

SUBMISSION TO THE JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT INQUIRY INTO PROBITY AND ETHICS IN THE AUSTRALIAN PUBLIC SECTOR

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While the Inquiry is to have particular regard to a number of recent ANAO Reports, this submission focuses more on the general terms of reference about probity and ethics in the Australian public sector (focusing mostly on the Australian Public Service) and the frameworks intended to achieve the objectives of supporting and promoting ethical use of resources.

Legislative Frameworks

Before examining the frameworks established by the central agencies, it is important to consider the legislation those frameworks are based upon, in particular the Public Governance, Performance and Accountability Act and the Public Service Act. The Members of Parliament (Staff) Act is also relevant, not for what it contains but for what is missing.

The PGPA Act and the PS Act demonstrate the shift from the former focus on detailed prescriptive rules (under the old Audit Act and then, less so, under the former Financial Management and Accountability Act, and under the 1922 Public Service Act) to a more 'principles-based' approach. Section 5 of the PGPA Act articulates the objectives of the legislation including the requirement 'to use and manage resources properly' ('proper' meaning 'efficient, effective, economic and ethical'). The Act then sets out the general duties of 'accountable authorities' and the general duties of all officials.

Section 3 of the PS Act sets out the objectives of that legislation including 'to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public'. The Act then sets out the APS Values which include being ethical explained as 'The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does'. There are also APS Employment Principles and a Code of Conduct that requires, *inter alia*, all APS employees at all times to uphold the Values and Employment Principles and the integrity and good reputation of the employee's Agency and the APS. Agency heads and Secretaries, and the Secretaries Board, as well as the SES have particular duties including to promote as well as to uphold the Values and Employment Principles. Amongst the responsibilities of Secretaries in Section 57 is 'managing the affairs of the Department efficiently, effectively, economically and ethically'.

This emphasis on principles in the legislation places a heavy onus on each agency to develop systems and processes that will embed these principles into practice. Central agencies also help to frame those systems and processes such as through the Finance Directions and Procurement Rules and the APS Commissioner's Directions and guidelines on official conduct. The onus on each agency, and the management flexibility allowed by this principles approach was also expected to be complemented by firmer accountability. There is a question, however, whether this reliance on legislative principles warrants some reconsideration and, at the very least, whether the articulation of the principles

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needs to be reviewed to ensure the principles fully and appropriately reflect the roles and responsibilities of officials in our Westminster-style government; and whether there is sufficient oversight to ensure the enhanced accountability promised under this principles-based framework.

Our Westminster-style government today operates in a more complex environment than decades ago, interacting more externally with the private sector (both for-profit and not-for-profit) and also internally having more 'players' involved including ministerial staff and a better resourced Parliament.

In this environment, I have proposed a comprehensive review of the way Values and Codes of Conduct are articulated for the different key groups within government, clarifying their shared values and responsibilities and where different values need to be articulated reflecting different roles and responsibilities. (See my Report to the Robodebt Royal Commission (copy attached), particularly recommendations A3 and A4, and the attached article published in *The Mandarin* on 25 April 2023). This would require not only amendments to the PS Act but also to the Parliamentary Service Act and the MOP(S) Act. The latter would draw not only on the recommendations of the Thodey Review of the APS directed at the need for a clear understanding of the role of the APS and having a legislated code of conduct for ministerial staff but also the recommendations of the Jenkins Review about the MOP(S) Act. It would also encourage agencies outside the APS (and the Parliamentary Service and MOP(S) Act employment) to clarify the values that reflect their particular roles, where they should align directly with APS Values and where they should differ.

While the Robodebt Royal Commission did not make specific recommendations about broader reform of the APS, it highlighted the Thodey Report recommendations directed at a clear understanding of the APS role and endorsed a number of recommendations particularly concerning secretary appointments and terminations, and the performance management of secretaries covering both outcomes and behaviours.

Recommendation 1: That the Committee recommend a comprehensive review of the values and codes of conduct for different types of Commonwealth organisations and employees, whether in legislation (particularly the PS Act, Parliamentary Service Act and MOP(S) Act) or, in the case of other Commonwealth organisations, in their public corporate documents, suitably authorised.

Central Agency Frameworks and Oversight

I have not recently examined the current Finance Directions and associated guidance in any detail, but suggest there is room for closer oversight of agencies' Chief Executive Instructions. These, with associated agencies' corporate documents, establish the agencies' own rules including for ethical behaviour. An education campaign, led by Finance and the APSC, perhaps along the lines of the Financial Management Improvement Program in the 1980s (where Finance encouraged initiatives across the APS with a network of enthusiastic managers discussing and promoting reform), might foster across the APS good practice in both defining the ethical rules and promoting ethical practice. Areas where practice often does not seem to reflect adherence to Finance rules include grants administration and procurement. The recent JCPAA Report 498 highlighted that there was inadequate oversight by Finance of procurement.

