**RESPONSE TO REQUEST FROM MR DAVID THODEY AO**

**Andrew Podger AO**

**6 December 2018**

On 30 November 2018, Mr Thodey emailed me regarding the supplementary information I provided to the APS Review following his speech to the IPAA ACT conference on 7 November. In his email, Mr Thodey said he ‘would value your insights and expertise’ in some specific areas:

* The respective roles of the Australian Public Service Commissioner and the Secretary of the Department of Prime Minister and Cabinet;
* Processes for appointments and terminations of agency heads and boards,
* Governance arrangements for different types of functions, and
* The issue of ministerial adviser positions and the way these relate to the APS.

Mr Thodey suggested the review team reach out to me to work through these issues and develop proposals for the review panel. My preference, however, is to provide written advice direct to the Review Panel. I would then be happy to respond to any questions the Panel wishes to ask about my written advice. I also continue to look forward to the Review Panel presenting publicly some substantial material representing its own analysis of the issues and the directions it is considering so as to allow considered and detailed responses.

The following expands upon the material in my original submission (dated 6 July 2018) and the more recent supplementary material (dated 16 November), relating to the issues raised by Mr Thodey.

**Respective roles of the APSC and the Secretary of PM&C**

I suggested in my original submission that:

‘the Commissioner should be regarded as the ‘professional head’ of the APS, responsible for overall stewardship of the APS as an institution, and the PM&C Secretary as the ‘operational head’ (or ‘head of government administration’), marshalling the APS to meet the demands of the Prime Minister and Cabinet’.

Section 41 of the Public Service Act sets out the responsibilities of the Commissioner, the first being to ‘strengthen professionalism’ in the APS. This emphasis on professionalism accords with the distinctive role I suggested. Other responsibilities include not only upholding high standards of integrity and conduct and promoting the APS Values but issuing Directions on each of the Values, and also: monitoring, reviewing and reporting on capabilities; fostering leadership, learning and career management; leading thinking about and driving reforms to workforce management policies; and partnering secretaries in stewardship of the APS. All these reinforce the particular ‘professional head of the APS’ role I suggest, but could be made clearer in the legislation, particularly Section 64.

The legislation does not set out the responsibilities of the Secretary of PM&C other than that the Secretary chairs the Secretaries Board (Section 64) and is the person who provides a report to the Prime Minister before appointment or termination of a secretary (Section 58). These responsibilities, however, have long been interpreted as meaning that the PM&C Secretary is the head of the Service. Arguably, the role of the Department of PM&C adds weight to this in serving the Cabinet (and PM) and in advising on Machinery of Government matters.

The distinction I propose would also be made clearer if changes were made to both the Secretaries Board arrangements and to the way appointments are made, including the appointment of the APS Commissioner as well as secretaries and other agency heads and boards.

The statutory function of the Secretaries Board is critical: the ‘stewardship’ of the APS and for strategies to develop and improve the APS. These go directly to the responsibilities of the APS Commissioner who should chair any such board. But I am not at all convinced that the board should just comprise secretaries. There are other agency heads who employ large numbers of public servants (indeed, in the recent past the majority of public servants were employed in non-departmental agencies), and some secretaries employ only small numbers of public servants. My preference would be to return the name of the board to the ‘Management Advisory Board’ or ‘Management Advisory Committee’, and allow the Commissioner to appoint non-departmental agency heads as well as secretaries. The APS Commissioner would be the appropriate chair, the views of the board or committee generally being most relevant to the Commissioner’s own statutory responsibilities.

In practice, there has long been another forum where secretaries regularly meet (at least monthly). The agenda does not usually involve APS management issues per se but policy priorities flowing from Cabinet or the Prime Minister. Its operational focus, ensuring the resources of the APS are properly directed to the elected government’s policies and priorities, means it is rightly chaired by the PM&C Secretary, complementing that official’s role with Cabinet and the PM and in machinery of government matters. Whether this forum needs statutory recognition is not clear, but perhaps by doing so the respective roles of the two APS leaders could be better clarified. Inevitably there will be considerable overlap of membership between the two forums, and at times some blurring of responsibilities to address some issues, but I believe the responsibilities are sufficiently distinct to warrant separation, and different chairs.

