

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

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General Remarks

While the Explanatory Memorandum claims that the Bill will ‘deliver enduring transformational change, and ensure the Australian Public Service (APS) is well placed to serve the Australian Government (the Government), the Parliament and the Australian public’, the Bill does not address the most significant of the Thodey Review Report’s recommendations for legislative change, including:

- Strengthening the powers of the APS Commissioner;
- Clarifying the distinct roles of the Secretary of PM&C and the APS Commissioner;
- Strengthening the merit-based processes for secretary appointments and constraining the capacity of the Prime Minister to terminate appointments;
- Consulting the Leader of the Opposition before the appointment of the APS Commissioner.

The current Government, when in Opposition, promised to revisit the Thodey recommendations not agreed to by the Morrison Government (which includes all the recommendations involving legislative change). It is not clear whether this Bill is just a first tranche of proposed changes, or whether it encompasses all the legislative measures the Government intends to pursue. The Committee should seek clarification on this from the Government. If further measures are under consideration, the Committee might question why this Bill should proceed ahead of those measures noting the risk that those further measures may involve revisiting some of the changes proposed in this Bill (for example, on the APS Values).

The Robodebt Royal Commission is to report on 7 July 2023 and may also make recommendations for changes to the Public Service Act (PSA). These may be additional to the changes outlined in this Bill, and/or may involve variations to the provisions in the Bill. Either way, the Committee might consider whether passage of the Bill should be deferred until the Government has considered the Royal Commission’s recommendations. There is nothing stopping the Government in the meantime from acting on most of the measures in the absence of legislation (eg on capability reviews, insights reports, publication of census data, pressing managers to ensure decisions are taken at the lowest appropriate level).

There has been very limited consultation about the Bill’s provisions (an exposure draft was released on 22 May 2023 with submissions required by 31 May) and, as the Bill was tabled in the Parliament just two weeks later with no substantial change from the exposure draft, it is doubtful that the submissions received were seriously considered. The very short consultation paper released earlier in May had many assertions but no serious rationale or analysis: it lacked important details, such as

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the fact that Thodey did not recommend 'stewardship' be an APS Value, and it omitted any alternative approaches to stewardship and the APS Values, and why the authors of the paper did not favour those alternatives. Thus, the apparent positive views of public servants who responded to the consultation paper may not have been well informed, their views reflecting only general support for reform and not necessarily the specifics suggested. The limited consultation to date also suggests that the Bill should not be rushed through the Parliament.

Recommendation 1: 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.

Item 2: Adding 'stewardship' to the APS Values

The Bill would add 'stewardship' to the APS Values (s10 of the PSA). I have always strongly supported the 2014 addition of 'stewardship' to the responsibilities of Secretaries and the Secretaries Board; it should also be added to the responsibilities of the SES given they are required to promote as well as uphold the APS Values. But stewardship is not a value that every APS employee is in a position to uphold; let alone being in breach of the Code of Conduct should they fail to do so!

Defining 'stewardship' in the legislation would be helpful, but the proposed wording in the Bill is a clumsy attempt to find something that all public servants might uphold. A simpler version that the APS leadership should be responsible for would be:

'Building the capability and institutional knowledge of the APS to support the public interest now and into the future'.

'Capability' might then be explained in guidelines from the APS Commissioner, to encompass skills and knowledge of staff, agencies' systems and processes including to take full advantage of those skills and knowledge, and processes for drawing on external expertise and the perspectives of those affected by the functions the APS performs. Such clarification would confirm that stewardship is a responsibility of senior executives, not a value that all APS employees should be expected to uphold.

Rather than add 'stewardship' to the Values, what is required (and Thodey recommended) is a more thorough reconsideration of the APS Values. Such a review might not only restore the central role of 'merit' (the centrepiece of the 1854 Northcote-Trevelyan Report that began the establishment of the Westminster system of a professional civil service), but also provide a clear framework for distinguishing between the core (Westminster) values of the public service and those which ministerial staff, other staff of MPs, the Parliamentary Service and other groups of public sector employees should be required to uphold. My article published in The Mandarin in May 2023 explaining how this might be done is at Attachment A.