The APS Commission issues guidance to both agency heads and APS employees on official conduct ('Values and Code of Conduct in Practice'), and complements this with more detailed advice on key ethical issues and an ethics advisory service. The main guide was rewritten in 2003 when I was the Commissioner to reflect the then relatively new principles-based legislation, and it has been

regularly updated since then. In 2003, the guide was also complemented by material on 'embedding the values', using case examples to promote tangible efforts in leadership (including training), management (including personnel and financial management) and assurance (through monitoring, staff and client surveys, and action in the case of alleged breaches of the Code of Conduct).

My concern today is not with the guidance provided by the APSC, which has been extended and improved since my time as Commissioner, but with the extent to which it is being followed by agencies, and how well agency practice is being monitored by the APSC.

In my Report to the Robodebt Royal Commission, I recommended improvements to the training of Secretaries of their statutory responsibilities, better orientation training of new appointees to SES and EL positions, and firmer performance management of Secretaries led by the APS Commissioner, and also of the SES (Recommendation B1 to B4). I also recommended more systematic ethics training for all APS employees, particularly new employees and newly promoted employees, supported by the APSC (Recommendation B5). The Royal Commission stated that it agreed with my argument 'that more needs to be done to ensure APS employees (in particular Secretaries, the SES and Executive Level officers) appreciate their statutory and other responsibilities'. It also recommended that the APSC 'deliver whole-of-service induction on essential knowledge required for public servants'; and, as mentioned above, it endorsed the Thodey recommendations about firmer performance management of Secretaries.

Areas where practice does not seem to reflect systematic adherence to APSC guidance include post-separation employment and transparency in the appointment and management of external candidates to senior positions; there also seems to be a need to reconsider 'gifts and entertainment' where firms seek to develop personal relationships to strengthen their reputation and improve their access. The latter is a serious issue – while there may be benefits from closer knowledge of the businesses the agency may work with, perceptions of conflicts of interest, and real conflicts, need to be addressed; the key is to explore the issue carefully and transparently (see further below).

If problems continue, particularly in the management of post-separation employment, consideration should be given to amendment of the PS Act to incorporate the 1978 Bowen principles on managing conflicts of interest into the law.

Recommendation 2: That Finance and the APSC strengthen their oversight of agency practice in following Directions and guidance, reviewing agencies' Chief Executive Instructions and using a FMIP-style approach to foster good practice.

Recommendation 3: That the APSC support improved training of new Secretaries, SES and EL staff on their statutory responsibilities and ethical leadership roles, and more systematic ethics training of all APS employees.

Recommendation 4: That if problems continue from failure to properly manage post-separation employment or other issues concerning conflicts of interest, consideration be given to amend the PS Act to incorporate in the law the 1978 Bowen principles.

Agencies' Responsibilities

While Finance and the APSC could do more to promote ethical behaviour, it is Agency Heads and their leadership teams who bear the most responsibility. As mentioned, those responsibilities are set out in the PGPA and PS Acts.

Two cases stand out in my own experience of effective promotion of ethical behaviour. I am sure there are many more, but these two had a particular impact and may still be helpful examples of good practice.

The first was when I was in Defence in the early 1990s, responsible for Acquisition and Logistics (all the major capital and supply contracting). A key ethical issue concerned post-separation employment – when a civilian or military employee was recruited by a firm with which the Department did business. A former Public Service Commissioner provided advice which led to the development not only of guidance within Defence but agreement with Defence industry regarding reciprocal obligations. Companies signed up to codes of conduct for their own managers and employees that included processes for any recruitment of Defence personnel (also committing to other ethical requirements such as non-collusion and not offering gifts or entertainment); Defence not only established clear rules on post-separation employment but agreed with industry that it must recognise in its purchasing processes its obligations to limit transaction costs as well as to be fair and transparent. The post-separation employment process involved identifying, if possible, an arrangement that satisfied all three parties: Defence, the departing official and the recruiting company.

The second example was from my experience in Health around 2000. It was an ethics awareness campaign for all staff, and for all future recruits to the department. It was developed by two of my branch heads. The title of the campaign was the 'Fork in the Road Café'. The key message was to encourage staff, when faced with an ethical dilemma, to 'wait in the café' before making a decision. There they should talk to colleagues, seek expert advice from those in the department with relevant experience, then decide. If with hindsight the decision was found to be wrong, no criticism was justified so long as the person had indeed stopped 'in the café' and checked with others first. The campaign was supported by a 'hypothetical' with Geoffrey Robertson and a panel of people from the department, health industry, the media and a minister (the cost was kept low on the basis that the video was only used internally); each division held seminars showing the video and then discussing the ethical issues most likely to arise in their business. The campaign encouraged staff to look out for ethical issues and dilemmas, and then helped them to know how to explore them and seek advice before taking a decision.

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