

Submission to Australian Public Service Commission:

APS Reform agenda

Stage 2 integrity reforms

Andrew Podger AO

Australian National University

Introduction

This submission responds firstly to each of the proposed initiatives discussed in the APS Commission's Issues Paper.

It also addresses one of the Government's Stage 1 integrity reforms which has not yet been fully implemented and one of the integrity-related recommendations of the Robodebt Royal Commission to which the Government has agreed but has not yet been implemented.

Thirdly, the submission identifies other reform initiatives, some of which the Government has publicly committed to, that should be pursued as important elements of a comprehensive integrity reform agenda.

A. Initiatives discussed in the APSC Issues Paper

1. Own motion powers and expanded inquiry powers

Investigation of alleged Code of Conduct breaches

As mentioned in the Issues Paper, the recent amendment to the Public Service Act (PSA) has clarified the APS Commissioner's authority to investigate alleged breaches of the Code of Conduct by former agency heads as well as current agency heads. This power is not subject to a request by a minister or the prime minister but its exercise is at the discretion of the APS Commissioner.

I believe this is appropriate (**Finding A1**). It is the professional head of the APS who should determine whether such an investigation should occur, not a political leader. The prime minister, or any minister, may of course ask the Commissioner to conduct such an investigation, and the Commissioner should have the discretion to agree or disagree.

As with any decision to investigate an alleged breach of the Code of Conduct, the Commissioner's decision to do so in the case of a current or former agency head will take into account the seriousness of the alleged breach and its apparent impact. Honest mistakes should not warrant investigation nor, for example, arguably insufficient care and diligence unless the apparent impact is demonstrably significant. Vexatious or frivolous complaints should not be investigated either and the Commissioner should not be pressed to investigate every complaint but should be free to focus only on substantial allegations with serious implications. The Commissioner might also accept an agency head's acknowledgement of unethical behaviour without any investigation nor a formal finding of a breach of the Code. For example, the committing of a driving offence might not warrant more action than notification to the Commissioner and acknowledgement and apology to agency staff.

The Commissioner should exercise such discretion (whether to investigate) without legislated constraints (**Finding A2**). In the event of an investigation, the PSA already provides for appropriate procedures.

The constraints on the Commissioner investigating alleged breaches by current or former APS employees seem to me appropriate (**Finding A3**). The primary responsibility here lies with the relevant agency head who may, however, consider that the circumstances require a more independent and higher profile investigation, and hence ask the APS Commissioner to investigate. The PSA also allows for the prime minister to refer alleged breaches to the Commissioner.

On sanctions, there is little benefit and significant difficulty in trying to impose sanctions on former agency heads or APS employees found to have breached the Code. But the severity of the breach would be clarified if the sanction that would have applied had the person remained in the APS was specified (**Finding A4**). This is consistent with the Robodebt Royal Commission's recommendation of a 'disciplinary declaration'.

The most important action to be taken relates to the conditions under which people found to have breached the Code may be appointed to APS positions in the future. In my view, they should be required to inform any APS selection process of the breach for the following five years (**Finding A5**). That selection process may then determine if the breach should preclude appointment.

While the PSA specifies the sanctions that may apply to an APS employee found to have breached the Code, it is less clear whether such sanctions can be applied to agency heads (though secretaries currently may have their appointments terminated at any time for any reason). It would be useful to ensure that the relevant sanctions that may be imposed on APS employees (reprimand, fine or termination) could be imposed on agency heads (subject to any other statutory requirements applying to statutory officers) (**Finding A6**). In practice, it is hard to see circumstances where a breach of the Code by an agency head has been formally found that a fine or reprimand would suffice. Given the statutory responsibilities of agency heads, particularly secretaries, the finding of a breach must raise serious questions about their leadership capacity including in promoting the APS Values.

The APS Commissioner's recent statement about the findings from investigations following the Robodebt Royal Commission emphasised the PSA's requirements of confidentiality and only revealed the names of former secretaries found to have breached the Code, recognising this was in the public interest. My view is that 'naming and shaming' is likely to be in the public interest more frequently than the Commissioner suggests, and can be a legitimate sanction (**Finding A7**). Relevant considerations are the individual's seniority (noting the requirement of agency heads and SES employees to promote as well as uphold the Values) and the scale of the impact of the breach.

Discretionary power to initiate reviews and investigations

This initiative was recommended by the Thodey Report (recommendation 7). It was not related so much to Code of Conduct investigations as to systemic integrity issues that might be raised by incidents or complaints, including whistleblower revelations. Thodey suggested the APSC be the one-stop shop for handling whistleblower complaints. I am less sure that that is appropriate. Agencies need to have their own processes for handling many of these and, while whistleblowers should be able to complain to the APSC, the APSC should not be expected to examine them all. But when it refers such a complaint back to an agency it should require a report back on the result and have the capacity to conduct a further investigation (**Finding A8**).

The main purpose of such own power is to be able to explore systemic issues and problems. The Issues Paper suggests the need for ‘appropriate safeguards’ about initiation and referral processes. I am not sure if these are necessary, particularly if the suggestion is to place them in legislation. But the APS Commissioner might indicate how the power would be exercised including the factors influencing priorities, and the way in which the necessary expertise will be found and applied (**Finding A9**). In some cases the investigation may be in the style of an independent audit, but I suspect that in most cases the Commissioner will wish to focus more on the lessons to be learned and will take a more collaborative approach to the investigation.

Such a power should also be seen as contributing to the strengthening of the role and independence of the APS Commissioner more generally. The Commissioner is both ‘inside the tent’ collaborating with the Secretaries Board and other agency heads, but also, importantly, ‘outside the tent’ overseeing the performance of agencies and the APS as a whole, including in respect of integrity.

Developing a Code of Conduct database

The Thodey Report recommended (within recommendation 11) that agencies be required to provide ‘integrity information’ to the APSC as part of strengthening the APSC’s role in ‘building and sustaining APS integrity strength and resilience’ by giving it more visibility over the whole APS integrity system.

The purpose of such ‘integrity information’ and a Code of Conduct data-base needs greater clarification. I suspect the main purpose is both to ensure greater consistency in administering the Code and to identify systemic issues which need to be addressed to improve integrity across the APS (**Finding A10**). I am not convinced that it should be used to help enforce agency (or Commission) actions such as requirements to reveal breaches when applying for positions. Accordingly, the database does not need to identify individuals.

Amongst the data that should be included are (**Finding A11**):

- The number of people investigated each year for alleged breaches
- The number and classification of people found to have breached the Code, and the number of breaches found
- The specific Code breaches found
- The nature of the misbehaviour involved (using a classification developed by the APSC such as: for personal gain, inappropriate workplace behaviour, disrespect towards the public, failure to obey lawful directions and rules, lack of impartiality)
- The sanctions imposed against the breaches found, by classification of the people concerned.

The Merit Protection Commissioner already holds some information on Code of Conduct breaches through the appeals against decisions which the Commissioner examines. The MPC has reported on these in annual reports, which are included within the APS Commissioner’s own annual report. That has on occasion included comments on the practice by agencies in conducting investigations and imposing sanctions.

With a broader database, the APS Commissioner could include material on current practices and on areas of concern in the State of the Service Report, while also drawing upon the MPC’s insights from reviews of decisions (**Finding A12**). This would be in addition to any specific measures taken to promote greater consistency and to address systemic issues.

2. Extension of the APS Values to other government entities

The proposed initiative is to extend the APS Values to other entities covered by the PGPA Act. The Issues Paper suggests that the initiative would not supersede any existing values, codes of conduct or statutory duties, and it would be subject to the objects of the entity's establishing legislation.

