cross out or add to a submission. That's just a statement of fact—having written quite a few cabinet submissions and seen what is done to them at times. The point I'm getting to is that there might be two scenarios. One is that sometimes you may be asked to review and check. The other would be an assurance mechanism, particularly on matters where you may have—what was your extreme typology?—high risk (particularly vulnerable) 'nudge, nudge, wink, wink' at the extreme end. Do you have either a real-time or a retrospective assessment of whether your work is being properly represented?

Mr Blunn: We would have an expectation, to the extent that the cabinet submission is making reference to or summarising the content of legal advice, that we would be given an opportunity to comment on the accuracy of that summary. As Mr Buckland noted, as to the content of the cabinet submission more generally, we would not be instructed to provide comment in relation to that.

CHAIR: No. Okay; that's reasonable. I mean, inadvertently, if you try to summarise a piece of legal advice you could accidentally misrepresent it or oversimplify it. So you should get a line of sight, or you do get a line of sight, or you must get a line of sight—should, do or must?

Mr Buckland: I can't answer that. We might have to take that on notice. My understanding is that generally we would see cabinet submissions. As you might be aware, there might be successive drafts. We would see at least one of those, and we would typically try and determine whether that accurately reflects the risk rating we've given. But my understanding is that it would rarely go beyond the words 'low', 'medium', 'high' or 'high (particularly vulnerable)' in a cabinet submission. We would look to see if the cabinet submission reflects what AGS has previously advised; are there matters in there, such as spending proposals, that we haven't advised on; and, ideally, does it vary significantly from what we previously advised on, such that our rating may not accurately apply to the new or amended proposal.

Question 3

CHAIR: That's interesting. In that sense, you're conflict free because you don't advise other people, so you're about the only people in the country that in that world view could provide both the commercial legal advice and the probity advice?

Mr Blunn: I wouldn't want to provide a definitive answer in relation to that question, because I think that at a level of principle there could still be some level of disconnection between the commercial advice and the probity advice, but I'm happy to take that on notice and provide you with a more fulsome—

CHAIR: Could you reflect a little further on that? That is an issue which has cropped up from time to time in entity world. I don't think it's related to you. I think it's related to circumstances where the same mob seems to have been providing the commercial transaction legal advice and the probity advice, and they've signed off things which are just manifestly indefensible, like, 'Yes, probity is fine.' Yes, except you haven't actually checked the conflict-of-interest forms, or half of them weren't returned—all that basic stuff. If you could take that on notice, that might be a sensible clarifying recommendation that we could put out. It seems like eminent common sense. Your probity advisers, if you're procuring from the commercial world, shouldn't be your legal advisers.

Mr Blunn: I'll consult with my commercial colleagues and provide you with a response.

Senator REYNOLDS asked the following question:

Question 4

Senator REYNOLDS: In this committee, we can ask these questions! Obviously, you have too many NPPs that come to you at the last minute to make those more considered assessments. What would 'good' look like to you? That's not just saying it's a risk framework but whether it's lawful, unlawful or likely to be one of the two for certain reasons. Is there a way of upskilling drafters of NPPs in departments, to say, even in the NPPs, 'We believe this is lawful,' and actually cite a head of power? There aren't that many of them, so they should be familiar with them. In terms of our recommendations, is there some way that we could look at how the budget process itself, and the rules, could be improved?

...

Senator REYNOLDS: The chair seems keen to move on, but could I ask you to take that on notice and, if there's anything more that you can provide in terms of what good or great would look like from your perspective, that would be handy.

The response to those questions is as follows:

Question 1

In addition to a number of constitutional risk assessments (CRAs), AGS provided legal advice (other than a constitutional risk assessment) to the Department of Health on 31 July 2020 in relation to the Community Health and Hospital Program.

Question 2

In summary, AGS is, for the most part, given a line of sight on whether legal advice it gives is accurately summarised in Cabinet submissions.

AGD is provided with 'Exposure Draft' and 'Coordination Draft' versions of most, but not all, Cabinet submissions. This reflects the procedures set out in the Cabinet Handbook (see: Annex D, para 35; Annex B, para 42). Where AGD receives a draft Cabinet submission, the Cabinet section in AGD reviews the submission and determines to which areas within AGD the submission should be circulated for comment, including AGS. The practice of the Cabinet section is to send to AGS for comment all Exposure Draft and Coordination Draft Cabinet submissions that:

- propose expenditure (which should refer to risk ratings contained in a CRA prepared by AGS), and/or
- refer to AGS advice.

Accordingly, provided the relevant Cabinet submission is provided to AGD, AGS will generally see at least one, and usually two, versions of a Cabinet submission that relates to a CRA or other AGS advice and have the opportunity, in the time available, to provide comments on them. We also endeavour to check that the details in each NPP have not altered in a such a way as to make our advice no longer accurate.

AGD, along with other departments, also provides 'coordination comments' on submissions, which constitute AGD's formal comment on the submission after it has been approved by the sponsoring minister. Coordination comments form part of the final submission and provide a means for the Cabinet to receive the views of departments and agencies on proposals, and are not cleared by Ministers (see: Annex D, paras 44 to 46 of the Cabinet Handbook). For example, AGD may include a coordination comment about the legal risk associated with a particular NPP.

