

## **SUPPLEMENTARY SUBMISSION TO THE JCPAA INQUIRY INTO PROBITY AND ETHICS IN THE AUSTRALIAN PUBLIC SECTOR**

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During the Committee's hearing on 20 November 2023, I took on notice a question from Senator Reynolds about the APS Integrity Task Force report, *Louder than Words: An APS Integrity Action Plan*, which had been released on 17 November by the Secretaries Board with the Board's in-principle agreement to its recommendations. Senator Reynolds asked whether I thought the report would lead to sufficient accountability of secretaries and the SES for the performance of their agencies in terms of probity, ethics and integrity.

The JCPAA Chair, Mr Hill, also invited me to provide any supplementary observations to my evidence at the hearing.

### **'Louder than Words: An APS Integrity Action Plan'**

The report and its recommendations certainly reflect an overdue effort to repair the damage to the APS' reputation for integrity arising from Robodebt, a series of ANAO and Parliamentary Committee Reports, the Bell inquiry (into Mr Morrison's multiple ministries) and the most recent dismissal of Mr Michael Pezzullo.

The definition of 'integrity' in the report's introduction – 'our behaviour matches the APS Values and we are accountable when it does not' – is more succinct and substantial than the definition used in recent times by the APS Commission ('doing the right thing at the right time' to 'deliver the best outcomes for Australia sought by the government of the day').

The report's framework, based upon 'culture', 'systems' and 'accountability', is similar to the framework used by the APS Commission in 2003 when I was the Commissioner aimed to 'embed' the then relatively new APS Values into practice across the APS. That framework, based on 'leadership', 'management' and 'assurance', with associated guidance to agencies, complemented the then new guidelines on official conduct directed at both agency heads and all APS employees. Both drew explicitly on the newly legislated Values and explained how they should shape APS relations with the Government and the Parliament, with the Australian public, and in the workplace, and promote the highest ethical standards.

There is much to commend the new report and its recommendations, but it is a pity it does not explore any of the history of efforts to promote integrity nor set out candidly the current context that so demands renewed effort. A clearer link between its recommendations and the current APS Values (and Employment Principles) would also have strengthened the report. (Though, as I recommended in my original submission, the current Values should be subject to a more comprehensive review so that they more clearly reflect the APS's role and its relations with the Government, the Parliament, the Australian public and in the workplace.)

The following comments suggest ways in which the report's recommendations could be strengthened, providing the JCPAA with more confidence that they would lead to sufficient accountability of secretaries and the SES for the performance of their agencies in terms of probity, ethics and integrity.

### *Culture*

The first set of recommendations rightly focuses on leadership, as it is the APS leaders who are most responsible for ensuring a culture of integrity.

The actions under the first recommendation to appoint the right leaders could go further. Applicants already in the APS should not just have the opportunity to provide recruiters access to past performance reports but should be required to do so. Such reports, and references, are at least as important as interviews. While 'self-reflection, commitment to inclusive culture building, and sustainable delivery' are no doubt worthy attributes to be tested, ethical leadership requires demonstrated courage, knowledge of the values, ethics and legal requirements, and a proven record of ensuring staff understand and can openly discuss these. Selection committees should treat with great scepticism any self-assessment of the attributes the report suggests by candidates whether in their applications or at interviews.

Recommendation 2 is perhaps the most important. Senior public servants must believe they will be sufficiently rewarded for ethical behaviour, and sufficiently punished for breaches, to outweigh any incentives to the contrary, whether through pleasing Ministers or their offices or public service superiors, because of 'results' achieved. The new SES Performance Leadership Framework offers a step in the right direction. The proposed appraisal framework for Secretaries and other agency heads is also critical: for this to have real impact, however, it must feed into the processes for appointment (and termination). This is not mentioned in the report, but Minister Gallagher has recently foreshadowed some reforms to the appointments process. (My own view is that more radical changes are needed including the removal of the current 'term contract' arrangements.)

Recommendations 3 and 4 and the associated actions, while unobjectionable, are mostly rhetorical rather than substantial. They could be strengthened if the APSC's annual agency survey and employees census had regular specific questions on sensitive issues such as those included in 2003 and 2004 on relations with Ministers and their offices, or for example questions on confidence of staff that advice on grants administration fully follow the relevant criteria and Finance directions.