If only this was so easy.

The following is the process I believe is warranted to achieve the underlying purpose of a consistent approach across the Commonwealth to setting values that define the roles and identify the ethical behaviours expected of Commonwealth employees (and statutory and other appointees).

First, to review whether some entities now outside the PSA should be brought within its coverage and hence subject to the APS Values (**Finding A13**). Twenty years ago, in accordance with governance advice from the Department of Finance (advice which is still operational for any new agencies created, the default position being PSA coverage), a number of entities were brought within the PSA (such as the then Health Insurance Commission). There is room to take this further. Examples include the Australian Securities and Investments Commission and the Reserve Bank. Both are regulatory agencies and there seems no convincing reason for them to be treated differently to other regulators such as the ACCC.

Second, to undertake a more fundamental review of how the APS Values are articulated in the PSA based upon the role of the APS as a key institution in Australia's democratic system of government, 'serving the Government, the Parliament and the Australian public' (PSA s3) (**Finding A14**). There is considerable confusion in the current articulation (especially in the way 'committed to service' blurs the role of the APS in serving the Government and the Australian public) and important omissions (particularly of the merit principle). Attachment A to this submission is a copy of the discussion paper I released in July 2024 presenting a more comprehensive reform agenda including how the APS Values should be revised; Attachment B is a more recent article published in The Mandarin with more details on the possible rewording of the Values.

Third, action is needed to emphasise the obligations of APS agencies to promote and uphold the APS Values and to challenge the practice of some agencies to articulate their own values (**Finding A15**). All APS agencies must uphold all the APS Values. It is true, however, that the relevance of the different values varies with agencies' functions. Service delivery agencies may emphasise the Values relating to serving the public while central policy agencies may emphasise serving the Government, but neither agency type should do so at the expense of not upholding the other APS Values.

Fourth, rather than extend the APS Values to non-APS entities, there needs to be careful consideration of the applicability of each of the Values depending on the specific role of the entity and, in some cases, on the different role of different staff (**Finding A16**). In particular, accountability arrangements vary depending on whether the people concerned work in the executive, legislature or judicial arm of government; also, in some cases the merit principle and being apolitical is essential and in others these are not. Suggestions in this respect are set out in the two Attachments.

Where feasible, the values should be included in the relevant legislation (e.g the MOP(S) Act) along with an associated code of conduct drawing as far as is appropriate from the APS Code of Conduct including the requirement to uphold the values (**Finding A17**). Breaches would then be managed primarily within each entity.

Finally, consideration should be given as to whether Commonwealth companies as well as entities under the PGPA should be required to articulate Values. I believe they should (**Finding A18**). These

would need to be agreed by the companies' boards, but preferably after consultation with the shareholder ministers. In particular, to limit the risk of a UK Post-type disaster, the values should balance obligations (largely financial) to shareholders and recognition of the important role of any Australian Government company to serve its customers (the Australian public) and apply ethical business practices.

3. Managing post-employment conflicts of interest

While the current guidelines issued by the APS Commission seem sensible and appropriate, the evidence suggests they have been frequently ignored and, where applied, the practice has not been consistent across the APS. For that reason, the rules must be given the weight of the law through provisions in the PSA possibly expanded upon by APS Commissioner Directions (**Finding A19**). That is the approach outlined in the discussion paper at Attachment A. The Commission should look again at the 1979 Bowen Committee Report on Public Duty and Private Interest.

A balance does need to be struck between meeting public concerns about perceptions of conflict of interest, and the rights of departing public servants to find work and to draw on their experience (and the benefits from time to time for the APS itself from drawing on that experience). The balance may be affected by the individual's seniority and scale of authority e.g. in purchasing or regulating.

In the case of agency heads, including secretaries, any employment or consulting work in the first two years after leaving the APS should be subject to written permission by the APS Commissioner who may include conditions (**Finding A20**). In line with international practice (such as in Canada), the expectation should be that this would deny for two years any work for the agency the individual had headed. Work for other agencies might also be subject to conditions.

In the case of the SES, any employment or consulting work in the first two years after leaving the APS should be subject to written permission by the relevant agency head who may impose conditions (**Finding A21**). That may also deny work for the agency for two years but possibly with exceptions where the agency considers the benefits of drawing on the individual's expertise are significant and can be managed without any reasonable perception of conflict of interest.

Agency heads should also designate non-SES positions where post-separation employment could give rise to perceptions of conflict of interest. APS employees in these positions would also have their post-separation employment for two years after leaving subject to written agreement by their agency head (or a delegate) (**Finding A21**). These positions may include officers with significant purchasing delegations, or have significant regulatory authority, or are responsible for major projects involving contracts.

Conditions attaching to permissions might include no involvement with the Agency for a period, or no involvement with particular programs or projects for a period.

The written permissions should, desirably, follow discussions between the agency (or APSC), the individual concerned and the new employer.

Agencies should also be encouraged to engage with the industries they most commonly interact with to ensure mutual understanding of the processes for handling conflicts of interest in post-separation employment (**Finding A22**). There may be room, as Defence found in the 1990s, for mutually supporting ethical guidelines not only in this area but in other fields of frequent ethical concern.

4. APS integrity data dashboard

While the Commonwealth Integrity Maturity Framework issued by the National Anti-Corruption Commission provides a useful general approach for monitoring how well agencies are promoting integrity, there is room for the APSC to spell out more specific indicators that agencies might report against and related questions that might be included in the APSC's annual employee census (**Finding A23**). This has been suggested by ANAO and considered recently by the JCPAA in its inquiry into probity and ethical decision-making in the Australian public sector. This information could then be used in the State of the Service Report each year.

The APSC might draw upon the work it undertook in 2003 on 'Embedding the APS Values', focusing on 'leadership', 'management' and 'assurance', each including specific actions that might be taken. Amongst the actions that might be monitored include (**Finding A24**):

- Training and related support on the APS Values and agency-specific ethical challenges, and the coverage of such training
- Staff confidence in their leaders' modelling ethical behaviour including in some specific areas of risk (eg procurement, grants administration, record-keeping, FOI management)
- How well the Chief Executive Instructions reflect promotion of the APS Values
- The inclusion of ethical behaviour in performance management
- Staff confidence in management arrangements reflecting the Values
- Maintaining data on Code of Conduct management
- ANAO investigations and responses
- Internal audit activity regarding integrity.

It would also be helpful if the APSC identified examples of good practice and encouraged other agencies to follow similar approaches tailored to their own business and ethical risks.

5. Strengthening transparency of agency customer feedback

As the Issues Paper notes, most APS agencies do report on customer feedback as part of the Performance Reports required under the PGPA Act. This information can be quite complex and some agencies are rightly publishing details separately from their annual reports. The information is also often very agency-specific presenting challenges for drawing together any APS-wide assessment.

On the other hand, the Survey of Trust in Australian public services is inevitably high-level and does not easily identify particular trends or areas for improvement.

A key challenge is to find some middle ground which is meaningful and supports improved performance across the APS. It is also essential that the information provided both by agencies and in any APS-wide report such as the State of the Service Report is frank, assessing performance against appropriate and clear targets, and pointing to possible ways of achieving improvements.

The State of the Service Report offers an excellent means for highlighting publicly key trends in service delivery performance (**Finding A25**). An option the APS Commissioner might consider is to structure the report around the key groups of APS Values suggested above with a major chapter on service to the Australian public. The information in the chapter would be drawn from questions put to key agencies focusing on the most significant services they deliver or oversee (e.g. social security,

Medicare, tax assessments, employment services, aged care, childcare, disability services, regulation). The report may focus each year on some specific area that the Commissioner considers warrants public attention, whether to highlight areas where significant improvement is needed or areas where significant improvement has been achieved (and how).