Question 3

What is probity advice?

- Probity advice, when provided by a legal adviser, is a type of legal advice. The scope of legal advice, including probity advice, is a function of client instructions. Sometimes clients engage a probity adviser who is not a legal service provider in which case their advice is of course not legal advice.
- In AGS's experience, a client's request for advice will be informed by the client's assessment of its requirements in the context of the particular program or arrangement. Sometimes a client may require a narrow scope of advice, for example, focusing on conflicts of interest, confidentiality and engagement with third parties. In other cases, a

client may ask for advice that includes, for example, compliance with an applicable legislative or policy framework, process design and development and/or governance issues more generally.

- Depending on the complexity and scale of a particular program, a client might have the capacity through its inhouse legal advisers to inform itself of the legal issues to be considered in a probity context. In more complex programs, an external adviser may be engaged.
- While probity advisers are often associated with procurement and grant processes, there are a range of other government activities and contexts where agencies engage legal advisers, including AGS, to provide advice on matters that might be considered ‘probity’ and/or process advice, for example when undertaking investments.
- In some cases, a client will form the view that the legal issues that arise for consideration in the context of a particular process are such as to require the appointment of different legal advisers. This happens in a range of different contexts, including where a client requires probity and other legal advice.

AGS Approach

AGS is regularly appointed as either a legal adviser or a probity adviser on Commonwealth projects, and sometimes as both.

- Where AGS provides all of the legal advice on a complex project, and our engagement includes advising on matters that might be considered ‘probity’ issues, we will structure a team to ensure we have team members with the relevant skills and experience to advise on all the relevant issues that are likely to arise – whether that be advising on management of conflicts of interest, compliance with applicable Commonwealth legislative or policy requirements, delegations and approval requirements, drafting of process documentation, developing contract documents, advising on particular issues (such as intellectual property, liability and risk allocation or regulatory requirements).
- Where AGS has been engaged to provide legal advice on probity matters and another legal service provider is also providing legal advice on other matters (or vice versa), the scope of respective instructions is confirmed at the start of the project and then reflected in any relevant work order/instructions as well as the project documents. If we identify gaps or overlaps between the AGS scope of work on a project and the scope of work of any other advisers, this will be discussed with the client.
- This is similar to any other situation where more than one adviser has been engaged to provide legal advice to a client. For example, AGS may be engaged to provide legal advice on a project, with another legal service provider engaged to provide specialist advice on a particular aspect or issue; or AGS could be engaged to advise on matters that raise particular Commonwealth considerations (PGPA Act issues, approvals processes, whole of government considerations) with another provider providing more general legal advice. In non-standard transactions, this could include a ‘peer review’ function in relation to some project documents. It is not always the case that there is only one discrete legal and one discrete probity role on a project.

Should there be separation?

A legal conflict arises where there is a conflict, the appearance of a conflict or the possibility of a conflict, between the interests of the client and the interests or duties of the lawyer. No conflict arises from the mere fact a legal adviser is providing legal advice relating to probity or other legal issues to the same client.

None the less, there are a range of considerations that might inform whether separate legal advisers will be appointed by a client, and what the scope of each adviser's role might be. The appointment of multiple legal advisers is not uncommon in a range of legal services and is managed by legal service providers and clients. Clients typically consider whether it is appropriate to have multiple legal advisers at the project planning stage. In this context, we note:

- That the types of issues that need to be addressed in a simple procurement will be different to those relevant to a complex procurement, a grant process or a major project.
- Separate probity advice is unlikely to be necessary, or value for money, for more routine projects.
- In complex projects or projects with the potential to give rise to probity risks not addressed by standard processes, there is often benefit in a dedicated team considering probity issues. Some agencies also have specific policies in relation to the appointment of separate probity advisers in certain types of projects, particularly procurements.
- Where there is a separate probity adviser, they will always be responsible for advising on conflict of interest issues.
- Not all probity related issues may be the responsibility of a probity adviser. For more complex projects, a probity plan or framework would typically be put in place under which a range of people have responsibilities to deal with issues that arise and to make decisions, and all participants will be required to be briefed on probity issues and bring issues to the attention of an appropriate person. For example, the probity plan may provide for a member of the project team to be dedicated to monitoring the implementation of and compliance with the probity plan and for this to be recorded in a probity register – with any more significant issues that arise to be escalated to an external probity adviser for specialist advice. In this situation, the probity adviser is not responsible for the 'day to day' management of probity issues.
- It is common in procurements and grant programs for all advisers to provide a sign-off in relation to matters for which they are responsible.

Question 4

This question asks AGS to express an opinion in relation to improvements to Government policy, limiting what can be said.

As a general observation, AGS continually engages with its clients to work to ensure that the CRA process is optimised to support the work of officials in the NPP process. Further, the Committee will have noted that, in its response to recommendations of the Royal Commission into the Robodebt Scheme, the Government committed to update the Budget Process Operational Rules and Cabinet procedures to provide greater clarity about legal advice provided to government in the cabinet process.