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ETHICS AND PUBLIC SERVICE GOVERNANCE

Paper by

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Officers of the Department of the Senate, in speaking with public servants about parliamentary accountability and the public service, have commended for their consideration the estimates test. This test is applied by asking about every proposed activity or project of a public department or agency: will we be happy in explaining and defending this at the next round of Senate estimates hearings? If the answer to that question is no, this is probably because the proposed activity is of dubious legality or propriety. In that case, the application of the test should lead to a reconsideration of the proposed activity.

It is called the estimates test because the estimates hearings are the forum in which public servants can be questioned about any of the activities or operations of their departments and agencies. The exposure of illegal or unethical activities in that forum can lead to the immediate sanction of an adverse public reaction and damage to the standing and reputation of the department or agency.

The test could more appropriately be called the full disclosure test. The question would be: would we be happy in explaining and defending this activity if all the information about it were fully disclosed? It just so happens that estimates hearings are the means by which public disclosure is most likely to take place. There are others, such as freedom of information requests and media investigations, but none are so regular or potentially effective as the estimates hearings.

The suggested test does not deny that there is justification for keeping some information confidential. It does not rely on any implication that all information *should* be disclosed. The test may be, and should be, applied even where it is known that information about an activity will never become public.

It is difficult to imagine any circumstances in which responsible officers would be totally satisfied as to the legality and propriety of a proposed course, but the test would still not be met.

There has always been some difficulty in convincing public servants that the estimates test should be embraced with enthusiasm. Estimates hearings are frequently seen as a hostile forum in which politically-motivated and hostile questions are asked. This perception is often accurate. The aim of much estimates questioning is to sheet home to the government

responsibility for mistakes and misdeeds. The public service is part of the government, and in any event in many cases public servants are seen as those responsible for the offending actions.

In spite of these factors, the estimates test and the estimates hearings should be regarded by public servants as valuable adjuncts to their work. They are a safeguard against illegality and impropriety in public administration. In particular, they are a safeguard against the public service getting involved in illegal and unethical activities, because failure of the test, and the likelihood of actual exposure in estimates hearings, can be urged by public servants upon their superiors as a reason for abandoning or modifying proposed activities.

Pressure to engage in such activities is most likely to come from public servants' ultimate superiors, the political wing of government, ministers and their personal staff. The estimates test can impose a barrier between the political wing and public servants to the transmission of illegal or unethical practices.

This suggestion is often received by public servants with a lack of acceptance. They point out that it is extremely difficult for public servants to raise objections to proposed activities of the political wing.

It is unfortunately the case that the political arm of government is dominated by a culture which has been described as the *whatever it takes* culture. This term is derived from the title of a book by a former minister, but it is descriptive of the prevailing mode of thought in political parties generally and is not confined to any brand of politics. There is among political leaders an overwhelming drive to win. There is also a fervent belief in the rightness of their doctrines and the absolute necessity of applying them. This can easily lead to disregard for questions of legality and propriety. The end becomes so all-important that the question of means becomes merely technical. It could as well be called the AWB culture: if it is of supreme importance to sell the wheat, then selling the wheat by whatever means becomes acceptable.

Also, politicians in power tend to regard the disclosure of information about their activities as a subversive tactic of their rivals and opponents. Their opponents are by definition losers. A contempt for opponents easily leads to a contempt for accountability and for accountability processes such as the estimates hearings.

Public servants find it difficult to urge the estimates test upon the political wing, because they have long been drilled into the necessity of being responsive to the requirements of government and to be focussed on achieving goals. There is a very fine line between

responsiveness and a focus on good outcomes, and embracing the whatever it takes culture and the contempt for accountability.

The estimates test is simply a variant on the principle of checks and balances: the exercise of power is subject to scrutiny and checking by another body with the countervailing power to perform that checking task, because this provides the best safeguard against misuse of the power, that is, its use for improper purposes which are proscribed by law and by ethical principles. Making those responsible for public administration accountable to the Parliament through the ability of estimates hearings to scrutinise their conduct is such a safeguard against improper conduct. The principle of checks and balances is not based on an assumption of untrustworthiness of office-holders, but on the need for assurance that, however rare, mistakes and misdeeds will be detected and remedied.