The information may highlight key trends and comparisons (e.g. waiting times, customer satisfaction levels) or draw attention to new approaches (e.g. online transactions) and their levels of success, or highlight interesting developments in gaining feedback (e.g. from customers of funded services delivered by non-government organisations).

As agencies enhance their own customer feedback information, this should be made public on their websites with annual reports providing summaries and highlights, identifying clearly overall performance for each program against targets that should be identified in portfolio budget statements (**Finding A26**).

The Government agreed in principle to the Robodebt Royal Commission's recommendation (12.2) for a customer experience reference group. The mechanisms outlined in the Government's response could also be used to help refine customer feedback metrics and related performance measures.

B. Initiatives the Government has committed to not addressed in the Issues Paper and yet to be fully implemented

Appointments

Amongst the Stage 1 initiatives listed in the Introduction is 'ensuring appointments to key independent institutions are transparent and merit-based'. The Minister for the Public Service committed to changes in the processes for the appointment (and termination) of secretaries and the appointment of the APS Commissioner in her 2023 speech on APS reform. The Government also commissioned a review of appointment processes for select public sector positions including board appointments. That review was completed a year ago but is yet to be released or its recommendations responded to.

It is surprising that the Issues Paper does not canvass the details (or options) about how these appointments are to be managed in future and the legislation to give effect to proposed changes.

The discussion paper at Attachment A includes the following proposals:

- Consistent with the recommendations of the Thodey Report (explicitly endorsed by the Robodebt Royal Commission), consideration should be given to amending the Public Service Act to provide for:
 - a presumption in favour of advertising unless there are good reasons not to do so
 - the independent APS Commissioner to be joint author with the Secretary of PM&C of advice to the Prime Minister on Secretary appointments, and
 - the Commissioner and PM&C Secretary to be authorised to consult others if they wish to do so. (Proposal 4)
- Consideration be given to requiring consultation with the Leader of the Opposition before the Prime Minister advises the Governor-General on the appointment of the APS Commissioner. (Proposal 5)

- Consideration be given to legislating a basic set of principles to apply to all statutory office appointments with scope to adjust particulars to fit different circumstances along the following lines:
 - all vacancies to be advertised;
 - an independent committee, including where appropriate the APS Commissioner or their nominee but not as a rule officers of the relevant department (i.e. only if specialist expertise is a factor that is best provided by the department), to prepare advice on suitable candidates;
 - Ministers only able to make appointments from the list of suitable candidates recommended by the committee, noting their ability to draw the names of potential candidates to the attention of the advisory committee; and
 - departmental annual reports to provide information on the operation of these principles in their portfolios. (Proposal 8)
- Consideration be given to set a ceiling of 5% on the proportion of ambassador/high commissioner positions (and heads of consulates) filled by people who are not career diplomats or public servants selected on a firm merit basis by the Secretary of the Department of Foreign Affairs and Trade. (Proposal 9)

Each of these proposals is consistent with the Stage 1 initiative and, given that the initiative is yet to be implemented, they should all be included in the Stage 2 integrity reforms (**Finding B1**).

Recordkeeping

The Government has agreed to the Robodebt Royal Commission recommendation (23.8) that the APSC should set standards for documenting important decisions and discussions. I am not aware of action yet taken to implement this.

This is a critical integrity issue repeatedly identified by inquiries and ANAO audits.

The most effective way to ensure there are clear standards and that these are observed is for the APS Commissioner to issue a Direction related to the APS Value of ‘accountability’ (**Finding B2**). That should be complemented by clear guidelines.

The Commissioner has publicly indicated his view that exemptions under the FOI Act should be extended to include ‘deliberative’ policy advice, and that in the absence of such a change requiring records to be kept might not be successful. Such an amendment to the FOI Act was not included as a condition on the Government’s endorsement of this Royal Commission recommendation. It is in fact a separate issue that might in due course be considered by the Government and explored by the Parliament.

In the meantime, there is no excuse for delaying the setting of standards.

C. Other integrity reform initiatives

As set out in the discussion paper at Attachment A, there are other initiatives that should be included in the next stage of integrity reforms.

A key issue arising from Robodebt and several other recent failures is whether the rewards and penalties facing secretaries are contributing to the absence of ‘frank and fearless’ advice to ministers.

Reforming appointment processes may help to get the rewards and penalties balance right, but a more fundamental change is needed to secretaries' tenure (**Finding C1**). The relevant proposal in the attached discussion paper is that:

- Consideration be given to amending the Public Service Act to:
 - provide for Secretary appointees to retain tenure to a position at level but with the expectation that they could be rotated from time to time
 - allow for Secretaries to be moved from positions where that is desired by the relevant Minister after consultation with the Prime Minister on the basis of a joint report provided by the Public Service Commissioner and the Secretary of PM&C
 - where a Secretary is moved from a particular position, every effort be made to find an alternative one or a position of roughly comparable status elsewhere in Commonwealth employment or any other position the Secretary is prepared to accept with dismissal only where such positions are unavailable and the Secretary is redundant, and
 - include the same tenure provisions as for other APS staff, allowing in addition to redundancy, for Secretaries to be dismissed for reasons of incompetence, incapacity for health reasons or improper behaviour. (Proposal 3)

Strengthening the role and profile of the APS Commissioner would also assist, in particular by clarifying the respective roles of the Commissioner and the PM&C Secretary (**Finding C2**). The following proposal is in the attached discussion paper (there is of course room to vary the suggested title of the PM&C Secretary):

- Consideration be given to clarifying in the Public Service Act that the APS Commissioner is 'the Professional Head of the APS' and the Secretary of PM&C is 'the Coordinator-General of the APS'. (Proposal 6)

APS integrity might also be enhanced by some further action with regard to the use of consultants and contractors including a firm requirement that those effectively in an employment arrangement be engaged as staff employed under the merit provisions of the PSA and subject to the APS Values (**Finding C3**). The relevant proposal in the attached discussion paper is that:

- Consideration should be given to legislation which would require:
 - the use of consultants and contractors to meet strict tests of essentiality, cost effectiveness and overall value for money
 - staff to be employed under the merit provisions of the Public Service Act where they are to be effectively engaged in an employment relationship
 - all departments and agencies to provide the Department of Finance and the Public Service Commission with annual plans for the use of consultants and contractors
 - all consultancies costing more than \$250k to be based on open tenders that should not be rolled over
 - all consultancies costing more than \$1m to be cleared with the Department of Finance and the Public Service Commission
 - the details of all consultancies and contractor engagements to be notified on departmental and agency websites within a week of contracts being signed, and
 - all department and agency annual reports to include information on their use of consultants and contractors including assessments of value for money and any effects on maintaining inhouse capability. (Proposal 10)

Strengthening merit processes across APS agencies would also support integrity reform (**Finding C4**). The attached discussion paper includes a proposal that:

- Consideration be given to amending the Public Service Act to require:
 - APS departments and agencies to provide brief merit staffing plans to the APS Commission and to report in their annual reports on the achievements of those plans;
 - the Merit Protection Commissioner to conduct regular reviews of merit practices in agencies; and
 - the APS Commissioner to confer with the Merit Protection Commissioner in the promotion of the APS Values, Employment Principles and Code of Conduct.

