

**SUPPLEMENTARY SUBMISSION TO SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION
COMMITTEE ON PUBLIC SERVICE ACT AMENDMENT BILL**

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Introduction

Since providing my submission to the Committee, the Robodebt Royal Commission's report has been released.

While the Royal Commission report states that it did not have the time or resources to examine whatever shortcomings exist in the APS as a whole, its work 'does enable it to add its voice to some of the recommendations of that (i.e. the Thodey) review and to make recommendations of its own particularly related to the deficiencies in conduct and failure to recognise responsibilities and obligations that were starkly manifested in the design and implementation of the (Robodebt) scheme' (p 637). It is now possible, therefore, to suggest how the Bill before the Committee should be amended to address the views of the Royal Commission and the full range of Thodey recommendations pertaining to the Public Service Act.

The first recommendation in my submission was to:

'Defer passage of the legislation so that it can incorporate the Government's (and the Parliament's) responses to both the full set of Thodey recommendations for changes to the PSA, and any recommendations from the Robodebt Royal Commission.'

That recommendation still stands, but I am now able to draw on both reports to clarify the enhancements to the Bill before the Committee which I would like the Government to make when it responds to the reports, or the Committee recommend should the Government fail to do so.

In addressing public service reform, the Royal Commission draws particular attention (p 638) to the Thodey recommendations concerning:

- The need for a clear understanding of the APS' role; and
- A more robust set of processes relating to the appointment, termination, and performance management of secretaries).

These are the main issues I focus on in this supplementary submission. The first issue concerns in part the APS Values and the provision in the Bill to add 'stewardship' to the APS Values. This supplementary submission therefore adds to my previous comments on that provision and my Recommendations 2 and 3.

The comments and recommendations in my original submission regarding other provisions in the Bill remain because they are not affected by the Royal Commission's report.

¹ Andrew Podger is a former senior public servant whose career included being the Public Service Commissioner for three years from 2002 to 2004. Since leaving the APS in 2005 he has written extensively on public service and public policy matters and provided submissions to various inquiries including Parliamentary inquiries on public service-related issues. Earlier in 2023 he provided a report to the Robodebt Royal Commission at its request.

The APS Values and ‘a clear understanding of the APS’ role’

As The Royal Commission notes, Thodey proposed codification of new ‘principles’ in the Public Service Act to complement the existing APS Values. Applying those proposed new principles – apolitical, stewardship, openness, integrity and adherence to the merit principle – would be the responsibility of senior APS leaders, while all APS employees would continue to be required to uphold the APS Values.

It would seem from the Bill before the Committee, the Government does not intend to pursue this approach, but to focus only on amending the APS Values. I support that approach: adding a new set of principles, some of which are already in the APS Values, seems likely to confuse rather than help the ‘clear understanding’ the Royal Commission, and Thodey, are looking for.

Adding ‘stewardship’ to the Values, however, would not help to clarify the role of the APS either. ‘Stewardship’ is not the responsibility of every APS employee and requiring them all to uphold such a ‘value’ in the Code of Conduct would only cause confusion.

What would greatly assist clarification would be to return to the Westminster principles in the way the APS Values are articulated. That would also, as explained in the attachment to my original submission, help in identifying the distinct values that other Commonwealth employees should uphold, including the Parliamentary Service (where accountability is not based upon ministerial responsibility), ministerial staff (who are not expected to be apolitical but are accountable through ministers) and other staff of MPs (who are also not required to be apolitical but whose accountability is via their employing MP, not ministers).

Most importantly, such an approach would lead to including ‘merit’ once again in the APS Values. ‘Merit’ was the founding principle of the Westminster civil service in the 1854 Northcote Trevelyan Report. It was unfortunately taken out of the APS Values in the 2013 amendments to the PS Act and given only minor priority in the then new Employment Principles. Failure to emphasise merit is one of the central problems in public administration in Australia today, including in secretary appointments, statutory appointments, board appointments etc. Not highlighting it in the APS Values has only added to the downgrading of the principle in recent years (the 2014 downgrading of the classification of the Merit Protection Commissioner reinforced this concerning trend).

The Royal Commission also supports the recommendation of both the Thodey Review and the Jenkins Review for a statutory code of conduct for ministerial staff. The Commission supports having a statement of values that clarifies their distinct role from that of the APS (and the Parliamentary Service) p 647) (though it wrongly attributed this recommendation to the two Reviews).

The following approach to the APS Values would assist in framing the distinct values of ministerial staff (and other Commonwealth employees) and their codes of conduct: that the APS is:

- Apolitical or non-partisan and professional
- Responsive to the elected government
- Accountable through the system of ministerial responsibility
- Impartial and committed to serving the public
- Merit-based in all aspects of employment
- Highly ethical in its exercise of public power.

Recommendation 3 in my submission is:

Do not add 'stewardship' to the APS Values but recommend a broader review of the APS Values which includes adding 'merit', using a framework that might assist in clarifying the distinct values for the Parliamentary Service and different groups of MOP(S) Act employees.