The ‘professional head of the APS’ role could also be reinforced by the process through which the APS Commissioner is appointed. The role of the APS as an institution separate from politics and able to serve any elected government could be strengthened by recognising the APS Commission as an ‘integrity organisation’ with responsibilities to the Parliament as well as to the political arm of the Executive. A provision, similar to that applying to the Auditor-General, could require consultation with the JCPAA before any appointment by the Prime Minister. A nominations committee of (say) three secretaries or equivalent, rather than the Secretary of PM&C alone, might advise the PM. I am conscious that such appointments often take place as part of a wider change in agency head arrangements, so it is unlikely that the position could often be advertised, but a nominations committee, consulting the current Commissioner, could keep abreast of likely suitable candidates and be in a position to offer timely advice.

I also think the process for advising on the appointment of the PM&C Secretary position should be broadened beyond the APS Commissioner, though the Commissioner should (as now) lead the process. My limited experience suggests that Prime Ministers are wont to make such appointments paying at most lip service to the statutory requirement for a report first from the Commissioner. To gain a PM’s serious attention requires any report to be readily available and well prepared. (In the one instance in my own experience, I provided a detailed brief to the PM in advance of the ‘report’ required under the Act, canvassing a range of possible candidates and pointing to a short-list for possible discussion; the PM later rang me, in the presence of his intended appointee, to ask that I prepare my formal report; fortunately I could do so consistent with the spirit of the legislation and without causing any embarrassment as the intended appointee was included in the short-list of candidates I had previously provided.) The process may be assisted by having a nominations committee involved well in advance of a vacancy occurring.

As outlined below re other secretary appointments, the PM should be required to explain to the Parliament should the appointment not be consistent with the advice from the Commissioner. In this context, it should be noted that the Commissioner’s report, as now, must follow consultation with the PM ensuring that the PM’s preferences re the attributes required and/or particular candidates will be taken into account.

Despite the trend evident over the last 30 years both in the Commonwealth and in most States for the First Minister to appoint someone he or she considers to have particular sympathy with the Government’s direction and/or a past personal connection, it is essential to the wellbeing and integrity of the APS as an institution that the Secretary of PM&C have the full confidence of the APS, the Parliament and the public, as well as the Government, to promote and uphold the APS Values.

**Processes for appointments and terminations of agency heads and boards**

The PS Act currently sets processes only for secretary appointments, not the appointment of other agency heads or boards. So let me first address the appointment of secretaries. The central issue here is to demonstrate that top appointments in the APS are merit-based, and that the public and the Parliament can be confident that appointees can and will promote as well as uphold the Values including of impartiality and non-partisanship.

As indicated in my original submission, I am attracted to the New Zealand arrangement where the State Services Commissioner is the employer of departmental secretaries. The system is in some ways the reverse of the Australian arrangement requiring the Commissioner to consult the PM and the relevant minister before making the appointment rather than the PM first receiving a report from senior officials before making the appointment. Politicians may express concern about the reduced role of the PM in the NZ arrangement but in discussions I have had with former NZ Commissioners it is clear that the key measure of success in their appointments is the close relationship that eventuates between the appointed agency head and the relevant minister (and the PM).