Conclusion

The APSC Issues Paper on Stage 2 integrity reforms is disappointing. While it includes some important initiatives, some of these require serious reconsideration or expansion. Even more importantly, the agenda identified is far from the comprehensive reform that recent events would seem to demand, and which offer the opportunity to gain wide public and parliamentary support.

23 October 2024

Discussion Paper

Further Reform of the Australian Public Service

Andrew Podger AO FASSA FIPAA

July 2024

SUPPORT FROM FORMER SENIOR PUBLIC SERVANTS

“While the Government has taken some useful steps to improve Commonwealth public administration, much more needs to be done. Indeed, the Public Service Minister has foreshadowed her intention to do more and has encouraged contributions from any with an interest.

In that spirit, we commend this paper prepared by former Public Service Commissioner and Departmental Secretary Andrew Podger. Robodebt and other recent cases of maladministration demonstrate the urgent need for reform, and also provide a once-in-a-generation opportunity to deliver it.

Andrew has not asked us to endorse every specific proposal in the paper but rather to encourage the Government and its advisers, Members of Parliament and other interested parties to consider them as a serious contribution to the development of further legislative reforms. We are pleased to do so.”

Stephen Bartos FIPAA

Roger Beale AO

Alan Behm

Tony Blunn AO FIPAA

Anne Buttsworth PSM AM

Michael Carmody AO

Marie Coleman AO PSM

Michael Delaney

Meredith Edwards AM FASSA FIPAA

Christine Goode PSM

Patrick Gourley

Jeff Harmer AO FIPAA

Tony Harris

Ken Henry AC FASSA

Joanna Hewitt AO

Michael Keating AC FASSA FIPAA

John McMillan AO FIPAA

Ken Matthews AO FIPAA

John Menadue AO

Ric Smith AO

David Stanton AM FASSA

Meryl Stanton PSM FIPAA FAHRI

Lynne Tacy FIPAA

Dennis Trewin AO FASSA

David Tune AO FIPAA

Sue Vardon AO FIPAA

Peter Varghese AO

Helen Williams AC FIPAA

PURPOSE

This paper outlines legislative proposals that have not thus far been prominent among those advanced by the Government.

Its purpose is to help promote discussion about the ways in which the efficiency, effectiveness and capability of the Australian Public Service (APS) and its integrity can be improved, and the standing of the APS as a key institution in Australia's democratic system can be restored.

BACKGROUND

Competent democratic government in the public interest requires an effective and efficient public service distinguished by probity and accountability. It is a fundamental responsibility of the Parliament and the Government to see that its public service is maintained in the best possible form for if that is not so, the well-being of society and citizens is at risk.

There are natural impediments to giving priority to public service laws, structures and procedures. For example:

- a. There is a tendency to see the public sector more as a cost than a benefit, a drain of resources that could be used more productively elsewhere. So resourcing of government administration can be based not so much on the basis of what is desirable but what is the cheapest, with the sector being seen more as a source of savings than an avenue for community investment.
- b. Public administration does not have the allure of other policies that more directly engage the interests of citizens and politicians – health and social security, education, defence, economics and taxation and national security. In the Commonwealth, for example, it has been rare for Ministers to engage deeply with public service matters except when things go wrong and cause political strife.
- c. Inappropriate forms of politics rather than sensible administrative policy can have baleful effects on the public service subverting the support it can give to governments and the services due to citizens. Examples of political and bureaucratic empire building and appointments based on political allegiance rather than merit and much in between are common.

These impediments, their inter-action and other influences have combined in the more recent history of the Commonwealth and under successive governments to damage the Australian Public Service (APS). The consequences have been detailed by the 2019 Thodey Review of the Australian Public Service, the Robodebt Royal Commission and numerous reports of parliamentary committees and the Auditor-General.

The Thodey review report said that 'the APS is not performing at its best today' and it 'is not ready for big changes and challenges Australia will face'. It said that 'the service's ill-preparedness reflects historical challenges in addressing known issues – including its people, its enabling systems and its culture.' Through a large number of recommendations, it urged 'a service-wide transformation to achieve better outcomes'. The Morrison government shelved several of Thodey's most important recommendations and there is little evidence of the transformation it called for.

In the Robodebt Royal Commission report, the Commissioner, Catherine Holmes, found 'dishonesty and collusion' and 'ineffectiveness of...institutional checks and balances.' She made rueful

observations about ‘the lengths to which public servants were prepared to go to oblige ministers’ this leading to ‘undermining the concept of impartiality and frank and fearless advice.’ It is heartening that the Government has accepted all but one of the Royal Commission’s recommendations, although some only ‘in principle’. It is to be hoped that these recommendations can be promptly and effectively implemented. The Government’s response did not consider the Royal Commission’s explicit endorsement of key Thodey report recommendations not included in its own recommendations, but the Minister for the Public Service, Senator Gallagher, committed the Government recently to a further tranche of legislation which will address many of these.

The Government has also taken notable steps to rehabilitate the public service including by:

- d. establishing a National Anti-Corruption Commission
- e. replacing the Administrative Appeals Tribunal with a new Administrative Review Tribunal
- f. beginning to cut back on the excessive use of consultants and contractors and rebuilding internal capacity including by an investment fund
- g. re-establishing program evaluation and undertaking to integrate high quality evaluation into all aspects of program and policy development (though further steps should be taken to reinstate the systematic processes used by the Keating Government).
- h. abolishing staff ceilings
- i. beginning to fix up the remuneration and classification mess, a legacy of almost 30 years of irrational policy, and
- j. undertaking to amend the Public Interest Disclosure Act to improve whistleblowing laws and considering better support for whistleblowers including the possibility of a Whistleblower Protection Authority.

Legislation to amend parts of the Public Service Act has also been passed by the Parliament in May 2024. In the main, its provisions are useful although they have been criticised for being too modest and unambitious for the seriousness of the problems now besetting the public service.

In acknowledging these criticisms, Senator Gallagher, has said that ‘not everything can be done at once’ and, as mentioned, she has foreshadowed a further ‘phase’ of reforms. That is welcome and necessary. Much has changed in government and politics and it is important for the public service to keep up with the times.

The Minister has also said that ‘everyone who wants to play a role...has a role to play.’ This paper is a response to that invitation and it is hoped that it might be helpful to the Minister, the Government and the Parliament.

ROLE AND VALUES OF THE AUSTRALIAN PUBLIC SERVICE

The role of the APS is set out in the Public Service Act 1999. The first main object of the legislation in Section 3(a) is: ‘to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public’.

The way this role is to be performed is set out in the APS Values in Section 10 of the Act. The Robodebt Royal Commission noted ‘a lack of understanding on the part of some of those involved of the APS’ role, principles and values’. It drew attention to the Thodey Report recommendations which

‘were largely directed at the need for a clear understanding of the APS’s role’ and included the codification of new ‘principles’ in the legislation to complement the existing APS values. The proposed principles, drawing on New Zealand practice, were apolitical, stewardship, openness, integrity and adherence to merit.

The Government has instead only added ‘stewardship’ to the current APS Values in the legislation passed in May.

A more substantial change, avoiding Thodey’s possibly confusing addition of new principles, would be to review the current articulation of the APS Values so that they more directly reflect the APS role to ‘serve the Government, the Parliament and the Australian public’. Such a revision could address the Royal Commission’s recommendation for ‘a fresh approach to customer service’ while also acknowledging explicitly the central democratic principle of serving the elected government. The current articulation, even with the inclusion of ‘stewardship’, blurs these responsibilities while also omitting the original Westminster principle for a civil service of merit-based employment.