Recommendation 5 includes improved induction training of new SES. As mentioned above, however, APS role clarity would be greatly enhanced by a more fundamental review of the APS Values than merely adding 'stewardship'.

### *Systems*

While making confidential ethics and integrity advice available to APS staff, SES and agency heads (Recommendation 6) is important, agency systems for 'whistleblowers' are also essential – safe ways for staff to express concerns outside the direct line of command. More generally, it is important that agency management systems and processes (e.g. senior management forums, performance management processes, HR systems) all clearly reflect the APS Values and promote open discussion. This was central to the 2003 'Embedding the Values' document.

Recommendation 7 on support for public servants working with ministerial offices needs to be complemented by measures to promote clarity of the roles and responsibilities of MOP(S) Act employees. While the legislation now before the Parliament will go some way towards better

management of ministerial staff (and other MOP(S) Act employees), it does not include a statement of values nor a legislated code of conduct (despite the latter being recommended by Thodey and Jenkins, and explicitly endorsed by the Robodebt Royal Commission).

Recommendation 8 and the related actions on legal matters respond appropriately to most of the relevant recommendations by the Royal Commission.

Recommendation 9 focuses on the important issue of record-keeping, a perennial concern of the ANAO and highlighted too by the Royal Commission. The proposed actions need to be supplemented by the Royal Commission's recommendation for a direction from the APS Commissioner about the minimum requirements for record-keeping. A new attitude is also needed within the APS towards FOI requests. The Government understandably rejected the Royal Commission's call for removal of the exemption of Cabinet documents, but much clearer appreciation is needed of FOI requirements, and assurance that these must not in future continue to constrain the keeping of proper records.

Recommendation 10 on bolstering skills in procurement and contract management includes sensible and practical actions.

### *Accountability*

The first two recommendations (11 and 12) and associated actions foreshadow both APS-wide and agency-level effort to promote integrity, but do not in themselves provide any metric for measuring integrity performance or ensuring there are consequences for failure. Recommendation 15 proposes the development of a measure but there is little information on what this might entail.

I doubt there is any single measure, but suggest the APSC's annual employee census could provide relevant information if it included questions on sensitive subjects such as staff confidence in agencies' advice on grants or in agencies' decisions on procurement, or more generally in their managers' promotion of the APS Values and in relations with Ministers and their offices. Such information could complement direct data on breaches of the Code of Conduct, on adverse reports by ANAO, the Information Commissioner or the Ombudsman, and on promotion appeals (reflecting adherence to the merit principle, which should be included in the APS Values).

Recommendation 13 involves specific actions to address the integrity of supplier conduct and Recommendation 14 specific actions on 'revolving doors'. Both are worthwhile, but both suggest the APS has failed to maintain previous efforts in these two areas, and indeed may also have forgotten about those efforts. I mentioned in my original submission the approach taken in Defence in the 1990s to develop complementary codes of conduct amongst suppliers of equipment and services, these *inter alia* ensuring proper post-employment processes for Defence employees joining suppliers. Such processes were first established following the Bowen Report in the 1970s but have apparently lapsed. The question now should be whether the proposed renewed action should be set out in legislation or in the APS Commissioner's Directions to ensure the action does not lapse again.

For a time in the 1990s and 2000s, attempts were made by some agencies to include in contracts requirements for supplier employees to uphold the APS Values. That was always bound to fail because some of the APS Values are not relevant to suppliers (e.g. accountability via ministerial responsibility, or being apolitical). The ANAO examined the issue a decade or so ago (I was asked to assist) and confirmed that trying to apply the APS Values was inappropriate. But complementary values and codes should certainly be considered along the lines of the 1990s Defence approach. These could, as suggested, then be included within contract arrangements.

Missing from this section on accountability, however, is any sense of how the APS might actually hold individuals to account for the sort of lapses in integrity identified by the ANAO, and the consequences for such lapses. The Robodebt Royal Commission identified individuals it considered should be formally investigated, but what if there had not been a Royal Commission? What ongoing processes should be in place to hold individuals to account?