If the NZ arrangement is a bridge too far for Australia (though I suggest the Review Panel not concede this without testing the case carefully), an alternative is to give the APS Commissioner, as the professional head of the APS, a greater role in advising the PM, and to require the PM to explain to the Parliament if the appointment decision is not consistent with the advice provided. I do not oppose the Secretary of PM&C being involved as I recognise that secretary appointments frequently coincide with ministerial appointments and machinery of government changes and need to be properly coordinated, but I firmly recommend that the APS Commissioner take the lead. I suggest the Commissioner chair a nominations committee (usually three people), and be responsible for the advice that goes forward. As now, the Commissioner should be required to consult the relevant minister before offering advice to the PM. Requiring the PM to explain to Parliament why a decision was made that was inconsistent with the Commissioner’s advice would be similar to the Western Australian legislation as I recall when I was APS Commissioner. It would not directly constrain the PM, but would present an important political hurdle. I suggest these arrangements apply to all secretary appointments (and terminations), but they are particularly pertinent to the Secretary of the Treasury who has a considerable public profile that must be seen to be professional and non-partisan.

While other agency head and board appointments are not subject to processes under the PS Act, some are subject to other statutory requirements in their agencies’ own legislation. Some years ago, a policy was also introduced requiring the relevant portfolio secretary in consultation with the Commissioner to provide advice to the relevant minister before an appointment was made. I am not sure of the status of this policy requirement today, or whether it has been applied consistently. I believe some such requirement should be included in the PS Act. The model I would prefer is for the Commissioner to chair a nominations committee in each case, including the portfolio secretary and up to one or two others, consulting the relevant minister before presenting its report (in the case of board appointments, the current board chair should be consulted). As with the secretary appointment process, the minister might be required to explain to the Parliament should the appointment made be inconsistent with the advice provided by the Commissioner. A lesser constraint if this is considered excessive would be to require the minister to seek Cabinet agreement wherever the intended appointment is not consistent with the Commissioner’s advice (though it is now commonplace for Cabinet to require any such appointment be referred to it for endorsement, the main purpose not being so much to apply the merit principle as to meet political considerations).

Special arrangements should apply to heads of ‘integrity agencies’. These are agencies with responsibilities to oversight executive activities and/or have a particular relationship with the legislature. They include the ANAO, the Ombudsman, the Electoral Commission, the Human Rights Commission as well as the APSC; arguably the ABS should also be included. Several have roles ‘inside the tent’ as well as in oversight (eg the APSC and ANAO). There is a strong case in my view for appointments to the heads of these agencies to be subject to some form of consultation or endorsement by the Parliament (or a Parliamentary Committee), as occurs now for the Auditor-General. This could be included in the relevant authority’s own legislation.

I should also like to draw to your attention that the latest amendments to the PS Act watered down the appointment process for the SES. In the past, such appointments were subject to ‘certification’ by the APS Commissioner that the processes used by the employing agency head were appropriate. Certification by the Commissioner now is only required for SES terminations (that they are in the public interest). I firmly recommend reinstating the role of the Commissioner in SES appointments: to certify that a proper merit-based process has been followed and the relevant agency head’s preferred candidate is suitable. This is consistent with the leadership role of the SES and the Commissioner’s role as the professional head of the APS, and would help to reinforce the Commissioner’s ability to manage succession across the APS. It also provides an important constraint on ministerial pressure on secretaries to make particular deputy secretary appointments (a not infrequent occurrence, despite the provision in Section 19 limiting ministerial directions).

**Governance arrangements for different types of functions**

My original submission referred to ‘a continuum of the appropriate degree of independence for different types of functions’, noting that the APS is not totally independent but works within the framework of ministerial responsibility (as stated in the APS Values). The continuum I described is discussed in more detail in a paper I presented at a workshop in China last year which in turn drew on work I did at the time of the Commonwealth Financial Accountability Review which led to the introduction of the PGPA Act. I am currently finalising the paper for publication next year, but am willing to provide the secretariat with a copy of my latest draft. The paper focuses on Australia but is written for a more international audience as well.