Proposal 1

Consideration be given to a more substantial revision of the APS Values in the Public Service Act to better reflect Westminster principles of being professional and apolitical, serving the elected government and administering its policies and programs, being accountable to the Parliament and the public through the system of ministerial responsibility, being impartial in its exercise of authority, being committed to serving the Australian public, adhering to the merit principle and having the highest ethical standards (the recently added value of stewardship of the APS could also be retained though that is primarily the responsibility of Secretaries and other senior public servants and there is still work to be done to clarify what this value means in practice for other public servants).

The Thodey report also recommended that its proposed ‘principles’ apply to Commonwealth bodies outside the APS. The above approach to articulating the APS Values – based on relationships with the Government, the Parliament, the Australian public and in the workplace – could clarify distinct values for other Commonwealth employees. That is already the approach for Parliamentary Service employees in the Parliamentary Service Act, recognising they work for the legislature not for the executive arm of government. Value statements could also be included in the Members of Parliament (Staff) Act for both ministerial staff (who work for Ministers) and other employees of Members, including Ministers (whose work relates to the Members’ legislative rather than any executive role), all of whom unlike APS employees are allowed to be partisan.

Proposal 2

Consideration be given to review the Parliamentary Service Values in light of the revision to the APS Values, to include in the MOP(S) Act statements of values for ministerial staff and other employees, and to require other non-APS bodies to articulate the values for their employees using the framework developed for the APS.

RELATIONS BETWEEN MINISTERS AND DEPARTMENTAL SECRETARIES

Section 57 of the Public Service Act defines the roles of Secretaries as, among other things, ‘the principal official policy adviser’ to Ministers and for ‘ensuring delivery of government programs and collaboration to achieve outcomes with the Agency Minister’s portfolio, and with other Secretaries, across the whole of Government.’

In discharging these functions mutual trust and confidence between Ministers and Secretaries is vital for effective government and administration.

Trust and confidence between Ministers and Secretaries can be affected by many things often not related to Secretaries’ competence. Personal incompatibilities, including working styles, can affect relations to the point where they become unworkable. In such cases it must be possible for Secretaries to be removed from their particular positions.

Since the 1990s, it has been unfortunate that this possibility has come to be taken as an opportunity for Secretaries not just to be removed from particular positions but to be sacked for any reason. This has gone against a longstanding tradition that staff in the public service should only be dismissed if they are incompetent, redundant or unfit on medical grounds or if they have been guilty of misbehaviour, a tradition which remains so for all staff except Secretaries. That is to say, the dismissal of Secretaries has, in many cases, not observed standards of merit applied to all other staff. Nor are standards of merit observed when Secretaries’ terms of appointment end and decisions are taken about new appointments. These failures of integrity provide a bad example of personnel management at the highest levels.

Worse, it creates an environment unconducive to the provision of comprehensive, frank and honest advice, policy or otherwise, to governments and ministers. While not all will be equally affected and some may not be at all affected, it is possible others may be inclined to temper their advice so as to avoid the prospect of falling out of favour and risking dismissal or non-reappointment with consequent damage to their reputations and financial security. These effects are insidious as they can trickle down departmental hierarchies and cause other senior staff to temper their advice in their best interests, as seemed to be the case in the Robodebt saga and some other recent cases of maladministration identified by ANAO.

In place of the Hawke Government’s system involving appointments with the same tenure as all other public servants but with consideration of rotation after five years in a job, fixed period contracts were mandated in the 1990s removing tenure as a trade-off for a pay increase. A sensible personnel policy rationale for this approach is elusive and no justification has been offered for it in those terms. It’s likely that the limited commitment they imply will be reciprocated and those who see no prospects of further appointments will typically spend a good deal of their

last year and months looking for an alternative job rather than concentrating fully on the one they have.

Proposal 3

Consideration be given to amending the Public Service Act to:

- (a) provide for Secretary appointees to retain tenure to a position at level but with the expectation that they could be rotated from time to time
- (b) allow for Secretaries to be moved from positions where that is desired by the relevant Minister after consultation with the Prime Minister on the basis of a joint report provided by the Public Service Commissioner and the Secretary of PM&C
- (c) where a Secretary is moved from a particular position, every effort be made to find an alternative one or a position of roughly comparable status elsewhere in Commonwealth employment or any other position the Secretary is prepared to accept with dismissal only where such positions are unavailable and the Secretary is redundant, and
- (d) include the same tenure provisions as for other APS staff, allowing in addition to redundancy, for Secretaries to be dismissed for reasons of incompetence, incapacity for health reasons or improper behaviour.

In light of such a change, the Remuneration Tribunal should be asked to review Secretaries' remuneration.

Of course, such amended tenure laws for heads of departments will not guarantee high standards of policy and other advice to ministers and governments. They will however remove an unhealthy impediment to it.

To achieve the appointment of high-quality people as Secretaries, it is important that their selection is based closely on merit rather than political considerations. Aspects of the existing arrangements are less than ideal.

Section 58 of the Public Service Act requires appointments to be made by the Governor-General on the advice of the Prime Minister after a report has been provided by the Secretary of the Department of the Prime and Cabinet in consultation with the APS Commissioner and the relevant Minister.

That is to say, the primary advising role on Secretary appointments is vested in an officer occupying a position often more subject than most to political pressures.

Further, the consultation arrangements are minimal and do not match the standard required for appointments for other positions in the Public Service where advice is provided by a committee of usually three. In short, the advisory system for Secretary appointments is far less collegial than is the case for other public service appointments or for many statutory offices. And unlike those positions, Secretary vacancies are rarely advertised to provide the opportunity for the widest possible field of applicants.

In her recent speech, Senator Gallagher foreshadowed changes to strengthen the appointments process for Secretaries but did not set out the details.

Proposal 4

Consistent with the recommendations of the Thodey Report (explicitly endorsed by the Robodebt Royal Commission), consideration should be given to amending the Public Service Act to provide for:

- (a) a presumption in favour of advertising unless there are good reasons not to do so
- (b) the independent APS Commissioner to be joint author with the Secretary of PM&C of advice to the Prime Minister on Secretary appointments, and
- (c) the Commissioner and PM&C Secretary to be authorised to consult others if they wish to do so.

The current provision requiring consultation with the relevant Minister should be retained.

Such arrangements would enable advice on Secretary appointments to be developed at a step removed from political pressures that could distort assessments of merit while preserving a central role for the Secretary of the Department of the Prime Minister and Cabinet.

The Thodey Report recommended that the stronger role for the APS Commissioner should be complemented by ensuring the appointment of the Commissioner has firm Parliamentary support through consultation with the Leader of the Opposition. Senator Gallagher's recent speech indicated she may be offering support for this recommendation.

Proposal 5

Consideration be given to requiring consultation with the Leader of the Opposition before the Prime Minister advises the Governor-General on the appointment of the APS Commissioner.

While this should ensure both the independence of the Commissioner and their status, consideration should also be given to requiring the Commissioner to have experience as a Secretary or an equivalent role. The Commissioner's role requires such standing amongst the peer agency heads (including Secretaries).

The Thodey Report also recommended clarification of the respective roles of the APS Commissioner and the Secretary of PM&C, the former to be designated 'head of people' and the latter as 'head of the service'. Given the APS Commissioner's statutory functions (s41(1) of the PS Act) are 'to strengthen professionalism of the APS ...', 'to uphold high standards of integrity and conduct in the APS' and 'to promote, review and report on APS capabilities ... to promote high standards of accountability, effectiveness and performance', it would be better to designate the APS Commissioner as 'the Professional Head of the APS'. The Secretary of PM&C is responsible for coordination of the APS (and of the Commonwealth public sector more generally) to meet the requirements of the Prime Minister and the Cabinet. Given that role, the PM&C Secretary might

be better described as ‘the Coordinator-General of the APS’ (drawing on the term sometimes used in the past to describe the role of the head of Premiers’ Departments in the States).