The recommendations in the first section about performance appraisal are important. But the APS Commission and agency heads need also to ensure there are processes for identifying those responsible for particular lapses that are identified in ANAO or other reports and reviews. That does not mean pursuing Code of Conduct investigations in every case, but ensuring there is a process for identification and reflection and learning, and the occasional investigation of an allegation of a serious breach of the Code. The facts are that senior public servants are extremely rarely held directly to account let alone charged with breaching the Code of Conduct, notwithstanding the responsibilities and duties set out in the Public Service Act and PGPA Act (including to promote, not just to uphold, the APS Values, Employment Principles and Code of Conduct).

### **Supplementary Observations**

Following the discussions at the hearing on 20 November, it seems to me important for the Committee to recognise that there has been, and perhaps continues to be, misunderstandings amongst Ministers as well as senior public servants about what is meant by 'accountability'.

Section 10(4) of the Public Service Act defines the APS Value of 'accountability':

'The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility'.

Under the framework of Ministerial responsibility, Ministers are accountable to the Parliament for the administration of their departments, but by longstanding convention they generally only take direct personal responsibility if a failure can be shown to be the direct result of a policy or administrative decision made by the Minister.

Public servants are expected to accept accountability for administering the policies and programs of the elected Government (including those continuing from previous governments, often in legislation) and for the quality of advice to Ministers. Such accountability, formally, is to Ministers who, through the system of Ministerial accountability, are in turn accountable to the Parliament. But the longstanding convention (increasingly with the expansion of the role of Parliamentary committees) is that accountability of public servants is also directly to the Parliament, this being supported by the role of the ANAO and other 'officers of the Parliament'. Such accountability is required of 'accountable authorities' under the PGPA Act; in the APS, these authorities are Departmental Secretaries and other APS Agency Heads. In turn, their employees are accountable to them through agencies' management systems.

Particularly in the case of Secretaries and their departments, the relationship with Ministers is critical. To serve the elected Government and to administer its policies and programs requires mutual trust and the confidence of Ministers that the public service will meet these responsibilities and act with loyalty to the Government of the day. The Parliament must equally have confidence that the public service would meet such responsibilities and act with equal loyalty to a different future Government.

When Governments change, or even when Ministers change within a Government, Secretaries must put considerable effort into building the relationship of trust and confidence that departments will

be loyal and will deliver the Government's (and Minister's) agenda. This is central to their professionalism. Having built such trust and confidence, it is much easier to provide 'frank and fearless advice' and to make clear any legal or other constraints on what the Government and Minister wants.

Under Section 3 of the Act, the first main object of the Act is:

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

Accordingly, the APS has responsibilities to the Parliament and the public, not just the Government. It must act according to the law. And it has a *degree of independence* reflected in the words used in the APS Values and Employment Principles such as 'professional', 'apolitical', 'impartial' and 'merit'.

This requires 'frank and fearless advice', keeping records and following 'due process', actions which, from time to time, Ministers or their staff may prefer not to occur. In most cases, over time, Ministers do value 'frank and fearless advice' and adherence to due process as this reduces the risk of policy failure and political damage.

Getting the balance right is a perennial challenge, but the evidence suggests that in recent years it has drifted seriously awry, and the rewards for pleasing Ministers have exceeded any penalties from being held to account for lapses in due process.

Finally, despite the very different institutional arrangements in the US, the Committee may be interested in how a retired senior US civil servant has recently described 'the three duties' of civil servants and political leaders<sup>1</sup>:

- The duty of career civil servants to speak truth to power;
- The duty of political leaders (and their staff) to listen; and
- The duty of both to make it work, and to revisit it if necessary.

The first two duties ensure political leaders' decisions are properly informed; the third duty ensures those (lawful) decisions are properly implemented. Robodebt is a classic example of failure – by both public servants and Ministers and their staff – to live up to these duties; I strongly suspect that behind many of the ANAO's adverse reports lie similar failures on both sides to live up to these duties.

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<sup>1</sup> Ronald Sanders, 'The 3 duties of public servants', *Government Executive*, 11 September 2023