I would like to *add* the following recommendation:

Recommendation S1: Revise the APS Values in line with Westminster principles focusing on being apolitical and professional, responsive to the elected government, accountable through the system of ministerial responsibility, impartial and committed to service, merit-based in all aspects of employment and highly ethical in its exercise of public power.

I remain firmly of the view (Recommendation 2 in my submission) that stewardship should not be included as an APS Value but should remain a core responsibility of the APS leadership, and that responsibility should be extended to the SES. I set out a suggested definition of stewardship that should be included in the legislation. I note that the Australian Financial Review recently reported Dr Davis Secretary of PM&C) as saying that '...stewardship is the idea that the public service has to be able to anticipate where it might need to do future work to make sure it has the skills to deliver'. That seems closer to my proposed definition than the one in the Bill.

Processes relating to the appointment, termination and performance management of secretaries

In my submission, I highlighted that the Bill before the Committee does not address the most significant of the Thodey recommendations to amend the PS Act. We now have the Robodebt Royal Commission lending support to most of those missing recommended amendments.

A central theme in the Royal Commission Report is the failure of senior public servants, including secretaries, to provide 'frank and fearless advice', revealing a lack of sufficient independence. The Report states that the current Government's request for the APS Commissioner to ensure that SES performance assessments cover both outcomes and behaviours regarding being honest and truly independent, 'does not go far enough;' (p 643). The Commission goes on to endorse a number of recommendations made in the Thodey Review in relation to secretary appointments which it says need to be revisited. The list in the Report does not refer explicitly to legislative changes, but to processes to support advice to the Prime Minister on appointments of secretaries and the APS Commissioner, robust and comprehensive performance management of secretaries, the framework for managing the performance of secretaries under the PS Act, and robust processes governing termination of secretaries' appointments.

As Thodey recommended, most of these measures would need to be underpinned by legislative changes. The changes Thodey recommended (Recommendations 38, 39a and 39c) involve clarifying the respective roles of the APS Commissioner and Secretary of PM&C, requiring the APS Commissioner's appointment to be subject to consultation with the Leader of the Opposition, and constraining termination of secretary appointments to specified legislative grounds.

My firm view is that the PS Act changes should go further than Thodey recommends:

- Specifying that the APS Commissioner is the 'professional head' of the APS and the PM&C Secretary the 'operational head', helping the PM and Cabinet to marshal the resources of the APS to meet the elected Government's priorities;
- The APS Commissioner to have the lead role in advising the PM on secretary appointments, working with the PM&C Secretary (and possibly others), with the PM required to report to Parliament if not accepting that advice;

- The APS Commissioner also to lead in advice on proposed terminations, with constraints on the PM as Thodey recommends;
- Every endeavour be made to find a secretary whose appointment is terminated or comes to the end of its term, another secretary or equivalent position unless it is clear that they would not gain the position on merit.

Accordingly, I would add the following recommendation:

Recommendation S2: Require the Government to include in the Bill measures that ensure a much more robust merit system for appointments and terminations, including making the APS Commissioner the professional head of the APS and requiring their appointment to be subject to consultation with the Leader of the Opposition.

I note that such improvements to secretaries' tenure would require a reassessment of their remuneration which was increased when tenure was removed in 1994.

Other recommendations for legislative change

The Royal Commission draws attention to uncertainty as to whether section 41A allows for a former secretary to be investigated for possible breaches of the Code of Conduct (p644). I had not been aware of this uncertainty assuming secretaries, like former APS employees, could be investigated for breaches of the Code. Clarification would seem to be a straightforward issue, and the relevant amendment would seem to be warranted as a matter of urgency.

Recommendation S3: The Bill include amendment to Section 41A to clarify that former secretaries can be investigated for breaches of the Code of Conduct.

The Commission also suggests drawing on Queensland precedents to include in a determination that a former employee had breached the Code of Conduct the action that would have been taken against them had their employment not ended.

Recommendation S4: The Bill include amendment to Section 41B to provide for a statement of the action that would have been taken if a former APS employee, having been found to have breached the Code of Conduct, had still been in employment.

There is one other recommendation in the Royal Commission Report which could affect the PS Act. Recommendation 21.1 proposes a statutory duty be imposed on departmental secretaries and agency chief executive officers to ensure their department or agency use its best endeavours to assist the Ombudsman in an investigation concerning it, with a corresponding statutory duty on the part of Commonwealth public servants within a department or agency being investigated to use best endeavours to assist the Ombudsman in the investigation. The Commission mentions the PS Act as one option for where this might be legislated.

I suspect that the PS Act would be the most appropriate place for setting out these statutory duties.

Recommendation S4: The Bill include the statutory duties recommended by the Royal Commission for secretaries, agency heads and their APS employees to use best endeavours to assist the Ombudsman in an investigation concerning their department or agency.

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