In exercising that role, the PM&C Secretary is appropriately the chair of the Secretaries Board on most day-to-day issues. However, when the Board is considering longer-term APS stewardship matters, it would be preferable for the APS Commissioner to take the lead.

Proposal 6

Consideration be given to clarifying in the Public Service Act that the APS Commissioner is ‘the Professional Head of the APS’ and the Secretary of PM&C is ‘the Coordinator-General of the APS’.

The APS Commission should also be required to report on the operation of the Public Service Act provisions on the appointment and tenure of departmental Secretaries in its annual report to the Parliament.

Consistent with the Thodey report and the Robodebt Royal Commission, Senator Gallagher has also foreshadowed welcome reforms to the performance management of Secretaries and to enhance the powers of the APS Commission to conduct reviews.

MINISTERIAL STAFF

The growth in the numbers of ministerial staff and the expansion of their policy responsibilities has affected relations between Ministers and Secretaries and their departments, not always for the good.

Difficulties are more likely to confound relations between Ministers and their departments where the roles and responsibilities of ministerial staff are unclear. Further, different Ministers will expect their personal staff to undertake different kinds of roles.

Nevertheless, for some years a code of conduct has applied to ministerial staff which, among other things, sets out a broad indication of roles and behaviour. While useful, the code is administrative and it lacks the gravitas and enforceability of the code of conduct in the Public Service Act that applies for staff employed under that Act (and of the code in the Parliamentary Service that applies to members of the Parliamentary Service). Legislating such a code was not only recommended by Thodey and explicitly endorsed by the Robodebt Royal Commission but was also recommended by the Jenkins Report on behaviour in the Parliamentary workplace. While other sensible changes were made in the legislation to amend the MOP(S) Act that was passed by the Parliament in October 2023, this widely supported proposal was not included.

Moreover, as mentioned above, the values ministerial staff should uphold are not currently articulated.

Proposal 7

In addition to including a set of values for ministerial staff in the MOP(S) Act, consideration should be given to including a code of conduct for ministerial staff in the Act.

Together with a statement of values, this could help to further clarify the roles of these staff and smooth relations between Ministers and departments (the code should explicitly require ministerial staff to facilitate communication between the department and the Minister). If it is good enough for Parliament and governments to require a legislated code of conduct for public servants, and a legislated code for those in the Parliamentary Service, it should equally be good enough for them to have one for their personal staff.

Further, a code reflecting the one for ministerial staff but appropriately modified could be legislated for all other staff employed under the MOPS Act.

As with others, the quality of ministerial staff will depend significantly on the thoroughness with which they are assessed for appointment. The amendments to the MOP(S) Act made recently will go a long way to improve the appointment, training and management of ministerial staff and other MOP(S) Act employees. But consideration should be given to also include in the Act a requirement for the Prime Minister to determine by regulations related procedures for ministerial staff, with the Presiding officers doing likewise for other MOP(S) Act staff. (There is also a strong case for giving more authority to the Parliament via the Presiding Officers, rather than the Prime Minister, over the allocation of MOP(S) Act staff other than ministerial staff, though this is not directly relevant to the APS and APS reform.)

The Prime Minister and the Presiding Officers (or the Parliamentary Service Commissioner) should also provide an annual report to the Parliament on the operation of the MOP(S) Act in relation to their respective responsibilities.

APPOINTMENTS TO STATUTORY OFFICES

Usually in the light of allegations about appointments that owe more to political allegiance than merit, of which the Administrative Appeals Tribunal is but the latest in a long line, considerable attention has been given to procedures to give greater emphasis to merit in statutory appointments.

The essential problem has been that the greater the scope for ministerial discretion, the more likely it has been for appointments to be politicised. This is unfortunate because the very reason for statutory office positions is to remove functions from ministerial and political involvement.

There is, for example, a clear case with regard to the public broadcasters (the ABC and the SBS), for ministers and governments not to become involved either directly or indirectly in determining what news they will report. The reasons in principle have been similar with the Administrative Appeals Tribunal where there is critical interest in the public being confident that the decisions of this quasi-judicial organisation are fully independent and untainted by political self-interest (some steps in the right direction have recently been made under the new legislation to take effect from 1 July 2024).

In the case of the ABC and the SBS, and some other statutory authorities, attempts have been made to ensure appointments are based predominantly on merit by attempting to limit ministerial discretion. Thus, following the advertising of vacancies, independent advisory committees have been set up to make recommendations on appointments with ministers being required to provide statements of reasons if they decide to appoint persons not recommended by the committees. These procedures have succeeded in part only and Ministers and governments of all persuasions have continued to disregard the independent committees' recommendations, at times appointing people with open political allegiances, thus diminishing public confidence in the independence of functions for which they are responsible.

If merit is to play a greater part in these appointments, ministerial discretion should be further narrowed.

While the Government has engaged Ms Lynelle Briggs to report on procedures for statutory appointments, at the time of the preparation of this document her report was not available. Senator Gallagher has, however, foreshadowed legislation to require a more merit-based approach to appointments of statutory offices.

Dr Sophie Scamps last year introduced the Transparent and Quality Public Appointments Bill (also known as the 'Ending Jobs for Mates Bill') which presents a comprehensive and accountable framework for statutory appointments. If adopted, it would make a major contribution to the integrity and depoliticization of such appointments.

Proposal 8

Consideration be given to legislating a basic set of principles to apply to all statutory office appointments with scope to adjust particulars to fit different circumstances along the following lines:

- (a) all vacancies to be advertised;
- (b) an independent committee, including where appropriate the APS Commissioner or their nominee but not as a rule officers of the relevant department (i.e. only if specialist expertise is a factor that is best provided by the department), to prepare advice on suitable candidates;
- (c) Ministers only able to make appointments from the list of suitable candidates recommended by the committee, noting their ability to draw the names of potential candidates to the attention of the advisory committee; and
- (d) departmental annual reports to provide information on the operation of these principles in their portfolios.

APPOINTMENT OF AMBASSADORS AND HIGH COMMISSIONERS

Firmer merit processes are also needed for the appointment of ambassadors and high commissioners, and heads of consulates. There are certainly occasions where the role of an ambassador/high commissioner can benefit from the particular skills and networks a former politician offers, but

the process should constrain the appointment of former politicians where such valid merit considerations are not demonstrated. Over recent years the proportion of appointments of non-professional career diplomats has increased from around 4% to over 8% (there are around 120 positions at the ambassador/high commissioner level, more including heads of consulates). The merit processes suggested above for statutory office appointments might not easily be translated for filling these positions – advertising the jobs for example beyond the APS might not be appropriate. An alternative approach the Government should consider is to set a ceiling on the proportion of ambassadorial positions filled by people who are not career diplomats or public servants selected on a firm merit basis led by the Secretary of the Department of Foreign Affairs and Trade. Such appointments should also be accompanied by a clear statement by the Minister (or the Prime Minister) explaining the merits of the preferred candidate for the particular position. A ceiling of no more than 5% would discourage non-meritorious appointments. A period of transition (say, five years) to this ceiling might be allowed.

Proposal 9

Consideration be given to set a ceiling of 5% on the proportion of ambassador/high commissioner positions (and heads of consulates) filled by people who are not career diplomats or public servants selected on a firm merit basis by the Secretary of the Department of Foreign Affairs and Trade.