The paper suggests that Finance should strengthen its current advice on organisational structures (its ‘Assessment Template’) recognising the differing balances of competing principles required for the management of different public sector activities or functions. The principles identified in the paper are:

* ‘The public interest’: public policies and programs should reflect the collective interests and preferences of the people whether determined through formal democratic processes (such as Australia’s parliamentary system and the role of elected ministers in determining policies in the public interest) or other forms of public engagement and consultation;
* Fairness and justice in decision-making: within the policy frameworks set by the government in the public interest, administrative decisions should be made impartially and professionally, strictly according to the law, and not influenced by personal connections or political or social affiliations;
* Performance: public resources utilised for the delivery of government services should be applied effectively to meet the government’s policy objectives, and used as efficiently as possible; and
* Public accountability: decisions should be made transparently and decision-makers should be held accountable to the public whether through democratic processes or other public review arrangements.

Recognising that the weights attached to each of these principles may vary with functions, the paper suggests a mapping of formal structures to the strength of support they offer to the different principles. This is summarised in the following table:

**TABLE 1: POSSIBLE MAPPING OF FORMAL STRUCTURES TO DIFFERENT KEY PRINCIPLES**

W = weak support for the principle; M = medium support for the principle; S = strong support

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **COMPETING PRINCIPLES** | **STRUCTURAL OPTIONS** | | | | | | | |
| **Ministerial**  **Department** | | **Executive Agency** | **Statutory Authority** | **Government company** | **Specially created non-government company** | **Third party under contract** | **Third party in partnership** |
| *Fully part of dept* | *Separate*  *Office in dept* |
| Importance of democratic/ministerial oversight and control | S | S | M/S | W/M | W | W | W/M | W |
| Independence of administration | W | W/M | M | S | S | S | M | S |
| Ability of citizens/communities to influence services | W | W/M | M | M | M/S | M/S | M | S |
| Importance of specialty/niche service | W | M | M/S | S | S | S | S | S |
| Linking policy and administration | S | S | M | W/M | W | W | W/M | W/M |
| Relevance of commercial principles for efficiency | W | W/M | W/M | W/M | S | M/S | M/S | M/S |

This possible mapping would be for guidance purposes only, recognising that there will always be political judgments about the balance of principles and the appropriate organisational structure for any particular function.

The paper also recognises the importance or informal processes that may complement the formal structures and help to address the principles appropriately. Suggestions about these are set out in the following table:

**TABLE 2: POSSIBLE COMPLEMENTARY AND MORE INFORMAL PROCESSES**

1. Democratic/ministerial oversight and control may be strengthened by:
   1. Ministerial approval of strategic directions etc.
   2. Ministerial ‘statements of expectations’ about the way in which an independent agency should administer its responsibilities
   3. Agreements between ministerial departments and agencies
2. Administration may be made more independent by:
   1. Statutory obligations including in program legislation
   2. Delegated authority
   3. Decision-making and reporting frameworks and processes (including public reporting and the use of advisory committees and boards)
3. Citizens/communities’ capacity to influence may be strengthened by:
   1. Advisory committees and other consultative arrangements
   2. Reduced legislative prescriptions
   3. Delegated authority
   4. Budget flexibility, funds pooling
   5. Appropriate agency culture, ‘public service motivation’, staff continuity, career paths etc.
4. Expertise in particular fields may be strengthened by:
   1. Identified specialist units and advisers in departments
   2. Public reporting
   3. Staff continuity, particular career paths
   4. Partnerships and staff interchange with external specialist organisations
5. Links between policy and administration may be strengthened by:
   1. Regular committee processes, joint task forces etc.
   2. Protocols about reporting experience and initiating policy proposals
   3. Purchaser/provider agreements with the policy departments
6. More ‘commercial’ approaches to program management may be strengthened by:
   1. Separate decision-making and reporting processes for identified programs
   2. Appropriate financial incentives and budgetary flexibility.

To be more specific, I believe the general assumption in the current Finance guidance that the default position should be for functions to be managed in ministerial departments unless a very clear case for not doing so is made, goes too far. Instead of applying such a firm default position, I would place more emphasis on the role of ‘portfolio secretaries’ in helping ministers coordinate activities across portfolios (and budgets), and having direct involvement in advising on appointments (as discussed above).

