August 23, 2019

Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By e-mail: legcon.sen@aph.gov.au

Re: ***Inquiry into the impact of changes to service delivery models on the administration and running of Government programs***

Dear Secretary

Thank you for the opportunity to make a submission to this Committee.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and academic staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by Professor Cheryl Saunders AO, and Associate Professor Kristen Rundle.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

Professor Adrienne Stone
Kathleen Fitzpatrick Australian Laureate Fellow
Redmond Barry Distinguished Professor
Co-Director, Centre for Comparative Constitutional Studies

Associate Professor Kristen Rundle
Co-Director, Centre for Comparative Constitutional Studies

Senate Legal and Constitutional Affairs References Committee Inquiry

The impact of changes to service delivery models on the administration and running of Government programs

SUBMISSION

Centre for Comparative Constitutional Studies

23 August 2019

1. Introduction

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. CCCS undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

We welcome the opportunity to make this submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the impact of changes to service delivery models on the administration and running of Government programs.

We note that the Committee's Terms of Reference group together a number of existing and proposed models for the delivery of Government programs and services across different sectors of government activity. We urge the Committee to recognise that choosing, designing, and assessing the suitability of different models for the delivery of Government services and programs is not a mere technical exercise. It is a special kind of constitutional responsibility.

Our submission accordingly addresses paragraph (e) of the Committee's Terms of Reference: 'any related matters'. We urge the Committee to turn its attention to the broader constitutional dimensions of the practices under examination. We address two of these constitutional dimensions in particular. The first concerns the demands of the constitutional framework for Commonwealth government in the context of outsourcing of government programs and services. This framework involves the distinctively Australian combination of federalism and responsible government and raises both the centrality of ministerial responsibility for the implementation of programs and the role of the Parliament in supervising such arrangements and providing a legislative framework for all except those that are routine. The second constitutional dimension to which we refer is the implications of different models of government service delivery for the relationship between government and the people from whom it draws its authority.

2. Models of government service delivery and the constitutional framework for government

The Commonwealth Constitution provides the framework within which the institutions of Commonwealth government must work. This has two dimensions that are relevant for present purposes. The first is that public power is divided between the Commonwealth and the States. The second is that the Commonwealth executive is responsible to the Parliament, and through the Parliament to the people, for the exercise of all aspects of the power under section 61. The critical nature of that relationship is confirmed by the description of the role of Ministers in section 64, as 'officers' who 'administer the departments of state' and must also be Members of the Parliament.

The latter dimension of the constitutional framework is most obviously relevant for present purposes. Ensuring the responsibility of Ministers to Parliament, on which the entire system depends, is complex enough when government programs are delivered by the departments of state. In conditions of modern government and politics, there are questions about the extent to which Ministers, as opposed to public service officers, are accountable for performance and whether and how public service officers are answerable to Parliament in circumstances where Ministers cannot be held to account. These are questions on which the Committee necessarily must have a view, in order to tackle the issue of the impact of 'changes'.

Whatever difficulties arise under the so-called traditional model of government administration, they are magnified by departures from it that further separate Ministers from the delivery of programs that fall within the areas of Commonwealth responsibility. The contracting-out of program delivery provides an example. By definition, private sector contractors do not have the public interest as their core responsibility. Public contracts cannot cover all the exigencies that might arise. The use of tender processes, whether for fairness or to seek value for money, places a departmental wall between contractors and Ministers, which can be used to avoid Ministerial responsibility.

The already complicated accountability relationship between public service officers, Ministers and Parliament is complicated further still where the role of public service officers is 'only' to supervise the effective performance of contracts. Contract-related doctrines such as commercial-in-confidence further impede accountability to Parliament and to the public. All of these issues, and others related to them, need to be resolved in decisions to use contracts for service delivery. These issues also suggest that the services for which contracts are used should be carefully chosen.

We draw attention to one other aspect of the constitutional framework to which attention should be paid for the purposes of the Committee's inquiry. Under section 61 of the Constitution, which deals with the scope of Commonwealth executive power, the choice of service delivery models is not one for the Commonwealth executive alone. Section 61 allows some scope for inherent Commonwealth executive power, exercisable without

parliamentary authority. In relation to contract and spending, for example, it seems likely, to paraphrase the *Williams* cases, that it extends to contracts made in the course of administering the departments under section 64 as long, as least, as the departments are administering programs within areas of Commonwealth responsibility. As the *Williams* cases also make clear, however, for reasons attributable to the constitutional framework, some contracts cannot be made by the executive branch alone and require legislative support, which in turn can be measured against the heads of federal legislative power enumerated in section 51 of the Constitution. This consideration also needs to be borne in mind in examining the impact of changes on service delivery models. Ultimately, if changes are agreed, the limitations on inherent executive power are likely to affect the ways in which the changes are put in place.

3. Models of government service delivery and the relationship between Government and the governed

The constitutional relationship that exists between the Government and those from whom government draws its legitimacy concerns the equality of both before the law. This relationship stands to be shaped, in significant ways, by different models for the delivery of Government services and programs.

The constitutional relationship between Government and the people from whom it draws its authority does not change simply because Government might choose to design and deliver its services in different ways. However, there are real concerns about how such arrangements as contracted-out government programs or services might operate to close off avenues of accountability to which the Government should be subject. Doctrines of commercial in-confidence' are especially notable here, and were mentioned above. In a constitutional order in which all administrative action is framed by and answerable to law, it is essential for these avenues for accountability to remain open, accessible, and effective.

Further, concerns about the intelligibility of the interactions that citizens have with Government on a daily basis are now widespread. The Committee's Terms of Reference speak directly to one of the most prominent examples of this problem: the 'Robodebt' debacle. We urge the Committee to see the constitutional significance of this dimension of its inquiry. It is essential that the relationship between the Commonwealth and those subject to its administrative power be designed and sustained in a manner that is intelligible and respectful.

4. Conclusion

In preparation for this submission we read with interest the recent research paper distributed by the Australia and New Zealand School of Government (ANZOG), *2030 and*

beyond: getting the work of government done, that was commissioned to aid the Australian Public Service Review Panel.[1] The authors of the paper emphasise the limits of transactional approaches to Government service delivery that have resulted from the dominance of 'agency theory' in the design and delivery of the work of Government. They call for a more 'relational' approach to thinking about this aspect of governing. We endorse these recommendations, and would also seek to extend the emphasis on 'relationships' to the two primary points raised in this submission: how the constitutional relationship between the Government and the Parliament is observed in relation to the choice and operation of different models of Government service delivery, and how the increasing distance between the Government and the governed that has accompanied the use of these models so far might be lessened with a view to developing a more responsive and responsible relationship between the two.

In closing we note that the functional dominance of the Government over the Parliament in many parliamentary systems, including that of Australia, makes it unlikely that an answer to the complex concerns raised in this submission will be self-imposed by the executive branch. The current inquiry offers an opportunity for the Senate Legal and Constitutional Affairs References Committee, as a critical parliamentary actor, to insist on the importance of such concerns. We urge the Committee to give close and thoughtful attention this aspect of its task. Different models of service provision stand to arrange and rearrange relationships between the Government and the people of Australia. The questions at issue thus go to the most fundamental dimensions of our constitutional order.

[1] Janine O'Flynn and Gary L. Sturgess, *2030 and beyond: getting the work of government done*, An ANZOG research paper for the Australian Public Service Review Panel, March 2019 (available at: https://www.apsreview.gov.au/sites/default/files/resources/2030-beyond-getting-business-government-done.pdf.