CONSULTANTS AND CONTRACTORS

Reports, including from parliamentary committees, have described the consequence of the extensive use of consultants and contractors in the public service (the most recent report by the Senate Finance and Public Administration References Committee was released on 12 June 2024). While in many instances the use of consultants and contractors is justified, much of it is not as it has:

- k. reduced the capacity of the public service to do what it is there for
- l. added significantly to operating costs, and
- m. resulted in consultants and contractors, who are not covered by the Public Service Act values and code of conduct, undertaking jobs within departments and agencies without going through the Act's merit appointment provisions so compromising efficiency and restricting the rights in the Public Service Act of ordinary citizens to have a reasonable opportunity to apply to join the public service.

The government is to be commended to taking steps to reduce reliance on consultants and contractors although there would be advantage in giving these efforts legislative backing so that an unfortunate history is not repeated.

Proposal 10

Consideration should be given to legislation which would require:

- (a) the use of consultants and contractors to meet strict tests of essentiality, cost effectiveness and overall value for money
- (b) staff to be employed under the merit provisions of the Public Service Act where they are to be effectively engaged in an employment relationship
- (c) all departments and agencies to provide the Department of Finance and the Public Service Commission with annual plans for the use of consultants and contractors
- (d) all consultancies costing more than \$250k to be based on open tenders that should not be rolled over
- (e) all consultancies costing more than \$1m to be cleared with the Department of Finance and the Public Service Commission
- (f) the details of all consultancies and contractor engagements to be notified on departmental and agency websites within a week of contracts being signed, and
- (g) all department and agency annual reports to include information on their use of consultants and contractors including assessments of value for money and any effects on maintaining inhouse capability.

ORGANISATION, HIERARCHY AND CLASSIFICATION

A consultants' review of hierarchy and classification initiated by the Public Service Commission several years ago came to the conclusion that much lower-level work was being inappropriately undertaken by higher levels in the hierarchy.

This is unsurprising as classification standards have been seriously debased. For example, in a much more complex public service of some 280,000 staff in 1975, there were around 25 officers at the Deputy Secretary level. Now, in a public service of around 170,000 staff there are some 150 Deputy Secretaries. This uplift in classification is reflected down the hierarchy. That is to say, it is little wonder that lower-level work is being done at higher levels than can be justified.

The Public Service Amendment Act 2024 includes a provision saying agencies 'must implement measures that create a work environment...that enables decisions to be made...[at]...the lowest appropriate...[level].' But this provision, however well meaning, is merely exhortatory. No means of enforcement are provided and there is no specific accountability requirement

Such problems as there are with the misallocation of work begin at the top with the vast increase in the number of Deputy Secretary positions. The initial policy was that these positions would be used where a Secretary's span of policy or management responsibility was too broad and needed to be relieved by the provision of a deputy position. Thus, the former Postmaster-General's Department with around 125,000 staff and an effective monopoly of postal and telecommunications services had two Deputy Secretaries. Some much smaller and much less complex departments now have many more than that.

Further, the increase in the number of staff at the senior levels has broken up parcels of work likely to a degree that causes inefficiency, slowness of response and confused accountability.

As with consultants and contractors, this is not a problem that is amenable to prompt and ready solution. Nevertheless, a start could be made by putting downward pressure on the hierarchy by better controlling the number of positions at the Deputy Secretary level.

Proposal 11

Consideration be given to amending the Public Service Act to require the APS Commissioner to approve the creation of all positions at the Deputy Secretary level and for agencies to consult with the Commission annually on their SES structures, with the Commission reporting on these matters in its annual report.

MERIT

Many of the suggestions in this paper go to the means of improving merit in staffing because it is a critical means for ensuring that the public service is as efficient and effective as it can be as well as providing a fair and equitable workplace in which diversity, inclusiveness and integrity can prosper. Emphasising merit is consistent with pursuing equal employment opportunities as the latter, properly exercised, enhance the talent pool available while also supporting better representativeness within the APS of the Australian population. The provisions of the Convention on the Rights of People with a Disability, which Australia has ratified, should be observed.

Merit's centrality should be underlined by including it as suggested earlier in the Values in the Public Service Act, as it once was. Its removal was a mistake, and it is not sufficient for it to merely be mentioned in the Act's employment principles where it is relegated to a secondary status. It is a primary value and one of the most important.

Even this is not sufficient to allow merit the scope it needs. It would be useful therefore for the Public Service Act to require departments and agencies to prepare plans setting out how merit is to be applied in all aspects of staffing including recruitment, promotion, separation and training and development.

Proposal 12

Consideration be given to amending the Public Service Act to require:

- a) APS departments and agencies to provide brief merit staffing plans to the APS Commission and to report in their annual reports on the achievements of those plans;
- b) the Merit Protection Commissioner to conduct regular reviews of merit practices in agencies; and
- c) the APS Commissioner to confer with the Merit Protection Commissioner in the promotion of the APS Values, Employment Principles and Code of Conduct.

The status of the Merit Protection Commissioner should also be reviewed again by the Remuneration Tribunal with a view to reversing the downgrading which occurred a decade ago.

CONFLICTS OF INTEREST

Section 13(7) of the Public Service Act provides that 'An APS employee must (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment, and (b) disclose any material personal interest of the employee in connection with the employee's APS employment.'

How effective this barebones primary legislation is in regulating conflicts of interest is not clear although it would be interesting to know how many disclosures under sub-section (b) are made each year, or if they are even recorded.

It might legitimately be wondered, however, if the Values, Employment Principles and Code of Conduct in the Act are all that is necessary to maintain a flourishing integrity culture.

For example, a recent report issued by the Department of the Prime Minister and Cabinet titled 'Louder than Words' recommends that risks associated with post separation employment and other conflicts of interest should be addressed. In particular, the report suggests:

- n. establishing clear conflict of interest policies and procedures for secondary and post separation employment
- o. developing specific processes for declaring and managing conflicts of interest for agency heads and the SES, particularly post-separation employment
- p. training, and
- q. centrally recorded information about conflict declarations and related matters.

The implication in the report is that these things either now do not exist or, if they do, they are insufficient.

That procedures for managing conflicts of interest including post separation employment may have withered on the vine implies that that section 13(7) has been ineffective.

If that is so, setting up new procedures for post separation employment conflicts on what might be an inadequate legislative base, suggests that base should be strengthened lest any revived administrative procedures again fade away.

Proposal 13

Consideration be given to amending the Public Service Act to provide specific provisions for regulating conflicts associated with post separation employment along the lines of those recommended by the 1979 Bowen Committee report on Public Duty and Private Interest.

Such a provision might require any public servant to declare any offer of outside employment where there might be a conflict of interest, especially where that conflict might involve giving the new employer an unfair advantage in competing for Commonwealth contracts. As a result of any such declarations, conditions could be applied to the acceptance of the outside employment or approval could be withheld say for up to two years. There are legitimate questions about the effectiveness of any such conditions but outside employers who are significantly reliant on Commonwealth work have been only too ready to comply where in the past such undertakings have been sought.

Further, a legislated approach might be considered in other areas of conflict of interest like outside employment when an officer remains a public servant, the acceptance of gifts or other areas.

CONCLUDING REMARKS

This paper does not purport to be a comprehensive outline of all the things needed to rehabilitate and improve the Australian Public Service.

Rather it concentrates on legislative proposals that have yet to be pursued by the Government but which could reasonably be considered to complement current proposals and fill out others recently mooted by Senator Gallagher, so the public service can be better protected from the risks of administrative and political whim.