At the very least, merit rather than stewardship should be added.

In the past, a review of the APS Values has always been accompanied by examination of the Values for the Parliamentary Service under the Parliamentary Service Act. This is not the case here. A more thorough examination would also include consideration of legislating values in the Members of Parliament (Staff) Act for ministerial staff and for staff of Members and Senators. The Government recently conducted a review of the MOP(S) Act but has yet to announce its position on the recommended changes. An ANU colleague, Dr Maria Maley, and I provided comments on that review's recommendations (to the Parliamentary Leadership Group as well as PM&C), supporting most of them while also suggesting the Act include statements of values and a corresponding code

of conduct (a copy of our comments is provided separately). Thodey, of course, also recommended a legislated code of conduct for ministerial advisers.

Recommendation 2: Add stewardship to the responsibilities of the SES as well as Secretaries and the Secretaries Board, and define 'stewardship' as 'Building the capability and institutional knowledge of the APS to support the public interest now and into the future'.

Recommendation 3: 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.

Items 3, 4 and 5: An APS Purpose Statement

While this proposal (inserting a new section 10B) is based on a Thodey recommendation, I believe it is not only unnecessary but potentially dangerous.

Section 3a of the PSA already sets out the first objective of the legislation, 'to establish an apolitical public service which is efficient and effective in serving the Government, the Parliament and the Australian public'. Indeed, this objective is highlighted (without reference) in the first sentence of the Explanatory Memorandum. What more is required as a unifying purpose statement?

The Bill would require the Secretaries Board to 'cause a written statement that sets out the purpose of the APS to be prepared', allow the Board to vary the statement, and require the statement to be reviewed every five years after consultation with both the public and the public service. This seems like a perpetual review of the role of the APS, rather than clarification of its ongoing Constitutional role and purpose. While functions of government change, the basic role of the APS does not. The proposed five-yearly process smacks of pandering to fashions in management; to the extent it is intended to reflect prevailing policy priorities, that surely is a matter for the elected government.

Thodey did not provide any illustration of such a purpose statement, and the Explanatory Memorandum gives no indication of its likely nature. PM&C's website, however, now has eight possible versions developed within the Public Service. The first observation I would make is that each one contains (selective) concepts already in section 3a and the APS Values or elsewhere in the PSA; the second observation is that, to the extent they introduce new aspirations (e.g. references to 'country' or 'wellbeing'), those should be properly examined including by the Parliament as possible additions to the APS Values themselves. As they stand, the eight suggestions merely reflect current views within the APS with little if any appreciation of existing provisions in the PSA or of the history of the APS.

While the Bill requires that the statement must not be inconsistent with the APS Values or the APS Employment Principles, whatever it contains, all agency heads would be required to uphold and promote it. That sounds almost like a blank cheque in the hands of the Secretaries Board: surely any purpose statement should be authorised by the Parliament. Experience also suggests that the Secretaries Board may be strongly influenced by the Government of the day (particularly if the chair, the PM&C Secretary, is closely associated personally with the Prime Minister), opening opportunities for undesirable political pressures.

Even a benign interpretation raises questions. Do we really want a purpose statement that is subject to change every five years? Is it appropriate to require every agency head - from the ACCC to AIATSIS

to Defence to APVMA - to promote and uphold some statement that goes beyond s3 of the Act and the APS Values and Employment Principles?

Recommendation 4: Remove from the Bill the provisions for an APS Purpose Statement (or, should the provisions remain, require such a statement to be subject to endorsement by the Parliament).

Item 6: Constraint on ministerial directions (Section 19)

The Bill would change the current wording prohibiting a minister from directing an Agency Head in relation to particular individuals regarding employment and the Code of Conduct matters, from a passive statement to an active statement. Perhaps the proposed new wording is clearer, but it seems no more constraining on ministers than the current wording. It certainly does not warrant any claim of adding substantively to the independence of the APS.

Recommendation 5: Accept the amendment to section 19, noting it does not seem to involve any material change.