In particular, I believe the former Centrelink model was a proven success as was the former Medicare Australia model, and that coordination of service delivery could have been achieved effectively by means of data linkages and shared service delivery offices without bringing the former statutory authorities within a ministerial department. In each case, the former agency had developed close relationships with the relevant portfolio department (and, since the establishment of the Department of Human Services, with the relevant policy departments as well). The change that occurred was, in my view, inconsistent with the broader trend towards citizens-centred services that is being pursued in aged care, disability care, health and education (including through the use of NGOs, boards etc.). I suspect it has also been a contributor to recent failures such as the ‘robo-debt’ case and poor performance in call centre arrangements. Another example of inappropriate absorption into a ministerial department is the Office of Indigenous Affairs. While the former ATSIC had conflicting governance arrangements, as a separate statutory authority it successfully developed a presence across Australia which fostered close partnerships with communities which the Office these days seems to find hard to maintain (the ‘Redfern Statement’ a few years ago from a range of Indigenous leaders and organisations advocated re-establishing an agency separate from a ministerial department).

Another specific area for reform is to clarify when a regulation function would be better managed by a separate authority. For example, it may now be time to remove the regulation of aged care from the Health Department just as the regulation of disability care is now in a statutory authority.

There is also a strong case in my view for departments to use less formal internal structures and processes to strengthen research and evaluation activity. Some have done so in recent years after a period during which such activity declined.

**Ministerial adviser positions and their relationship with the APS**

The Members of Parliament Staffing Act 1984 represented a compromise over a former proposal to allow a proportion of SES officers to be political appointees. It had several advantages including the provision of much needed political management support for ministers (and other MPs) and removing pressures on APS employees to undertake political functions such as liaison with parties and backbenchers and handling the media.

There was always some tension between the ministerial advisers’ role and that of the APS, but over the 1980s and 1990s the relationship matured as each recognised the contribution of the other and respected their respective responsibilities. This was aided by the modest numbers of advisers involved and the background of most of the advisers appointed. A significant number were public servants seconded to MOPS positions, and many external appointees had considerable policy expertise and engaged with APS experts on the substance of policy and did not focus exclusively on the political implications.

There has been considerable research more recently about developments in the role of ministerial advisers and the nature of the people appointed (eg by Anne Tiernan, Maria Maley and an excellent book by Alan Behm; just last week Adam Creighton published data in The Australian on the increasing numbers of advisers across Australian jurisdictions). Amongst the trends appear to be:

* Continuing increases in numbers;
* Fewer public servants seconded;
* Fewer subject matter experts appointed, and a stronger focus on political tactics and media management;
* Closer control of the APS through more extensive interaction down into agencies (as revealed by past APSC surveys); and
* A shift in the careers of politicians towards significant ‘apprenticeships’ as ministerial advisers before preselection as candidates for election.

When I was the APS Commissioner, I revised the guidelines on official conduct to take into account the newly articulated APS Values and Code of Conduct, and included new material on the relationship between the APS and ministers and their staff. This material has been largely maintained in subsequent versions of the guidelines, and expanded upon in material developed by my immediate successor, Lynelle Briggs. Critical to this guidance was acknowledgment of the importance of a partnership built upon mutual understanding of respective roles and responsibilities. This included explicit understanding that advisers do not have the power to direct APS employees, and that the APS has responsibility to provide the minister with its professional advice based on any legal requirements and the best evidence available from analysis and experience (I do not recall the exact words). I also publicly encouraged the Government to develop a code of conduct for advisers to complement the rules applying to the APS, but that was only introduced some years later.

A central issue, highlighted by Anne Tiernan, is whether there is an accountability gap when it comes to advisers. The exemption of advisers from appearing before the Parliament is based on the assumption that ministers accept responsibility for the advisers’ actions. But that, too often, has proven not to be the case as ministers use ‘plausible deniability’ and blame advisers for misconduct or failure to inform, sometimes dismissing them but not allowing them to be examined by a Parliamentary committee. As numbers of advisers grow, this accountability gap becomes more serious, and the assumption that ministers can and will accept responsibility for their advisers’ actions becomes unrealistic.