The proposals seek in particular to give greater weight to merit to improve effectiveness, efficiency and integrity and promote a fairer and more inclusive and diverse public service. This is essential to restoring the standing of the APS as a critical institution in Australia's democratic system.

Are the APS Values ‘Fit for Purpose’?

Andrew Podger

Australian National University

During last week’s Mandarin webinar, there was not time to respond to all of the questions raised by the audience. Several of these related to the APS Values and the extent to which the APS is obliged to serve the public. As one questioner put it, ‘are the APS Values and Code of Conduct still ‘fit for purpose’?

Let me attempt to answer this important question.

Section 3 of the *Public Service Act 1999* sets out the objects of the legislation, the first main one being:

‘to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public.’

This object reflects the role of the APS as an institution in our democratic system of government, an institution the High Court has found to have Constitutional standing (most recently in the 2019 Banerji case).

The 1999 PSA replaced the previous one which was first enacted in 1922. One of the key changes, consistent with the direction of public sector reform over the previous twenty years, was to replace detailed rules with general principles to guide the public service in a more flexible and devolved ‘managerial’ environment. Those principles were articulated in the APS Values.

Importantly, the Values are not just a set of feel-good desirable behaviours in any workplace, but are intended to clarify the core roles and responsibilities of the APS consistent with the main object of the legislation. The APS Values are complemented by the APS Code of Conduct which includes the requirement that APS employees uphold the APS Values at all times.

The original 1999 legislation listed fifteen Values, which were agreed unanimously by the Parliament after lengthy negotiation between the Howard Government and Labor Opposition (Senator John Faulkner played the lead role for Labor). The compromise involved including a number of ‘values’ which were more about the union movement’s legitimate concerns regarding employment arrangements than the core responsibilities of the APS as an institution.

When I was Public Service Commissioner, we reviewed the Commission’s Guidelines on Official Conduct in light of the new legislation and the Directions which Helen Williams, my predecessor, had subsequently issued. To ensure the new guidelines (published in 2003 as *APS Values and Code of Conduct in Practice* and updated regularly ever since) reflected the core roles and responsibilities of the APS, we used a structure that effectively placed the Values into four groups: relationship with the Government and the Parliament, relationship with the Australian public, workplace relations, and ethical obligations. The emphasis on relationships was consistent with the idea of values-based rather than rules-based management, and the structure resonated with s3 of the PSA (this structure is still used by the APSC in the updated guidelines).

Following the 2010 Moran Review of Australian Government Administration, the relatively new PSA was amended in 2013. Moran called for ‘a smaller set of values that are meaningful, memorable and

effective in driving change', this to be made possible by moving the values concerning employment arrangements into a separate set of APS Employment Principles. Not a bad idea, but the APS Values which finally appeared in the legislation may have been more memorable than the previous set, but were certainly not more meaningful.

There were three serious weaknesses in the new formulation of five Values (impartial, committed to service, accountable, respectful and ethical, or 'I CARE'):

- 'Merit' was omitted, being left to the APS Employment Principles (and not even as the first one), despite being at the centre of a professional civil service since the 1854 Northcote Trevelyan Report in the UK and the 1883 Pendleton Act in the US (it was also included in the Moran Report's suggested short list of Values).
- The democratic principle of serving the elected Government and being subject to lawful directions by Ministers was also surprisingly omitted, though 'responsiveness' (which was in the original set of APS Values) is still referred to in the Commissioner's Directions.
- Responsibilities to serve the Australian public were confused with responsibilities to serve the Government under the one Value, 'commitment to service'.

The 2019 Thodey Report addressed some of these problems by suggesting, instead of a revised set of APS Values, an additional separate set of 'principles'. These would be above the APS Values and Code of Conduct, and would apply across the Commonwealth public sector, not just to the APS. Thodey suggested they include merit and stewardship as well as apolitical, openness and integrity. This suggestion seems way too messy, and I was not surprised that it has not been taken up.

Instead, the 2024 amendment to the PSA merely adds 'stewardship' to the existing five values and does not address the three concerns listed above. There is a danger in including 'stewardship' as a Value which every APS employee must uphold: it may in fact dilute the concept of stewardship as a clear responsibility of top management (and Ministers). That responsibility is to maintain agencies' capability to address future as well as current challenges in terms of skilled staff, systems to retain corporate knowledge, hold data and support management and analysis, productive relationships with academia and civil society as well as across government, and a culture of openness and collaboration.

Hopefully, the APS Commissioner can clarify APS employees' responsibility for stewardship in a way that complements the responsibilities of senior management when he issues his Direction under this new Value.

What is really needed, however, is a more substantial rewrite of the APS Values which clarifies once and for all the responsibilities of the APS as an institution. That might help to correct the confusion evident in the Robodebt tragedy and to rebuild integrity as well as capability.

In the Discussion Paper I recently released, I suggested using the framework of the relationship the APS has with the Government and the Parliament, its relationship with the Australian public, its workplace relations, and its ethical obligations, and indicated the central Values which should be included. The following is an elaboration drawing upon some of the wording in the current legislation.

Relationship with the Government and Parliament

- Apolitical and professional
- The democratic principle of loyalty to the elected Government and being subject to the lawful directions of ministers

- Providing the Government with advice that is frank, honest, timely and based on the best evidence available
- Open and accountable to the Parliament within the framework of Ministerial responsibility

Relationship with the Australian public

- Committed to service to the public that is efficient and effective, administered impartially, inclusively and with respect, and recognises people's rights and heritage

Workplace Relations

- Employment decisions based on merit

Ethical obligations

- Trustworthy and acting with integrity in all that the APS does.

There is, of course, room to discuss the exact words under these headings, and what should be in the APS Values themselves and what should be in the related Commissioner Directions.

Every one of these Values is important and all must be upheld. But in some circumstances, they may be in tension, as the APSC guidelines mention. In that case, public servants must decide on the appropriate balance, not pursuing one Value to the point it conflicts with upholding another. In particular, the APS must serve the Australian public and be accountable to the Parliament while also being loyal to the elected Government and obeying the lawful directions of Ministers.

Even if the APS Values were made much clearer as suggested here, the reliance on such principles does raise the risk of inappropriate behaviour. For that reason, I have argued for some specific rules or procedures on issues such as post-separation employment where there is evidence that ethical behaviour has been missing because of failures by APS leaders to require effective management of conflicts of interest.

One of the advantages of the above framework is that it could also be used to clarify the similarities and differences in the roles and responsibilities of other Commonwealth employees. So ministerial staff are within the executive arm of government and must be loyal to the elected Government and accountable through the framework of Ministerial responsibility, but they are not required to be apolitical and they are not subject to strict merit-based employment processes.

The Parliamentary Service on the other hand is in the legislative arm and serves the Parliament and its Senators and Members so is not meant to be loyal to the Government or accountable via Ministerial responsibility; but it is apolitical and professional and subject to the merit principle. Electoral staff are also part of the legislature but they, like ministerial staff, are not required to be apolitical or subject to strict merit employment processes.

Boards of GBEs such as Australia Post could also be required to articulate the values they require of their employees which should include a commitment to serve the public as well as to be accountable for performance to the board and its shareholder ministers.

Such clarification can only help people across the Commonwealth public sector to work together, respecting the boundaries that are essential to the roles and responsibilities of each group.

Robodebt and other recent failures demonstrate boundaries being crossed and roles and responsibilities misunderstood.

Until these are clarified, the APS Values and Code of Conduct are not 'fit for purpose'.

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