It is suggested that an early application of the estimates test would not only avoid embarrassment in estimates hearings, but would also avoid most of the problems which have arisen in public administration in recent years. The major public administration failures have involved illegalities or improprieties which would not have occurred had the relevant personnel thought at an early stage about the implications of public disclosure of the decisions and actions taken.

Many of those administrative failures also demonstrated the continuing validity of what are known as the Watergate principles: that illegal or improper actions can be less important than the knowledge of those actions by those who should have applied some remedy; and the concealment of what was known, when it was known and what was done or not done about it can become more significant than the original activity.

This is illustrated by a relatively recent case: the knowledge by Australian personnel of the treatment of detainees in the war against terrorism, some whose existence was not revealed and some whose treatment was not in accordance with humane standards. Australian personnel were not responsible for the detention or treatment of the persons concerned; the question was: what did Australian personnel know about their detention and treatment and what did they do about it? Under persistent questioning, mainly in estimates hearings, responsible ministers and officers were taken from a position of claiming no knowledge to revealing definite knowledge on the part of Australian personnel and reporting of that knowledge to others in Australia. A statement that Australian personnel had not interrogated prisoners was subsequently qualified by an admission that they had “interviewed” them. The effect of these revelations was to create an impression of Australian complicity in the concealment of the notorious mistreatment of detainees. Had relevant personnel acted on the premise that the information would at some stage be publicly disclosed, they would no doubt

have handled the whole matter differently and avoided the unfortunate perception which emerged.

Another example is provided by the regional partnerships and sustainable regions programs. These programs involved large sums of money being handed out to persons and organisations for desirable projects, and the desirability of the projects was, to say the least, a matter of subjective judgment. Public servants deferred to members of the political wing in deciding to give money to particular projects. Some of the schemes were the subject of ridicule and derision when they were revealed. The episode added to the unfortunate perception of lack of scruple in government, but the most unfortunate aspect was that the public service was not exempted. An application of the estimates test to the whole programs and to each project would have resulted in greater integrity of process, some projects being excluded, and such a perception being at least lessened.

Some kind of due process is essential. Without due process, any project and its outcomes can be poisoned by an appearance of arbitrariness in decision-making. The public service by definition should operate on due process; it is inherent in the term “public”. Whenever a significant public activity is proposed, the first consideration should be: by what process will it be applied? The neglect of process in favour of outcomes has been responsible for many of the recent difficulties.

These programs also provide an instance where a whole policy may not meet the estimates test, apart from the process adopted. The test should be applied at the start of policy formulation. The policy was the handing out of bags of money for nebulous purposes without specified criteria and a clearly impartial decision-maker. The Audit Office has issued guidelines for making grants under these kinds of programs, but in some cases it is impossible, because of the nature of the programs, to avoid a perception of “pork barrelling” and vote buying. This taint rubs off on the public service. Is it expecting too much to hope that ministers will be advised against these kinds of schemes without prescribed criteria and a clear specification of an irreproachable decision-maker?

The task of public servants, then, is to apply the estimates test to their own activities and decisions, and to convince the political wing of government to apply it to theirs. As has been indicated, the latter is the difficult step. If it is not undertaken, however, there is a danger of the loss, first of the perception of a professional, non-partisan public service, followed by the actual loss of such a service.

There is an added danger arising from the achievement by the current government of a majority in the Senate. There are already some signs that this has led ministers and officers,

knowing that political and procedural remedies cannot now be pursued through the Senate, to slide into that contempt for accountability which has been mentioned, and to become careless as to whether questions are answered at all or are answered fully and accurately. It is up to public servants to resist that slide for the sake of a professional service and to prevent illegal and improper actions multiplying throughout public administration.

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