The Review Panel’s terms of reference seem not to allow it to explore in any detail the MOPS arrangements but, as with the guidelines I prepared as Commissioner, it may be possible to take useful steps from the APS end and by implication identify the further work on the MOPS Act and related matters to be done by others later.

The distinct roles and responsibilities of advisers and APS employees could be made clearer by careful revisiting of the APS Values as I suggested in my original submission. By linking the values to key relationships it would be more apparent, for example, that the APS relationship with ministers and the Parliament is based on being non-partisan, not just responsive and accountable; that the relationship with the public includes being impartial with no (political or other) interests, as well as being committed to service; that the relationship in the workforce is based on merit. Each of these differs from the values that advisers might be required to uphold. Such a values framework could also help to distinguish the APS from the Parliamentary Service, which shares most of the APS values but does not operate under the framework of ministerial responsibility but has obligations to the legislature and to each and every MP.

Specific measures to improve the relationship between the APS and advisers include:

* Encouraging more secondments of APS employees into MOPS positions for a period (generally, say, no more than three years to limit assumptions of ongoing partisanship), both to ensure better awareness within the senior echelons of the APS of the needs and pressures on ministers and their offices, and to help ministers and their offices to strengthen links with departments and understanding of the APS;
* Developing guidelines on the return of APS secondees to the APS (such guidelines exist in some overseas jurisdictions);
* Clarifying best practice about Departmental Liaison Officers (DLOs). My firm view is that the senior DLO should not be an APS 4 or 5 administrator managing documents etc., but should be at least at EL2 level, and one of the department’s best and brightest. They should have the clout to phone the secretary directly when circumstances require and the skills and experience to direct the office to the appropriate people in the department and ensure the department fully understands the context of requests for information and advice. They should also by personal example demonstrate the capability that lies within the department. They must uphold the APS Values but also gain the confidence of the minister and office to be an accepted member of the team there;
* As Alan Behm suggests, ensuring the Chief of Staff and the office fully appreciate that the secretary is ‘the principal official policy adviser’ as set out in the PS Act (Section 57(1)(a));
* Encouraging the secretary to meet the chief of staff regularly (as well as the minister) to discuss the relationship between the office and department, including any sensitive matters such as poor performance by an area of the department in meeting timeframes for briefings, and inappropriate pressure from an adviser about policy advice received. Such meetings must not be at the expense of meetings between the minister and the secretary;
* Recommending more extensive induction training of advisers including about the APS and the Parliament, as well as about Cabinet and budget processes.

Some further thoughts on these issues can be found in my book on *The Role of Departmental Secretaries* (ANU Press 2009, available on-line).

**Other relevant matters**

I am conscious that my suggestions reflect the perspective of a former senior public servant, albeit one who worked very closely with ministers on both sides of politics; I also continue to have good relations with those with whom I worked most closely. The suggestions may seem to some current politicians to involve a less responsive public service. That is not the intention, albeit I do advocate a greater degree of independence in several respects. The intention is to strengthen the quality and effectiveness of the APS as an institution, including in serving the Government of the day.

Perhaps it would be worthwhile considering some complementary actions to make this very clear:

* The APS Values should again include being ‘responsive’ to ministers, along with being impartial, non-partisan and accountable (‘responsiveness’ is still included in the Commissioner’s Directions, but was removed from the Values themselves in 2014);
* The provision ‘under the minister’ should be returned under the responsibilities of secretaries, reflecting the Constitutional fact that ministers are responsible for administration and are able to issue lawful directions;
* Membership of political parties by SES officers should be discouraged; such membership should be required to be included in the statements of interests all SES officers provide their agency heads (allowing the agency head to address any concern about partisanship or real or perceived conflict of interest). Similarly, holding office in any political-type organisation should be discouraged, and required to be included in statements of interest.