Item 7: Agency Heads to enable decisions by APS employees at the lowest appropriate classification

The Bill inserts a new section 19A which would require agency heads to create a work environment that enables decisions to be made by APS employees at the lowest appropriate classification. Is this really a matter for legislation rather than just good management?

While there is a provision ensuring failure to comply would not affect the validity of a decision, it is not clear if the amendment could open up other avenues for dispute that should be handled in the workplace without raising questions of law. Could, for example, a public servant pursue through the law a complaint that someone more senior had taken a decision, or could a union pursue a concern? What exactly is a 'decision'?

On the other hand, the proposed provision includes no process for enforcement. It seems therefore mostly rhetorical, and inappropriate for legislation.

There is a strong case for changing the hierarchical culture of many agencies, but legislation is not the answer. A more effective start would be to reduce the number of deputy secretary positions in departments and to give Executive Level staff more authority in both administration and policy advising.

Recommendation 6: Remove from the Bill the proposed new section 19A.

Item 8: Capability Reviews

The Thodey recommendation for capability reviews was endorsed by the Morrison Government. Legislating for such reviews, while not specifically recommended by Thodey, would have the advantage of prohibiting future governments from ceasing such reviews as occurred in 2014. I therefore support the proposed provisions regarding capability reviews and associated action plans (new sections 44A and 44B), suggesting only that more agencies than the ATO and Services Australia be added to those mandated to have reviews at least once every five years (proposed section 44A(2)). Perhaps this should apply to every agency, but at least every one with more than 100 employees (including, for example, the ABS, NDIA, Productivity Commission, ACCC).

Recommendation 7: Agree the proposed new sections 44A and 44B with a widening of the scope of 44A(2) to require all agencies (or all with more than 100 employees) to have capability reviews at least every five years.

Item 10: Long-term insights reports

I support the proposed provisions for long-term insights reports which would build on a Thodey recommendation and draw on New Zealand experience. By authorising the Secretaries Board to arrange for such reports, there is the opportunity to consider cross-portfolio and whole-of-government challenges as well as ones within a portfolio department's responsibilities. Such insight reports would ensure the APS focuses on longer-term issues of public interest and help to rebuild its strategic policy advising capability.

Recommendation 8: Agree the proposed new section 64A.

Item 12: APS Employee Census – results and action plans

Having introduced the first employee survey in 2003, I have always had a strong interest in the role of the now employee census: it offers essential staff feedback to management including on the practical application of the APS Values and Employment Principles. Publication of the results by agency also offers a reality check.

The proposed provision (a new section 78B), however, focuses on mandating agency action plans, not just the publication of agency results. I am not convinced that this is necessary. Agencies are already required to prepare and publish corporate plans under the PGPA Act, and in many if not all cases, those plans would be a more appropriate place for responding to issues arising from the employee census, rather than a separate action plan every year. Corporate plans also have the advantage of focusing management attention not only on internal concerns but also on agencies' public responsibilities and their capability to meet them.

Recommendation 9: Limit the provisions in the proposed new section 78B to publishing census results by agency, perhaps requiring that corporate plans required under the PGPA Act take the results into account.

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Attachment A

A COMPREHENSIVE APPROACH TO VALUES AND CODES OF CONDUCT²

Andrew Podger

In a recent submission to PM&C's public service reform team (www.themandarin.com.au/218023-stewardship-as-an-aps-value-is-the-new-it-word/), Paddy Gourley, Helen Williams and I support stronger action to improve the capability of the APS and its standing as an institution, but do not support adding 'stewardship' to the APS Values. Stewardship is a responsibility of ministers and senior public servants, not a value that every public servant can be expected to uphold.

But we also strongly support a comprehensive review of the APS Values.

Indeed, such a review might be broadened to clarify the distinct roles and responsibilities of Commonwealth employees working outside of as well as within the APS, including those employed under the Members of Parliament (Staff) Act and those in agencies and Government-owned corporations outside the APS.

