

Your Ref: D1709824

27 July 2018

Mr Darren Foster
Director General
Department of the Premier and Cabinet
Locked Bag 3001
WEST PERTH WA 6872

By email: AboriginalPolicy@dpc.wa.gov.au



Dear Mr Foster

Discussion paper – An office for advocacy and accountability in Aboriginal affairs in Western Australia

With reference to your 2 July 2018 letter, please find attached the Public Sector Commission's submission in response to the above-mentioned discussion paper.

Should you have any queries, please do not hesitate to contact either myself on 6552 8551 or lindsay.warner@psc.wa.gov.au, or Ms Melissa Travers, Assistant Director, Legislation and Reviews, on 6552 8584 or melissa.travers@psc.wa.gov.au.

Yours sincerely



Lindsay Warner
ACTING PUBLIC SECTOR COMMISSIONER

PUBLIC SECTOR COMMISSION SUBMISSION

JUNE 2018 DISCUSSION PAPER: AN OFFICE FOR ADVOCACY AND ACCOUNTABILITY IN ABORIGINAL AFFAIRS IN WESTERN AUSTRALIA

The Public Sector Commissioner (the PSC) endorses the objectives and principles underpinning the proposed creation of a new statutory office for advocacy and accountability in Aboriginal affairs in Western Australia.

It is noted the discussion paper is generally consistent with the previous input of the PSC provided during the paper's development. That advice dealt principally with the structural and administrative approach to be adopted in achieving the preferred model. This submission takes the opportunity to reiterate the principal features previously recommended and conveyed by the PSC.

Application of the Public Sector Management Act 1994

It is considered the new body should be an integral part of the Public Sector and as such subject to the *Public Sector Management Act 1994* (PSM Act).

The PSM Act sets out a framework for integrity and accountability across the public sector (see for example the general principles in sections 7, 8 and 9 and the associated standards and codes of ethics). It is not considered that compliance with this framework, as part of the public sector, would interfere with the independence or operations of the proposed office. In this regard, it is noted that the Parliament has seen fit to ensure that other independent bodies created since commencement of the PSM Act in 1994 - such as the Inspector of Custodial Services, the Corruption and Crime Commission and the Commissioner for Children and Young People (CCYP) - remain subject to that integrity framework.

Ensuring independence in the staffing and operations of the entity is possible without excluding it from the Public Sector, as the models for the entities referred to above demonstrate.

In a similar vein, there are benefits to staff of the office being part of the Public Service:

- It provides access to a pool of experienced career staff (without denying the option of externally recruited individuals).
- The associated employment practices, subject to (Public Sector) Commissioner's instructions are focussed on ensuring overall integrity of approach. These include appointment through to termination of employment (including for example, as a result of substandard performance or disciplinary breaches). The risk of unsuitable or problematic practices is thereby minimised. It provides employee rights (available to employees sector-wide) in the event of redundancy occurring.

Structure, powers, accountability and independence of new office

Accountability to Parliament for other accountability bodies is provided in the form of requirements and/or powers to report to Parliament (see for example section 22F PSM Act and section 49 *Commissioner for Children and Young People Act 2006* (CCYP Act)).

Standing committees of Parliament are another form of accountability of statutory offices to Parliament. For example, section 216A of the *Corruption Crime and Misconduct Act 2003* (CCC Act) and section 51 of the CCYP Act require Parliament to establish joint standing committees. Typically, the functions and powers of these Committees, as determined by the Parliament, include scrutiny of the operations of the relevant office.

In some instances the independence of the office is also set out in the establishing legislation. For instance, section 22 of the PSM Act states that the PSC shall act independently in relation to the performance of his or her functions and is not, except as provided in the Act, subject to direction from the Minister or any other person.

Similarly, section 25 of the CCYP Act provides that the CCYP is not subject to ministerial direction by the Minister or any person in the performance of their functions.

However, it is noted that this legislation also provides for a limited Ministerial power to direct the office in relevant circumstances. This is consistent with the principle of responsible government, that public sector bodies are accountable, through the relevant Minister, to the Parliament for what they have done in the exercise of their statutory authority, and how they have expended public monies. For instance, section 24 of the PSM Act sets out limited circumstances in which the Minister may direct the PSC, such as to conduct a review of a public sector body and section 26 of the CCYP Act acknowledges that the Minister may give written directions as to the general policy to be followed in the performance of the Commissioner's functions (providing a mechanism for regard to be had to government priorities). Transparency for any directions issued is provided through a requirement for any ministerial directions to be tabled in Parliament.

The discussion paper suggests that the accountability functions of the proposed office will be of a high level/strategic nature involving monitoring and reporting (including on agency effectiveness and efficiency), rather than investigating individual cases. This would appear to be consistent with the model established under the CCYP Act, where a broad role to "monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people" is incorporated within the CCYPs broader advocacy and monitoring functions (see section 19 CCYP Act). This contrasts with the more investigative type functions of the Ombudsman and CCC, and the NSW Ombudsman in relation to assessment of prescribed Aboriginal programs under Part 3B of the NSW Ombudsman Act.

Consistent with the CCYP's high level strategic advocacy and monitoring functions, it is noted that the CCYP Act does not provide the office with investigation powers as

such, but does require agencies and service providers engaged by them to disclose relevant information to the CCYP (see section 22 CCYP Act). In addition, Part 5 of that Act provides the CCYP with power to conduct a special inquiry into a matter affecting the wellbeing of children and young people. It is understood that the CCYP has not to date conducted such an inquiry. However, such powers of inquiry, compulsion and reporting (equivalent to a royal commission) may be worthy of consideration in relation to the proposed office.

In this regard the CCYP Act may provide a suitable model for the proposed Aboriginal accountability and advocacy office.

Title and appointment process for officeholder

In the PSC's view other notable features of the CCYP Act may be worthy of consideration and give appropriate guidance, including provisions relating to:

- The title of the statutory office;
- the appointment and removal from office in sections 7 and 8;
- oath or affirmation of office in section 15; and
- relationship with the Minister in Part 4.

It should be noted that a review of that Act conducted for the (then) Attorney General in 2013 by the PSC found that this Act had been operating effectively to achieve its purpose of promoting the wellbeing of children and young people in WA, and no amendments to the provisions of the Act that establish the CCYP's independence or accountability were recommended.

PSC

27 July 2018