This could form a key element of an integrated package of reforms drawing on those Thodey Report recommendations rejected by the Morrison Government which the Albanese Government is committed to revisit, and the recommendations from the Robodebt Royal Commission that is to report in June 2023 (<http://robodebt.royalcommission.gov.au/publications/andrew-podger-ao-report-robodebt-royal-commission>).

A central purpose of the APS Values has always been to define the central role of the APS as an institution in our democratic system of Government. A comprehensive review might help to establish a framework for setting values not only for the APS but also for other groups of Commonwealth employees clarifying their particular roles and responsibilities. Such a framework could also guide codes of conduct including for ministerial staff (which Thodey recommended should be in legislation) and the decisions yet to be taken in response to PM&C's recent report on amendments to the MOP(S) Act in response to the Jenkins Review. And it would also assist Minister Gallagher in her stated desire to consider the application of the APS Values to non-APS agencies.

Such an integrated and comprehensive review of the APS Values and those that should shape the behaviour of other Commonwealth employees would not be based on some popularity test amongst the employees, but should focus on a serious examination of respective roles and responsibilities in our quasi-Westminster system. One of my concerns with the 2023 amendments to the Values was that, while arguably making them simpler and more memorable, they also reduced their substance in terms of defining the unique role of the APS in particular by omitting merit, a keystone in the proper working of the public service.

The framework I suggest the Government consider would focus on each group of employees and their relationship with the Government and the Parliament, their relationship with the public, their workplace relationships and their ethical behaviour.

For the APS this would highlight that the APS is:

- Apolitical or non-partisan and professional
- Responsive to the elected government

² Published in The Mandarin 25 April 2023

- 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.

Much of this is already captured in the current legislation but, importantly, merit – the central civil service attribute since the 1854 Northcote-Trevelyan Report - would be reinserted. Such a revision of the APS Values would make redundant the Thodey suggestion of a new set of principles.

Most of these values would, as now, also apply to the Parliamentary Service but, because that Service is in the legislature not the executive arm of government, it is not accountable through ministers nor is it responsive to the elected government. Accountability is through the Presiding Officers and it serves all Members of Parliament.

The changes to the MOP(S) Act proposed by the PM&C review would distinguish between:

- Electoral staff
- Personal staff of ministers
- Personal staff of other Members and Senators.

This sensible approach would facilitate clarification of the different values appropriate for those MOP(S) Act employees in the legislature – electorate staff and personal staff of non-ministerial Members and Senators – and those who are the personal staff of ministers. Unlike the APS and the Parliamentary Service, none of these employees would be required to be non-partisan and the merit principle would not be as strictly applied (though some sensible constraints are recommended by Jenkins and the PM&C review). Those in the legislature would be accountable primarily to their employing Member or Senator and through them to the Presiding Officers; ministerial staff would be accountable through the system of ministerial responsibility.

This general framework would also suggest that employees in non-APS agencies such as the ABC and CSIRO should have values similar to those for the APS but recognising their greater independence from the elected government (as often set out in their own legislation) and that accountability through the system of ministerial responsibility essentially relates to the agencies' boards (which commonly report to both ministers and the Parliament) rather than to the agencies' employees.

An interesting question is whether employees of government-owned companies and corporations should be subject to values distinct from those in any private commercial body. My view is that it is reasonable for the public to expect those working in the companies they own to have some commitment to serving them, to fair or impartial treatment and being accountable, even if the other APS Values should not be imposed. This might be reflected in the values set by the boards after consultation with their shareholder ministers.

This suggested framework for setting values not only for the APS but also for other Commonwealth employees evidently would need more work. Questions include how the APS Values relate to the APS Employment Principles, the degree to which impartiality and merit should apply to MOP(S) Act employees and whether employees of government-owned companies and corporations should be subject to any particular values and how these might be articulated.

But the benefit of this sort of approach is that it encourages a more systematic approach to setting values and codes of conduct across the Commonwealth sector. It would also reinforce other elements that need to be in the post-Thodey, post-Robodebt reform agenda, such as strengthening

the role of the APS Commissioner, ensuring more merit-based senior appointments, addressing capability and promoting more citizens-centred services.